

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Report and Recommendations

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Date of Report and Recommendations – August 7, 2020

**IN THE MATTER OF** sections 91, 92, 94, 95, and 99 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 Bow City Power Ltd., respecting the decisions by the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, to refuse to issue Licences under the *Water Act*, to Bow City Power Ltd. in relation to Application No. 001-00156188 and Application No. 001-00240006.

Cite as: *Bow City Power Ltd. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks* (7 August 2020), Appeal Nos. 19-095-096-R (A.E.A.B.), 2020 ABEAB 22.

**BEFORE:**

Ms. Meg Barker, Acting Board Chair.

**PARTIES:**

**Appellant:**

Bow City Power Ltd., represented by Mr. Sean Parker, McLennan Ross LLP.

**Director:**

Mr. Andun Jevne, Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Bow City Power Ltd. (the Appellant) applied for:

1. a Licence under the *Water Act*, for a diversion of 18 million cubic metres of water annually from the Bow River, through the works of the Eastern Irrigation District for power production through a proposed coal-fired power plant in the County of Newell (Application No. 1); and
2. a Licence under the *Water Act*, for a diversion of 8 million cubic metres of water annually from the Bow River, through the works of the Eastern Irrigation District for power production, in the Hamlet of Bow City (Application No. 2).

The Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the Director) refused to issue the water licences to the Appellant in relation to the applications.

The Appellant filed Notices of Appeal with the Environmental Appeals Board (the Board), appealing the Director's decisions to refuse to issue the water licences to the Appellant.

A mediation meeting was held, and a resolution was reached whereby the Parties asked the Board to recommend to the Minister of Environment and Parks that Application No. 1 be reinstated with amendments. Upon Application No. 1 being reinstated, Application No. 2 would then be abandoned.

The core of the amendments to Application No. 1 was to reduce the volume of water to 1.2 million cubic metres of water and change the method of power production to a solar panel facility, with an electrolyzer facility for the storage of energy as hydrogen. The Board accepted the mediated agreement and recommended Application No. 1 be reinstated and amended according to the mediated agreement.

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## I. BACKGROUND

[1] On September 10, 2001, Bow City Power Ltd. (the “Appellant”),<sup>1</sup> submitted Application No. 001-00156188 under the *Water Act*, R.S.A. 2000, c. W-3 to Alberta Environment and Parks (“AEP”), requesting a water licence to divert up to 18 million cubic metres of water annually from the Bow River, through the works of the Eastern Irrigation District (“EID”), for power production in relation to a coal-fired power plant in the County of Newell (“Application No. 1”).

[2] On August 3, 2004, the Appellant withdrew related applications for the coal-fired power plant it had before the Energy and Utilities Board (now the Alberta Energy Regulator) and the Alberta Utilities Commission. The Appellant also suspended work on its Environmental Impact Assessment. These related applications and the Environmental Impact Assessment were essential parts of Application No. 1, providing AEP with much of the information it needed to process the application.

[3] On September 19, 2005, the Appellant submitted Application No. 001-00240006, requesting a water licence to divert up to 8 million cubic metres of water annually from the Bow River, through the works of the EID Bassano head works for power generation purposes in the Hamlet of Bow City (“Application No. 2”).

[4] In 2006, the *Approved Water Management Plan for the South Saskatchewan River Basin* (the “Plan”) was approved. The Plan recommended that “... Alberta Environment [and Parks] no longer accept applications for new water allocations in the Bow, Oldman, and South Saskatchewan River Sub-Basins until the Minister of Environment [and Parks] specifies, through a Crown Reservation, how water not currently allocated, is to be used.”<sup>2</sup> This Plan recommended the purposes for which licences may still be granted and the priorities of those licences, from the unallocated waters in the sub-basins. As a result of this Plan, AEP stopped accepting applications for new allocations of water in the Bow, Oldman, and South Saskatchewan River Sub-Basins.

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<sup>1</sup> Bow City Power Ltd. was previously known as Fording Coal Ltd., which had been retained by Luscar Ltd. to obtain the *Water Act* licences.

<sup>2</sup> *Approved Water Management Plan for the South Saskatchewan River Basin* (Alberta Environment, August 1, 2006) at the Executive Summary, page v.

