

ALBERTA
ENVIRONMENTAL APPEALS BOARD

DECISION

Date of Decision – February 1, 2012

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Paula McGinnis with respect to *Water Act* Licence No. 00253967-00-00, *Water Act* Approval No. 00254609-00-00, and *Water Act* Amending Approval No. 00204375-00-01 issued to BURNCO Rock Products Ltd. by the Director, Central Region, Operations Division, Alberta Environment and Water.

Cite as: Preliminary Motion: *McGinnis v. Director, Central Region, Operations Division, Alberta Environment and Water*, re: *BURNCO Rock Products Ltd.* (01 February 2012), Appeal Nos. 11-097-099-ID1 (A.E.A.B.).

BEFORE:

Justice Delmar W. Perras (ret.), Board Chair.

WRITTEN SUBMISSIONS:

Appellant: Ms. Paula McGinnis.

Approval Holder: BURNCO Rock Products, represented by Mr. Kim Titus, Vice President, Aggregate Division.

Director: Mr. Neil Hollands, Director, Central Region, Operations Division, Alberta Environment and Water,* represented by Ms. Aurelia J. Nicholls, Alberta Justice.

* For all relevant times during this appeal, the Department was named Alberta Environment. However, as of October 12, 2011, the Department was renamed Alberta Environment and Water.

EXECUTIVE SUMMARY

Alberta Environment and Water issued a Licence, Approval, and Amending Approval under the *Water Act* to BURNCO Rock Products Ltd. for its sand and gravel operations in Parkland County. The Licence authorizes the operation of works and the diversion of water for commercial purposes, the Approval authorizes the drainage of water from the pit recharge pond to the Bellhouse Drainage Management Project, and the Amending Approval authorizes the construction and maintenance of an end pit water body for multiple uses as a result of reclamation for the sand and gravel extraction operation.

The Board received Notices of Appeal from Ms. Paula McGinnis appealing the Licence, Approval, and Amending Approval.

As the appeals for the Approval and Amending Approval were filed outside the 7-day timeline provided in the *Water Act*, and the appeal of the Licence was filed outside the 30-day limit, the Board established a written submission process to determine whether the Appellant's request for an extension of time to appeal should be granted.

Upon review of the written submissions, the Board accepted the appeals were filed in time. Ms. McGinnis did not receive notice of the decisions until October 20, 2011, and her appeal was filed on October 27, 2011, which was within the 7-day time limit for the Approval and Amending Approval and the 30-day time limit for the Licence.

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I. BACKGROUND

[1] On June 1, 2011, the Director, Central Region, Operations Division, Alberta Environment and Water (the “Director”) issued *Water Act* Licence No. 00253967-00-00 (the “Licence”), *Water Act* Approval No. 00254609-00-00 (the “Approval”), and *Water Act* Amending Approval No. 00204375-00-01 (the “Amending Approval”) all under the *Water Act*, R.S.A. 2000, c. W-3, to BURNCO Rock Products Ltd., (the “Approval Holder”), for its sand and gravel operations in Parkland County, Alberta. The Licence authorizes the operation of works and the diversion of water up to a maximum of 80,750 cubic metres annually from surface water runoff in SE 16-53-3-W5M and an aquifer as accessed by pits in the N½ 22-53-3-W5M for commercial purposes. The Approval authorizes the drainage of up to 250,000 cubic metres of water annually from the pit recharge pond to the Bellhouse Drainage Management Project. The Amending Approval authorizes the construction and maintenance of an end pit water body for multiple uses as a result of reclamation for the sand and gravel extraction operation.

[2] On October 27, 2011, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Ms. Paula McGinnis (the “Appellant”) appealing the Licence, Approval, and Amending Approval (collectively the “Approvals”). She stated she did not receive the notification of the Approvals being issued which was sent to her on June 3, 2011, possibly due to the incorrect postal code on the letter and a postal strike that was occurring at that time. The Appellant noted she received notification via e-mail on October 20, 2011.

[3] On October 28, 2011, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals.

[4] As the Approvals were issued on June 1, 2011, and the Appellant’s Notices of Appeal were received on October 27, 2011, apparently outside of the 7-day time limit prescribed in the *Water Act* for the Approval and Amending Approval and the 30-day limit for the Licence, the Appellant was requested to provide the Board with reasons why it should allow an extension of time to appeal and to explain in more detail why the appeals were filed outside the specified time limits.

[5] On November 10, 2011, the Appellant provided additional details regarding her late-filed appeals. The Appellant confirmed she filed a Statement of Concern that was accepted by the Director. The Appellant explained she received notice of the Director's decisions on October 20, 2011, and she filed her Notices of Appeals within the 7-day time limit. The Appellant noted section 116(1) of the *Water Act* requires the Notice of Appeal to be filed within seven days of receipt of notice of the decision of an approval, not seven days from the date of the decision.

[6] On November 22, 2011, the Approval Holder provided its response submission. The Approval Holder explained it met with the Appellant on August 17 and September 6 and 15, 2011, to try to address her concerns prior to the appeal process at the Parkland County Subdivision and Development Appeal Board and this Board. The Approval Holder stated the Appellant acknowledged at the August 17, 2011 meeting that the Approval Holder was granted authorizations under the Approvals, so she had notice before the date she noted.

