ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 7, 2013

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 an appeal filed by Alberta Foothills Properties Ltd. with respect to the decision by the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development, to refuse to issue a Licence or Preliminary Certificate under the *Water Act*.

Cite as: Intervenor Decision: *Alberta Foothills Properties Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development* (07 November 2013), Appeal No. 11-179-ID1 (A.E.A.B.).

BEFORE:	Mr. Alex MacWilliam, Panel Chair.
SUBMISSIONS BY:	
Appellant:	Alberta Foothills Properties Ltd., represented by Mr. Hugh Ham, Municipal Counsellors.
Director:	Mr. Brock Rush, Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Alison Altmiks, Alberta Justice and Solicitor General.
Intervenor Applicants:	Town of Okotoks, represented by Mr. Gilbert Ludwig, Wilson Laycroft; and Ms. Ruth DeGama.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) refused to issue a licence or preliminary certificate to Alberta Foothills Properties Ltd. (Wind Walk) for the diversion and use of groundwater for residential and commercial purposes.

Wind Walk appealed the refusal of the licence. In response to the Notice of Hearing, the Environmental Appeals Board (the Board) received intervenor requests from the Town of Okotoks (Okotoks) and Ms. Ruth DeGama.

The Board requested, received, and reviewed written submissions on whether the intervenor requests should be granted.

Wind Walk and AESRD took no issue with Ms. DeGama participating in the hearing as an intervenor, since evidence indicated the groundwater aquifer she uses is the same as the aquifer from which Wind Walk intended to divert water. Therefore, the Board granted Ms. DeGama limited intervenor status.

Wind Walk opposed the intervenor request of Okotoks. The Director did not oppose Okotoks' request. The Board determined Okotoks would provide evidence that is relevant to the issue to be heard at the hearing and is not duplicative of the other submissions the Board expects to receive. The Board granted Okotoks full intervenor status.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision on intervenor applications filed with respect to the appeal of the decision of Alberta Environment and Sustainable Resource Development ("AESRD") to refuse to issue a licence or preliminary certificate to Alberta Foothills Properties Ltd. (the "Appellant") under the *Water Act,* R.S.A. 2000, c. W-3, for diversion and use of groundwater. The groundwater was to be used for a residential and commercial development, known as Wind Walk, in the Municipal District of Foothills (the "M.D. of Foothills") adjacent to the Town of Okotoks. The Appellant appealed the refusal to issue the licence.

[2] The Environmental Appeals Board (the "Board") received intervenor requests from the Town of Okotoks ("Okotoks") and Ms. Ruth DeGama (collectively, the "Intervenors").

[3] The Board grants the intervenor requests. Okotoks is granted full intervenor status and Ms. DeGama is granted limited intervenor status.

II. BACKGROUND

[4] On February 9, 2012, the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued a decision refusing to issue a licence or preliminary certificate under the *Water Act* to the Appellant. The application for the licence or preliminary certificate was for the diversion and use of groundwater from two proposed water wells in NW 16-20-29 W4M.

[5] On March 6, 2012, the Board received a Notice of Appeal from the Appellant appealing the Director's decision.

[6] On March 8, 2012, the Board wrote to the Appellant and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records relating to the appeal (the "Record") and asked the Parties for available dates for a mediation meeting, preliminary motions hearing, or hearing.

[7] On March 26, 2012, the Board notified the Parties that, based on their available dates, a mediation meeting was scheduled for June 7, 2012.

[8] On April 27, 2012, the Board received a copy of the Record, and copies were provided to the Parties on May 3, 2012.

[9] The mediation meeting was held on June 7, 2012, in Calgary. No resolution of the appeal was reached.

[10] On September 6, 2012, the Board received a motion from the Appellant to determine whether Okotoks filed a valid Statement of Concern with the Director. The Appellant submitted that Okotoks had filed its Statement of Concern after the statutory deadline and, accordingly, the Statement of Concern was invalid.

[11] On September 10, 2012, the Director responded to the Appellant's motion. The Director explained that Okotoks e-mailed its Statement of Concern to the Director on July 31, 2012, and the hard copy was received by the Director on August 5, 2012. The Director submitted the Statement of Concern had been received in time and was, therefore, valid.

[12] On September 14, 2012, the Board wrote to the Parties acknowledging the Appellant's motion and response from the Director. The Board noted the issue of Statements of Concern has no bearing on this appeal, as the applicant for the licence or preliminary certificate is the only person entitled to appeal under the *Water Act*.