[5] In 2007, the *Bow, Oldman, and South Saskatchewan River Basin Allocation Order*<sup>3</sup> (the “Order”) was passed. This Order closed the Bow River Basin, the Oldman River Basin, and the South Saskatchewan River Basin to new applications except for those that fell under the exceptions listed in the Order.<sup>4</sup> The Order allows the Director to issue licences for all purposes if the application was complete and filed on or before the date the Order was filed under the *Regulations Act*, R.S.A. 2000, c. R-14.

[6] The Plan and the Order prevent the Appellant from filing a new application for a *Water Act* Licence. Therefore, the Appellant can only acquire water for its project through the reinstatement and successful completion of either Application No. 1 or Application No. 2 (collectively the Applications”), or the transfer of an allocation of water from another *Water Act* Licence. Without an allocation of water under a *Water Act* Licence, the Appellant cannot acquire the other authorizations necessary for the development of its power generation project.<sup>5</sup>

[7] On October 31, 2019, the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”), sent the Appellant a Supplemental Information Request asking the Appellant to update the Director and provide information regarding:

- (a) applications submitted to the Alberta Energy Regulator and the Alberta Utilities Commission;
- (b) when the Environmental Impact Assessment will commence and be completed;
- (c) the required development permits from the County of Newell and if they had not yet been obtained, a timeline for when the Appellant expected to submit applications for those permits and to receive them;
- (d) updated timeline on the construction of the plant;
- (e) confirmation regarding the amount and purpose of the water diversions requested;
- (f) information regarding combining the storage and operation needs between the Appellant and EID;

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<sup>3</sup> *Bow, Oldman, and South Saskatchewan River Basin Allocation Order*, Alta. Reg. 171/2007.

<sup>4</sup> The Director may issue licences for use by a First Nation, a company owned by a First Nation, water conservation objective, and storage, if it is to protect the aquatic environment and improve the available water for existing licence holders and registrants, in all three river basins. See sections 4(1), 6(1) and 8(1) of the Order.

<sup>5</sup> The Appellant’s project has changed from a coal-fired power plant to a renewable energy project, consisting of a solar panel facility and electrolyzer facility for the storage of electricity as hydrogen.

- (g) the maximum rate of diversion for Application No. 1 and the point of diversion; and
- (h) a Water Shortage Response Plan.

The Director asked that the Appellant provide this information by December 2, 2019, stating that if it was not provided, the Director would make a decision based on the information in the file.<sup>6</sup>

[8] On December 2, 2019, the Appellant responded to the Director's Supplemental Information Request with the information it was able to provide, stating that it still wished to proceed with the Applications. The Appellant advised that its project had changed from a coal-fired power plant to a natural gas-fired power plant to a renewable power configuration in which electrical energy will be created using photovoltaics (solar panels).<sup>7</sup> The Appellant further advised the Director that it still needed the water diversions for cooling as well as feedstock for hydrogen production.

[9] On January 30, 2020, the Director refused to issue the water licences to the Appellant in relation to the Applications. The Director in his decisions stated, there was not enough water in the Bow River to meet the volumes required by the Applications without having an adverse effect on the aquatic environment and other household users, other licences, and traditional agricultural users. The Director further stated, that water could not be diverted for more than six months of the year if water conservation objectives were put into place, that the Appellant had not submitted a Water Shortage Response Plan to ensure a continuous water supply in the event of the river flow being at or below water conservation objectives, and as the Appellant had not pursued other mandatory regulatory permits, the Applications could be considered speculative.<sup>8</sup>

[10] On February 24, 2020, the Appellant filed Notices of Appeal with Board in relation to the Applications.

[11] On March 4, 2020, the Board acknowledged receipt of the Notices of Appeal from the Appellant and notified the Director of the appeals. The Board requested the Appellant and the Director (collectively, the "Parties") provide available dates for a mediation meeting.

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<sup>6</sup> Director's Supplemental Information Request, October 31, 2019.

<sup>7</sup> Appellant's Response to the Director, December 2, 2019 at page 1.

<sup>8</sup> Director's Decision Letter, January 30, 2020 at page 1 re: Application No. 001-00156188. Director's Decision Letter, January 30, 2020 at page 1 re: Application No. 001-00240006.

The Board further requested the Director provide the Director's Record related to the Applications. The Board received the Director's Record on April 29, 2020, and provided the Record to the Appellant on May 13, 2020.