[7] The Director took no position on the Appellant's late filed appeals.

[8] In the Appellant's rebuttal, she acknowledged she was invited to the meetings noted by the Approval Holder to try to resolve issues prior to the subdivision appeal hearing. The Appellant stated the fact the Approval Holder had received an approval from Alberta Environment and Water was raised at one of the meetings, so after the meeting, she pursued the matter with the Director. The Appellant explained she advised the Director she had not received notification of the Approvals and requested the notification, which was then e-mailed to her on October 20, 2011. The Appellant stated she did not have any official notification from the Director until that time which would define the conditions that could be appealed.

II. ANALYSIS

[9] In considering the Appellant's request for an extension of time to appeal, the Board refers to sections 116(1)(ii) and 116(2) of the *Water Act*, in which the timelines for filing a Notice of Appeal with the Board, with respect to approvals and licences issued under the *Water Act*, are dealt with. Sections 116(1) and 116(2) of the *Water Act* state:

“116(1) A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after ...
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.
 - (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.
- (2) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1) extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

[10] Therefore, the appeal period for the Approval and Amending Approval is seven days and the appeal period for the Licence is 30 days from the date the Appellant received notice of the decision.

[11] While section 116 of the *Water Act* provides strict timelines for filing a Notice of Appeal with the Board in relation to a *Water Act* approval or amending approval, it also gives the Board the authority to extend the deadline for filing a Notice of Appeal where there are extenuating circumstances.

[12] The Board does not grant extensions unless it is clear an extension upholds the principles of natural justice and fairness. In its previous decisions related to late-filed appeals, the Board determined that certainty is an important element to take into consideration. In this case, certainty involves the specific deadlines included in the legislation for appealing licences, approvals, and amending approvals under the *Water Act*.

[13] In its *Biggart*¹ decision, the Board stated the time limit specified in the legislation in which an appeal must be filed is stipulated so that all parties – the applicant for the approval, the people who are directly affected, and the regulator – know when the process is complete. If no time limits were placed on the appeal period, the applicant for an approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the approval. The timelines included in the legislation, and the certainty they create, balance the interests of all parties involved. Once the appeal period has

¹ *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.).

ended, the approval holder can proceed with the project as permitted under the known terms and conditions in the approval.

[14] The *Water Act* clearly stipulates the timeline for filing an appeal starts when the person receives notice of the decision. The Appellant stated she received notice of the Director's decision on October 20, 2011, by e-mail and only after she requested the documents. She became aware the Approvals had been issued at a meeting with the Approval Holder, and this prompted her to contact the Director.

[15] Under section 111(2)(b) of the *Water Act*, if notice of the application was published, then the Director must, or he must require the approval holder, to give notice of the decision to every person who submitted a Statement of Concern.² The Appellant filed a Statement of Concern in response to the published application notice. The Director accepted the Appellant's Statement of Concern and, therefore, she was entitled to receive direct notice of the Director's decision when it was made. The Appellant is not required to contact the Director to see if the Approvals had been issued. The Director sent notice to the Appellant on June 3, 2011 by letter. However, the Appellant did not receive the letter. It is unclear why the letter did not reach the Appellant, but, as noted by the Appellant, the postal code was incorrect. In addition,

² Section 111 of the *Water Act* states:

“111(1) If the Director

- (a) issues an approval,
- (b) issues a preliminary certificate,
- (c) issues a licence when a preliminary certificate has not been issued with respect to that licence, except for a licence issued to the Government under section 51(2) that relates to the implementation of a water conservation objective, or
- (d) amends an approval, preliminary certificate or licence,

the Director must comply with the notice requirements referred to in subsection (2).

(2) If subsection (1) applies, the Director must

- (a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person, or
- (b) if notice of the application or proposed changes was provided under section 108, give notice or require the approval holder, preliminary certificate holder or licensee to give notice of the decision, in accordance with the regulations, to every person who submitted a statement of concern under section 109.”

mail delivery was interrupted at that time due to a postal strike. In circumstances where there is a possibility delivery of the letter may be interrupted, it may be prudent for the Director to consider alternate forms of notifying Statement of Concern filers. This may be a more onerous task, but it would ensure notices are received within a reasonable amount of time, and it would only be necessary when there are extenuating circumstances, such as a postal strike.

[16] The Appellant filed her Notices of Appeal more than three months after the Director issued the Approvals. However, the requirement for an approval issued under the *Water Act* is the Notice of Appeal must be filed no later than seven days, or thirty days for the Licence, after receipt of notice of the decision that is being appealed.

[17] The Board considers the time for filing the appeals in this case started when the Appellant received direct notice of the Director's decision, which was October 20, 2011. The appeals were filed within seven days of the Appellant receiving direct notice of the Approvals. Therefore, based on the above, the Board considers it fair to conclude the appeals were filed within the timelines prescribed by the *Water Act*.

III. CONCLUSION

[18] Upon review of the legislation and the written submissions from the Participants, the Board concludes the Appellant's Notices of Appeal were filed within the time specified in the legislation.

Dated on February 1, 2012, at Edmonton, Alberta

“original signed by”

D.W. Perras
Chair