

ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Date of Decision – February 14, 2003

**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 Martin and Lillian Dyck with respect to Preliminary Certificate No. 00182584-00-00 issued under the *Water Act* to Coyote Cove Golf Course Inc., by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Dyck v. Director, Southern Region, Regional Services, Alberta Environment, re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.).

## **EXECUTIVE SUMMARY**

Alberta Environment issued a Preliminary Certificate under the *Water Act* to Coyote Cove Golf Course Inc. The Preliminary Certificate provides that, upon compliance with conditions, Coyote Cove will receive a licence to divert water from Pine Creek in NW 4-22-1-W5M near DeWinton, Alberta.

The Environmental Appeal Board received a Notice of Appeal from Mr. Martin and Mrs. Lillian Dyck opposing the issuance of the Preliminary Certificate.

The Board found that Mr. and Mrs. Dyck had not filed a Statement of Concern nor had they filed their Notice of Appeal with the Board within the time frame required by the *Water Act*. Mr. and Mrs. Dyck did not provide the Board with a legitimate reason to grant an extension. Therefore, the Board dismissed the Notice of Appeal.

**BEFORE:**

William A. Tilleman, Q.C., Chair.

**PARTIES:**

**Appellants:**

Mr. Martin and Mrs. Lillian Dyck.

**Director:**

Mr. Brock Rush, Director, Southern Region,  
Regional Services, Alberta Environment,  
represented by Ms. Charlene Graham,  
Alberta Justice.

**Approval Holder:**

Coyote Cove Golf Course Inc. represented  
by Mr. Tom Walter, Q.C.

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## I. BACKGROUND

[1] On September 17, 2002, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”) issued Preliminary Certificate No. 00182584-00-00 (the “Certificate”) under the *Water Act*, R.S.A. 2000, c. W-3, to Coyote Cove Golf Course Inc. (the “Certificate Holder”). The Preliminary Certificate provides that, upon compliance with conditions in the Certificate, the Certificate Holder will receive a licence to divert 173,415 cubic metres of water annually at a maximum rate of 0.076 cubic metres per second from Pine Creek in NW 4-22-1-W5M near DeWinton, Alberta.

[2] The Environmental Appeal Board (the “Board”) acknowledged receipt of Notices of Appeal from Mr. Grant and Ms. Beth Spackman (EAB Appeal No. 02-75) on October 23, 2002, and Mr. John Evans (EAB Appeal No. 02-76) on October 24, 2002.<sup>1</sup>

[3] The Board notified the Certificate Holder and the Director of the appeals and requested that the Director provide the Board with a copy of all documents related to these appeals (the “Record”), and requested that the parties provide available dates for a mediation meeting or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards replied in the negative.

[5] On November 4, 2002, the Board received the Record from the Director, and on November 6, 2002, the Board acknowledged receipt of the Record and forwarded a copy to Mr. and Ms. Spackman, Mr. Evans, and the Certificate Holder.

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<sup>1</sup> These Notices of Appeal were addressed by way of a mediated settlement. See: *Spackman et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (22 January 2003), Appeal Nos. 02-075 and 02-076-R (A.E.A.B.).

[6] On November 22, 2002, in consultation with the other parties,<sup>2</sup> the Board scheduled a mediation meeting for January 17, 2003, to be held in Calgary, Alberta.

[7] The Board received a letter from Mr. Martin and Mrs. Lillian Dyck (the “Appellants”) on December 9, 2002. The Board acknowledged this letter on December 10, 2002, and requested clarification by December 16, 2002, as to whether this letter constituted a Notice of Appeal. The Board also advised that if the intent was to file a Notice of Appeal, the time frame to file had expired, but if the Appellants wished, they could provide an explanation as to why the appeal was filed outside the 30-day appeal period and request an extension of time to appeal.

[8] On December 17, 2002, the Board received clarification by telephone that the December 9, 2002 letter constituted a Notice of Appeal, and on December 19, 2002, the Board received a formal Notice of Appeal from the Appellants (EAB Appeal No. 02-137) appealing the Certificate. At the same time, the Board received a letter from the Appellants requesting an extension of time in order to file their appeal.

[9] The Board reviewed the Notice of Appeal and the Appellants’ reasons for extending the time limit to file the appeal, and on January 13, 2002, the Board advised the Appellants that the Board had made a decision that it would not accept the late filed Notice of Appeal.

[8] On January 17, 2003, a mediation meeting took place in Calgary, Alberta, and the appeals filed by Mr. Grant and Ms. Beth Spackman and Mr. John Evans were resolved.<sup>3</sup>

## II. ANALYSIS

[9] In their December 9, 2002 letter, the Appellants outlined their concerns regarding the development of the Coyote Cove Golf Course. These concerns centred on the possible effects the diversion of water would have on Pine Creek, which runs through their property. In their submission, the Appellants outlined their observations over the past six years concerning the water level of the creek, including the effect of the development of the Deerfoot Trail

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2 “Other Parties” means the Certificate Holder, the Director, Mr. and Mrs. Spackman and Mr. Evans.