[13] On October 2, 2012, the Board confirmed that, based on the written submissions provided by the Parties, the issue for the hearing would be:

> "Is the proposed sources of water reserved water as per the terms of the Bow, Oldman, and South Saskatchewan River Basin Water Allocation Order?"

[14] In the Board's October 2, 2012 letter, the Board asked the Parties to provide their available dates for a hearing. The Director responded on October 19, 2012. On October 24, 2012, the Appellant responded, expressing concern that it was not certain the appeal could be dealt with in one day, since it anticipated Okotoks and at least one landowner would likely seek intervenor status. The Appellant added that it was not its intention to challenge whether intervenor status should be granted to Okotoks or Ms. DeGama.

[15] The Board responded on October 26, 2012, asking the Parties to provide available dates for a two day hearing.

[16] On January 30, 2013, after reviewing comments from the Parties, the Board notified the Parties that the hearing would be held on May 28 and 29, 2013. On February 11, 2013, the Board notified the Parties the hearing would be rescheduled due to issues with the availability of the Appellant's witness.

[17] On March 15, 2013, the Board confirmed that, based on the Parties' available dates, the hearing would be held on September 26 and 27, 2013.

[18] On April 19, 2013, the Appellant notified the Board that its witness would not be available until October 2013.

[19] On June 18, 2013, the Board confirmed the hearing would be held on November 19 and 20, 2013.

[20] The Board published the Notice of Hearing in the Okotoks Western Wheel and posted it on the Government of Alberta and Board websites. The Board provided the Notice of Hearing to the Town of Okotoks, M.D. of Foothills, Town of Black Diamond, Town of High River, Town of Turner Valley, and the Village of Longview to place on their public bulletin boards and websites.

[21] On September 25, 2013, the Director provided an updated Record, and the Board provided copies of the updated Record to the Parties on September 26, 2013.

[22] In response to the Notice of Hearing, the Board received intervenor requests from Ms. DeGama on September 30, 2013, and from Okotoks on October 1, 2013.

[23] The Board received submissions on the intervenor requests from the Appellant and Director on October 3 and 8, 2013, respectively.

III. LEGAL BASIS FOR DETERMINING INTERVENORS

[24] Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board can determine who can make representations before it. Section 95(6) states:

> "Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[25] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

> "(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
>
> (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

[26] The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
>
> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
> - the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
> - the intervention will not repeat or duplicate evidence presented by other parties...."

IV. MS. DEGAMA

A. Submissions

1. Ms. DeGama

[27] Ms. Ruth DeGama explained she lives less than one kilometre south of the proposed development. She noted the Appellant applied to withdraw 75 gallons per minute continuously from the area aquifer. Ms. DeGama stated the Appellant intends to withdraw water from the same aquifer that she uses for her home and livestock.

[28] Ms. DeGama stated the Appellant offered to drill a portion of a new well on her land or to bring in piped water if her well declines, but she would bear the cost. Ms. DeGama stated she has adequate water now at no cost, and even though it is not a strong well, it is currently adequate to serve her needs providing the licence is not issued.

[29] Ms. DeGama stated that all wells drilled into the same aquifer of the Appellant's proposed water source will radically decline and may need to be abandoned.

[30] Ms. DeGama said the aquifer for the proposed wells services the Sheep River and would be considered reserved water. She asked that consideration be given to her property and her statutory right to water.

2. Appellant

[31] The Appellant agreed to Ms. DeGama's request to intervene. The Appellant noted Ms. DeGama had filed a Statement of Concern and the Appellant's expert evidence confirms the groundwater aquifer from which Ms. DeGama's well produces water is the same aquifer from which the Appellant proposes to produce water.

[32] The Appellant stated it would oppose Ms. DeGama submitting expert evidence from Worsley Parsons. The Appellant submitted that Worsley Parsons advised AESRD on the development of new standards for determining whether a groundwater aquifer is connected to surface water and, therefore, Worley Parsons is not impartial.

3. Director

[33] The Director had no objection to Ms. DeGama participating in the hearing given her interest and concern in the application. The Director stated he would have accepted Ms. DeGama's Statement of Concern had it been filed within the legislated timeframe.

