

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 7, 2013

IN THE MATTER OF sections 91, 92, 93, 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 Lloyd Blimke with respect to Enforcement Order No. EO-2013/01-NR and WA-2013/01-NR issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and the *Water Act*, R.S.A. 2000, c. W-3 to Lloyd Blimke and Citizens Power & Gas Ltd.

Cite as: *Blimke v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Blimke and Citizens Power & Gas Ltd.* (7 June 2013), Appeal No. 12-047-D (A.E.A.B).

BEFORE:

Ms. A.J. Fox, Panel Chair.

SUBMISSIONS BY:

Appellant: Mr. Lloyd Blimke, represented by Ms. Jessica Proudfoot, McLennan Ross LLP.

Director: Mr. Michael Aiton, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Erika Gerlock, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

On March 12, 2013, Alberta Environment and Sustainable Resource Development (AESRD) issued an enforcement order to Mr. Lloyd Blimke and Citizens Power & Gas Ltd. for diverting water without a licence. Mr. Blimke appealed the enforcement order on March 28, 2013.

The appeal was filed past the 7-day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked Mr. Blimke to explain why he filed the appeal late. The Board found there was a *prima facie* case to consider extending the appeal period and gave AESRD an opportunity to respond.

Mr. Blimke contacted and had discussions with AESRD as soon as the enforcement order was issued. AESRD had different opportunities, including discussions held within the appeal period, to explain the appeal period was 7 days. Based on the explanations provided, comments received, and actions taken, the Board granted the request to extend the time for Mr. Blimke to file his Notice of Appeal.

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I. INTRODUCTION

[1] This is a preliminary motions decision by the Environmental Appeals Board regarding an appeal filed by Mr. Lloyd Blimke (the “Appellant”).

[2] Alberta Environment and Sustainable Resource Development (“AESRD”) issued Enforcement Order No. EO-2013/01-NR and WA-2013/01-NR (the “Order”) to Mr. Lloyd Blimke and Citizens Power & Gas Ltd. (“Citizens Power”). The Appellant appealed the Order.

[3] As the appeal was filed outside of the 7-day appeal period, the Environmental Appeals Board (the “Board”) asked the Appellant to provide reasons why the Board should extend the appeal period.

[4] The Appellant provided a *prima facie* case for extending the appeal period. AESRD did not take a position.

[5] The Board granted the extension of time for filing the appeal. These are the Board’s reasons.

II. BACKGROUND

[6] On March 12, 2013, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued the Order under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, (“EPEA”) and the *Water Act*, R.S.A. 2000, c. W-3 to Mr. Lloyd Blimke and Citizens Power & Gas Ltd. The Order was issued because AESRD believes the Appellant and Citizen Power are diverting water without a licence for a subdivision on SW 15-74-05 W6M located in the County of Grande Prairie. On March 28, 2013, the Board received an appeal from Mr. Blimke on the sole issues of the Director’s decision to name the Appellant in the Order.

[7] On April 2, 2013, the Board acknowledged the appeal and notified the Director of the appeal. In this letter the Board noted the Notice of Appeal was filed after the 7-day appeal period for enforcement orders issued under EPEA¹ and the *Water Act*.² The Board asked the

¹ Section 91(4)(a) of EPEA states:

Appellant to provide an explanation as to why the appeal was filed after this time limit and to provide reasons why an extension should be granted.

[8] The Appellant provided his response on April 5, 2013. Based on the Appellant's response, the Board asked the Director to provide a response submission and confirm how the Appellant received notice of the Order.

[9] On April 11, 2013, the Director notified the Board the Appellant was notified of the Order by way of an email.

[10] On April 16, 2013, the Board notified the Appellant and Director there was sufficient information in the Appellant's submission for the Board to consider extending the appeal period. The Board asked the Director to provide a response to the Appellant's submission. The Director responded to the Appellant's submission on April 23, 2013, stating he took no position on extending the appeal period.

III. Discussion

A. Submission

[11] The Appellant submitted there are three grounds for extending the time to file his appeal:

1. he had no actual knowledge of the prescribed 7-day time limit until after the appeal period had lapsed;
2. the Director did not adequately advise the Appellant in writing or otherwise of his appeal right or the timeline for filing an appeal; and
3. he made diligent and timely efforts to raise his concerns with the Director.

[12] The Appellant explained he immediately undertook what he thought were reasonable and diligent efforts to respond to the Order.

"A notice of appeal must be submitted to the Board not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h)...."

² Section 116(1) of the *Water Act* provides:

"A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after
 - (i) receipt of a copy of a water management order or enforcement order...."

[13] The Appellant said he is a trained equipment operator and sole director, shareholder, and employee of Citizens Power. He stated he is unfamiliar with AESRD's enforcement processes, timelines, and procedures. The Appellant said he operated the waterworks system for the development for 13 years without incident.

[14] The Appellant explained the Director contacted him in late 2011 to discuss the waterworks system. He cooperated with the Director and met with his staff to visit the site and discuss licencing requirements. He was advised a water licence would be required.

[15] The Appellant stated he prepared and submitted an application for a water licence on March 14, 2012, and the Director responded about four months later, advising him the application was incomplete. The Appellant said the Director told him he would forward information to the Appellant to assist with the completion of the application shortly. The Appellant stated he was still waiting for the information when the Director called to follow up on the status of his water licence. The Appellant said he was advised he was responsible for ensuring the application proceeded in a timely manner and was encouraged to "push some buttons." The Appellant said he resubmitted his application on February 7, 2013, and the Director followed up on February 20, 2013.