[12] A mediation meeting was held on June 25, 2020, via video conference.<sup>9</sup> Productive discussions resulted in a resolution of the appeals.

## II. DISCUSSION

[13] Pursuant to section 11 of the *Environmental Appeals Board Regulation*, Alta. Reg. 114/93, the Board conducted a mediation meeting with a Board Member presiding as the Mediator (the "Mediator"). In conducting the mediation meeting, the Mediator reviewed the appeal and the mediation process and explained the purpose of the mediation meeting. Before the mediation meeting, the Board circulated copies of the Participants' Agreement to Mediate, which the Parties signed. Following productive and detailed discussions, an agreement evolved at the mediation meeting.

[14] The mediated agreement resulted in the Parties asking the Board to recommend to the Minister that Application No. 1 be reinstated with amendments and that Application No. 2 be abandoned. The Board considers the mediated agreement reasonable and recommends to the Minister that Application No. 1 be reinstated according to the agreement reached between the Parties.

## III. RECOMMENDATIONS

[15] In accordance with section 99 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ("EPEA"),<sup>10</sup> and based on the agreement reached between the Parties, the Board recommends the Minister of Environment and Parks order that *Water Act* Application No. 1 be reinstated in accordance with the agreement reached between the Parties, and that the Director's decision with respect to Application No. 2 be confirmed.

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<sup>9</sup> In response to the COVID-19 pandemic, an in-person mediation could not be held.

<sup>10</sup> Section 99 of EPEA provides:

"In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."



- [16] Based on the mediated agreement, Application No. 1 is amended as follows:
- (a) changing the purpose to support a diversion and storage water licence for a renewable energy project, consisting of a solar panel facility and electrolyzer facility for the storage of energy as hydrogen (the “Amended Project”);
  - (b) changing the maximum water diversion volume to 1.2 million cubic metres per year;
  - (c) amendments to reflect the updated information that was provided to the Director’s satisfaction in accordance with the mediated agreement:
    - (i) the Amended Project description;
    - (ii) the maximum water diversion rate;
    - (iii) the timing of the proposed diversions;
    - (iv) the calculations for the volume required for the Amended Project, including the anticipated losses and the volumes identified;
    - (v) the proposed storage needs and volumes of water for the Amended Project; and
    - (vi) the proposed timelines for the initial (10 MW) and subsequent build outs of the Amended Project to a maximum of 150 MW for the solar power plant and a maximum of 450 MW for the electrolyzer.
  - (d) Application No. 1 will proceed as an application for a Preliminary Certificate, with a ten-year duration.

[2] Under section 100(2) of EPEA,<sup>11</sup> copies of this Report and Recommendations and any decision by the Minister are to be provided to:

1. Mr. Sean Parker, McLennan Ross LLP, on behalf of the Appellant; and
2. Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General, on behalf of the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks.

Dated on August 7, 2020, at Edmonton, Alberta.

“original signed by”

Meg Barker  
Acting Board Chair

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<sup>11</sup> Section 100(2) of EPEA states:

“The Minister shall immediately give notice of any decision made under this section to the Board and the Board shall, immediately on receipt of notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.”





ALBERTA  
ENVIRONMENT AND PARKS

*Office of the Minister  
Government House Leader  
MLA, Rimbey-Rocky Mountain House-Sundre*

**Ministerial Order**  
**47 /2020**

*Environmental Protection and Enhancement Act*  
R.S.A. 2000, c. E-12;

and

*Water Act, R.S.A. 2000, c. W-3.*

**Order Respecting Environmental Appeals Board Appeal Nos. 19-095-096**

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 19-095-096.

Dated at the City of Edmonton, in the Province of Alberta, this 27 day of AUG, 2020.

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Jason Nixon  
Minister

## Appendix

### Order Respecting Environmental Appeals Board Appeal Nos. 19-095-096

With respect to the January 30, 2020 decisions of the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the "Director"), to refuse to issue Licences to Bow City Power Ltd. under the *Water Act*, R.S.A. 2000, c. W-3, in relation to Application No. 001-00156188 ("Application No. 1") and Application No. 001-00240006 ("Application No. 2"), I, Jason Nixon, Minister of Environment and Parks, order that:

1. The Director's decision to refuse to issue a Licence with respect to Application No. 1 is reversed, and the application for the Licence is reinstated; and
2. The Director's decision to refuse to issue a Licence with respect to Application No. 2 is confirmed.