B. Analysis

[34] Neither the Appellant nor the Director had objections to allowing Ms. DeGama to participate in the hearing as an intervenor.

[35] Ms. DeGama lives adjacent to the proposed development and relies on a groundwater well for her use and for watering her livestock. The Appellant stated its expert confirmed Ms. DeGama's groundwater well is in the same aquifer identified as the source of groundwater in its application for a licence. Since the Appellant's withdrawal of water from the aquifer may impact Ms. DeGama's water source, the Board believes Ms. DeGama has a direct interest in the matter and will be able to provide relevant information to the Board.

[36] The Board notes the issue of whether Ms. DeGama filed her Statement of Concern within the legislated timeframe is irrelevant in determining whether she should be granted intervenor status.

[37] In her request to intervene, Ms. DeGama asked the Board to consider her written request be reviewed and included in the hearing. The issue before the Board is very technical since it requires the Board to determine whether the water from the proposed wells is reserved water under the South Saskatchewan River Basin Allocation Order. Based on Ms. DeGama's submission, it appears she would not be bringing forth any technical evidence.[1] However, the Board still wants to hear from Ms. DeGama since it is clear she could be directly impacted by the Board's recommendations. Therefore, the Board grants Ms. DeGama intervenor status, and she will be allowed time at the beginning of the hearing to present her evidence to the Board and be available for cross-examination by the Appellant and questioning by the Board.

---

[1] In the event that Ms. DeGama presents any technical evidence, the Board believes the procedure established for the hearing will provide the Appellant with an adequate opportunity to respond to the evidence and provide any oral submission with respect to its weight.

V. OKOTOKS

A. Submissions

1. Okotoks

[38] Okotoks explained it has been involved in the water issues relating to the Appellant's proposed development because of concerns about the connectivity between Okotoks' water supply and the water source proposed by the Appellant. Okotoks stated the proposed water source is subject to the prohibitions in the South Saskatchewan River Basin Allocation Order. Okotoks said it filed a Statement of Concern with the Director in response to the Appellant's application for a licence and was considered an affected party in relation to the application. It also provided the Director with expert reports that are included in the Record.

[39] Okotoks stated its participation in the hearing will materially assist the Board. Okotoks said it has retained experts who have reviewed the reports, test data, and physical data relating to the application, and have conducted their own analyses of the Appellant's well reports. Okotoks said that, being adverse in interest to the Appellant, Okotoks' expert testimony, cross-examination of the Appellant, and argument will assist the Board in resolving the legal and technical matters in this appeal.

[40] Okotoks submitted it has a tangible interest in the appeal, because there is a concern over evidence of connectivity between the Appellant's water supply and Okotoks' water supply and the South Saskatchewan River Basin Allocation Order. Okotoks said its participation in the appeal would not unduly delay the proceeding, as the Parties already have copies of its expert reports.

[41] Okotoks submitted the Director's decision to refuse the application was correct, and the relief sought by the Appellant should be denied.

[42] Okotoks stated its participation would be vital to the Board reaching a just and fair conclusion and to Okotoks' interest. Okotoks said the Board should be fully informed and the participation of an adverse party ensures a full and complete hearing.

2. Appellant

[43] The Appellant opposed Okotoks' request to intervene. The Appellant argued:

1. Okotoks did not file a Statement of Concern within the statutory time limits;
2. Okotoks did not submit any evidence to the Director to demonstrate the proposed wells are connected to surface water; and
3. Okotoks' expert witness is a member of Worley Parsons, and Worley Parsons provided advice to AESRD on the development of new standards for determining whether a groundwater aquifer is connected to surface water. On this basis, Worley Parsons is not an impartial expert.

[44] The Appellant referred to the Court of Queen's Bench decision in *Alberta Wilderness Association* v. *Alberta (Environmental Appeal Board)* 2013 ABQB 44 ("*Alberta Wilderness Association*"), in which the Court stated the Board cannot exceed its jurisdiction as provided for in the *Water Act* to hear public interest appeals.

[45] The Appellant argued the *Water Act* does not give the Board the jurisdiction to allow Okotoks to intervene. The Appellant stated Okotoks did not provide any evidence that the relevant aquifer is connected to surface water and, therefore, Okotoks is representing a public interest.

[46] The Appellant argued that, if the relevant aquifer is groundwater, Okotoks cannot be directly affected. Alternatively, if the aquifer is connected to surface water, it is reserved water and the Board must uphold the Director's decision to deny the licence. Again, Okotoks would not be affected.