[16] The Appellant stated a formal investigation started shortly thereafter, but the relatively relaxed approach through the early, less formal stages of the investigation led the Appellant to believe the Director was not operating on short or strict deadlines. As a result, he presumed the pace of enforcement would parallel that of the earlier stages of the investigation, and he would have at least a few weeks to appeal the Order.

[17] The Appellant explained the only information he was provided regarding his right to appeal was a standardized notice included as the last page attached to the Order. The Appellant noted the notice stated that copies of sections 115 of the *Water Act* and section 91 of EPEA were enclosed, but copies of these sections were not, in fact, included.

[18] The Appellant stated no one from AESRD advised him of his right to appeal or the timeline to do so, even though they had numerous occasions to do so.

[19] The Appellant said that when he received the Order, he immediately met with the Director to discuss his ability to comply with the Order and the prescribed timelines, but the Director did not provide any information regarding appeals.

[20] The Appellant stated he met with the Director again on March 21, 2013, and he again expressed concern regarding his ability to comply with the Order, but he was not advised that he had a right to appeal or that the time to appeal had lapsed. The Appellant explained that between these two meetings, he communicated regularly with the Director by telephone and email, but no one advised him of his appeal right or the timeline.

[21] The Appellant stated he was attempting to find legal counsel, and he submitted his Notice of Appeal the same day he became aware of the 7-day appeal period.

[22] The Appellant stated the Director had several opportunities to explain the appeal periods, and the Order should have contained copies of the relevant sections of the *Water Act* and EPEA.

[23] The Appellant submitted an extension upholds the principles of natural justice and fairness. The Appellant asked the Board to extend the time prescribed for submitting a Notice of Appeal.

[24] As stated, the Director responded to the Appellant's submission on April 23, 2013 stating that he was not taking a position on this motion.

B. Analysis

[25] Section 94 of EPEA and section 116 of the *Water Act* set the time lines for filing a Notice of Appeal.³ The appeal period for an enforcement order issued under EPEA or the *Water*

³ Section 91(4)(a) of EPEA states:

“A notice of appeal must be submitted to the Board not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h)...”

Section 116(1) of the *Water Act* states:

“A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after

(i) receipt of a copy of a water management order or enforcement order”

Act is seven days. The appeal period starts upon receipt of notice of the decision, with the next day being the day one of the seven-day appeal period.

[26] Section 93 of EPEA and section 116(2) of the *Water Act* allow the Board to extend the appeal period if there are sufficient grounds to do so.⁴

[27] Attached to the Order was an additional page notifying the Appellant he may have a right of appeal. The same paragraph stated there may be a strict time limit for filing an appeal, and the relevant sections of the *Water Act* and EPEA were attached.

[28] Nowhere in the letter does it state the appeal period is seven days, only that there may be strict timelines. The Appellant explained he presumed that, given the “relaxed approach throughout the earlier, less formal stages of the investigation,” the Director was not operating on strict deadlines. This was also supported by the lack of response from the Director in providing the information the Appellant required to complete the application properly. Although the Director told the Appellant the information would be sent out shortly, the Appellant waited a number of months and it is not clear if he ever received the information, and if he did, when it was received. In addition, given the wording of the warning attached to the Order that there “may” be strict timelines, the Board can understand how the Appellant might have misconstrued the urgency of filing a Notice of Appeal. The Board appreciates the Director tries not to be confrontational at the start of an investigation in order to seek compliance without issuing an order. However, the Director's staff must also demonstrate to the person who is the subject of an order the matter must be taken seriously.

[29] Although the Appellant argued he was not told of his right of appeal, it is included in the addendum to the Order. It is generally accepted that ignorance of the law is not an excuse.

⁴ Section 93 of EPEA provides:

“The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so.”

Section 116(2) of the *Water Act* states:

“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.”

The Appellant was at least aware that an appeal period may exist. He could have investigated further to determine what right of appeal exists and the time limit for filing an appeal.

[30] The Board notes that in letters notifying Statement of Concern filers of AESRD's decision in other appeals, the letter specifically states the appeal period. In this case, the Director chose not to clearly state the appeal period. Although the Director intended to include the relevant sections of the *Water Act* and EPEA, the Appellant stated he never received these documents, and the Director did not refute the Appellant's statements. Therefore, the Board accepts the Appellant's submission that he never received the relevant sections of the *Water Act* and EPEA. Given the appeal period is so short, it would seem prudent for the Director to clearly state the appeal period in the letter attached to the Order or in the addendum to the Order.

[31] The Appellant met with AESRD staff on two occasions shortly after receiving the Order, and he contacted them on numerous occasions via telephone and email right after the Order was issued. The Director knew the Appellant had issues with the Order. The Appellant did not delay contacting the Director to discuss the Order. At no time did the Director point out the 7-day appeal period.

[32] Based on the description of events provided by the Appellant, he cooperated with the Director and AESRD from the start of the investigation. When he received the Order, he contacted the Director to discuss the Order and expressed his concerns regarding the Order. He took proactive steps to deal with the Order. The Board is unsure why the Director did not make it clear to the Appellant that the appeal period was only seven days.

[33] The Director knew of the Appellant's concerns with the Order and he could have explained the options available to the Appellant. Even if the Appellant filed an appeal, discussions can continue between the Appellant and the Director in an effort to resolve the Appellant's concerns and potentially the appeal.

[34] Under these circumstances, the Board will exercise its discretion under section 93 of EPEA and section 116(2) of the *Water Act*, and extend the appeal period for filing a Notice of Appeal.

IV. DECISION

[35] The Board will grant the extension of the timeline for the Appellant to file his Notice of Appeal. Therefore, the Board accepts the Appellant's Notice of Appeal as having been filed in time.

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



A.J. Fox
Panel Chair