[47] The Appellant stated section 95(6) of EPEA allows the Board to hear from intervenors in appeals filed pursuant to EPEA, but the *Water Act* does not have such a provision. On that basis, according to the Appellant, neither Ms. DeGama nor Okotoks may participate. However, as Ms. DeGama meets the test for an appellant, the Appellant had no objection to Ms. DeGama participating.

[48] The Appellant noted Okotoks retained Worley Parsons to provide expert evidence. The Appellant argued Worley Parsons would not provide impartial evidence because

Worsley Parsons advised AESRD on the development of new standards for determining whether a groundwater aquifer is connected to surface water and, therefore, Worley Parsons is not impartial.

3. Director

[49] The Director had no objection to Okotoks participating in the hearing given Okotoks' ongoing concerns and interest in the licence application.

[50] The Director noted the Board has the discretion to allow any person the Board considers appropriate the opportunity to make representations to the Board. The Director noted the Board's Rules of Practice set out who may be allowed to participate in an appeal, and the Board has broad discretion to grant or deny intervenors status.

[51] The Director distinguished *Alberta Wilderness Association*, noting that decision did not involve parties seeking status as intervenors in an existing appeal as in the present case. The Director said *Alberta Wilderness Association* does not stand for the proposition that the powers of the Board under EPEA are inapplicable when an appeal arises under the *Water Act*. The Director stated *Alberta Wilderness Association* confirms there is no public interest standing to initiate an appeal, and the Board does not have jurisdiction to grant public interest standing.

[52] The Director noted he accepted Okotoks' Statement of Concern. The Director explained he received Okotoks' Statement of Concern by e-mail on July 31, 2012. The Director noted there is no legislated timeframe for intervenor applications.

[53] The Director stated AESRD did not retain Worley Parsons to provide advice on groundwater connectivity.

B. Analysis

[54] The Appellant opposed the intervenor request filed by Okotoks on the grounds Okotoks did not file a valid Statement of Concern, its expert witness would be biased, Okotoks did not provide evidence of a surface water connection, and the Board has no jurisdiction to allow intervenors in an appeal under the *Water Act*.

[55] In most cases, before an appeal can be accepted by the Board, the appellant must have filed a valid Statement of Concern within the specified time limit. The Director explained, and the Record indicates, the Statement of Concern was filed by Okotoks within the 30-day time limit. It was originally sent via email and it was only the hard copy that was received after the 30-day time limit. However, as stated in the Board's letter dated September 14, 2012, the issue of whether the Statement of Concern was filed in time is irrelevant to Okotoks' intervenor request.

[56] A person asking to participate as an intervenor does not have to file a valid Statement of Concern. A Statement of Concern is only relevant to determining whether an appeal is validly before the Board. Under section 115(1)(d) of the *Water Act*,[2] only the person who was refused a licence has the right to file an appeal. If another person wants to be involved in the appeal and has information that will assist the Board, the only recourse is to apply to be an intervenor. A Statement of Concern does not have to be filed to be an intervenor. However, it was important in this case for Okotoks to file a Statement of Concern to preserve its appeal right in case the Director had issued the licence. It also provides the Director with more information that could assist in his decision making or lead to additional conditions in a licence. In this case, only the Appellant had a right to appeal, and the issue of whether Okotoks filed a valid Statement of Concern is irrelevant to determining Okotoks' intervenor status.

[57] The Appellant argued Okotoks did not provide evidence to demonstrate the proposed water sources are surface water. This is the issue that will be heard at the hearing. It is at that time Okotoks will presumably provide the evidence it deems will demonstrate the proposed water source is not groundwater. The Board will assess Okotoks' evidence and the Parties' evidence to determine whether the proposed water sources are groundwater or reserved water. That evidence does not have to be brought forward at this time. Okotoks explained in general terms what it intends to argue at the hearing, and it provided the Board with sufficient

---

2 Section 115(1)(d) of the *Water Act* provides:

> "A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:...
>
> (d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence."

information to determine Okotoks will be providing evidence that is relevant to the issue that will be heard and it will not duplicate the evidence of the Parties.

[58] The Board notes that in a letter provided by the Appellant on October 24, 2012, the Appellant requested the Board schedule a two-day hearing. In this letter, the Appellant anticipated that Okotoks would participate in the hearing as an intervenor and the Appellant would not oppose Okotoks' participation. Now the Appellant is objecting to Okotoks' involvement. The Board has scheduled the hearing for two days in response to the Appellant's October 24, 2012 letter. (See paragraphs 14 and 15 of this decision.) As the Board and the Parties have set aside two days for the hearing, there is no issue regarding Okotoks' involvement causing a delay or lengthening the hearing.

[59] The *Alberta Wilderness Association* decision referred to by the Appellant was a determination of whether the applicant had met the directly affected test in order to bring a valid appeal before the Board. In the matter presently before the Board, there is a valid appeal that was filed by the Appellant. Under section 115(1)(d) of the *Water Act*, it is only the person who was denied a licence who can file an appeal of that decision. The test to grant intervenor status to a person is different than the test applied to determine whether a person is directly affected. When a person applies to intervene, the Board looks at whether the person will be able to bring evidence that is relevant to the issue under appeal and the evidence is not duplicative of the other parties. Therefore, *Alberta Wilderness Association* does not apply to the determination of who may participate as an intervenor.

[60] The Appellant argued there is no right under the *Water Act* to intervene in an appeal. With respect, the Board does not agree with the Appellant's argument. Section 114 of the *Water Act* stipulates an appeal can be filed to the Board, and sections 115 and 116 of the *Water Act* specify who may file an appeal and the timelines for filing a Notice of Appeal. However, it is Part 4 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, that describes the jurisdiction of the Board. Section 91(1)(p) of EPEA incorporates the appeal rights as determined in the *Water Act*. It is Part 4 of EPEA that sets out the requirement for a hearing of the appeal, the ability to ask for additional information, the powers and duties of the Board, the ability to award costs, grant a stay, grant a reconsideration, and the requirement for the Board to provide a report and recommendation to the Minister. The *Water Act* does not

repeat these requirements. The Appellant does not argue the Board lacks the jurisdiction to conduct a hearing of the Appellant's appeal and to provide a report and recommendation to the Minister after the hearing. The Appellant cannot arbitrarily select one section of Part 4 of EPEA, specifically section 95(6), and argue that section does not apply to an appeal under the *Water Act* whereas all of the other sections of Part 4 of EPEA apply. It is clear in the plain reading of the legislation, and based on the principles of natural justice and fairness, that all sections of Part 4 of EPEA apply to appeals filed under the *Water Act*. Therefore, the argument presented by the Appellant is not accepted by the Board.

[61] Okotoks indicated that it has retained Worley Parsons to provide evidence on the hydrogeology in the area. The Appellant argued this expert would be biased because AESRD had previously retained Worley Parsons to provide advice on the development of standards to determine whether a groundwater aquifer was connected to surface water. The Director stated AESRD did not retain Worley Parsons to provide advice on groundwater connectivity. The Board has generally allowed a participant to an appeal to retain the experts the participant believes will be able to support its position most effectively. The Director confirmed AESRD has not retained Worley Parsons to provide advice on the issue before the Board in this appeal. Based on the information currently before it, the Board does not view the fact that this firm has done work for both AESRD and an intervenor as giving rise to a reasonable apprehension of bias. The Board suspects that AESRD has retained many consulting firms that have also appeared before the Board on behalf of other participants in prior appeals. If, after hearing the evidence, the Board finds there is actual bias, the Board will determine the appropriate weight to be given to the evidence taking the degree of bias into account.

[62] It is clear Okotoks has a valid interest in the appeal given the Board's recommendations could ultimately impact Okotoks' water source. Okotoks has stated that it has retained experts to review the data available and conduct additional analysis on the Appellant's well reports. The issue before the Board is to determine whether the water source applied for by the Appellant is groundwater or reserved water. The Board considers it valuable to have as much relevant information before it as possible in order to make the best recommendations possible.

[63] Therefore, the Board grants Okotoks full intervenor status. Okotoks will have the opportunity to provide opening comments, present direct evidence, be subject to cross-examination by the Appellant and questioning by the Board, and provide closing comments.

VI. CONCLUSION

[64] The Board grants the intervenor requests of Ms. Ruth DeGama and the Town of Okotoks in accordance with the terms set out in this decision.

Dated on November 7, 2013, at Edmonton, Alberta.

"original signed by"
Alex MacWilliam
Panel Chair