3 See: *Spackman et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote*

highway extension, and expressed concern for the fish and wildlife that inhabit the creek and surrounding area. The Appellants stated:

“Pine Creek has been dry for most of the late summer and fall to the detriment of the herons, pelicans, eagles, muskrats and fish that inhabit this end of the creek – it is a small creek that supports a diverse wildlife corridor, and any further disruption to the natural flow would upset the delicate balance of a creek already struggling to maintain its flow...Please consider very carefully the damage that could be done to this creek if water is allowed to be diverted to a golf course – keep the environment a priority.”

[10] In their Notice of Appeal, the Appellants added that their land is used for grazing horses, arguing that reduced water flow would negatively affect this use. The Appellants stated, “...in years of drought and low water levels, any diversion of water would be damaging and could result in loss of water...” The Appellants also expressed concern about the possibility of any herbicides and pesticides used to maintain golf course grass, contaminating the creek water. In answer to what they would like the Board to do to resolve their appeal, they stated: “We would like the Board to restrict water diversion of Pine Creek upstream to ensure that downstream users will not be negatively affected...[and]...to restrict water diversion for recreational purposes.”

[10] Under the *Water Act*, an individual applying for a licence to divert water must advertise the fact that an application has been made in a Notice of Application.<sup>4</sup> Once the Notice of Application for a licence to divert has been published, individuals who have concerns with the proposed work (potential appellants) have 30 days to file a Statement of Concern. This timeline is specified by section 109(2) of the *Water Act* and must be adhered to.<sup>5</sup>

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*Cove Golf Course Inc.* (22 January 2003), Appeal Nos. 02-075 and 02-076-R (A.E.A.B.).

4 Section 108(1) of the *Water Act* provides:

"An applicant ...

(b) for a licence, ... shall provide notice of the application in accordance with the regulations."

5 Section 109(1) states:

“If notice is provided

(a) under section 108(1), any person who is directly affected by the application or proposed amendment, and

(b) under section 108(2), the approval holder, preliminary certificate holder of licensee, may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

(2) A statement of concern must be submitted

[11] The purpose of filing a Statement of Concern is twofold. First, the filing of a Statement of Concern provides the Director with the filer's input into the decision that the Director must make, and second, it automatically preserves the filer's right to appeal the decision. Both of these rights are contingent on the Statement of Concern being filed on time.

[12] The Board has previously held that the requirement of filing a Statement of Concern is a prerequisite to the filing of a Notice of Appeal. The Statement of Concern and Notice of Appeal processes under *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") are virtually identical to those under the *Water Act*, and therefore, the Board is of the view that the same principles should apply. In the case of *O'Neill*, the Board stated:

"Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even where a statement of concern has *not* been filed - due to an extremely unusual case (e.g. directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case."<sup>6</sup> (Emphasis in the original, footnotes omitted.)

[13] The Board can arguably accept a Notice of Appeal without a Statement of Concern being filed, as discussed in *O'Neill*. However, to respect the safeguards established by the Legislature, the Board will allow late-filed appeals in exceptional cases, where the equities require it. Unfortunately, in this case, it is the Board's view that no such exceptional circumstances exist to prompt the Board to permit the Appellants to proceed further.

[14] In order for an appeal to be valid, *Water Act* appeals must also meet the following requirements:

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- (a) in the case of an approval, within 7 days after the last providing of the notice, and
  - (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice."

6 *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-250-D at paragraph 14 (A.E.A.B.).

“115(1) A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:...

(b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted

(i) by the preliminary certificate holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108 ...

116(1) A notice of appeal must be submitted to the Environmental Appeal Board ...

(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 Appeal 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.”

[15] Even if the absence of a Statement of Concern could be excused, the Appellants filed their Notice of Appeal well past the statutory deadline.<sup>7</sup> In their December 19, 2002, request for an extension, the Appellants stated that, since they are not neighboring landowners, they were “...unaware of the appeal process and the time limit...” and that they only became aware of the process when they saw the mediation meeting announcement in the newspaper.

[16] It is the Board’s position that the Appellants’ request for an extension does not amount to the sufficient grounds necessary for the Board to approve an extension of the period of time to file a valid Notice of Appeal.

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<sup>7</sup> The Preliminary Certificate was issued on November 17, 2002, and on the same day, notice of its issuance was sent to those individuals who had filed a Statement of Concern. The Board received the Appellants’ Notice of Appeal two months after the expiry of the appeal period, on December 19, 2002.

### III. DECISION

[17] The Board finds that the statutory prerequisites to filing a Notice of Appeal have not been met and that no special circumstances exist to extend the appeal deadline. Therefore, in accordance with section 95(5), the Board dismisses the Notice of Appeal filed by Mr. Martin Dyck and Mrs. Lillian Dyck.

Dated on February 14, 2003, at Edmonton, Alberta.

“original signed by”  
William A. Tilleman, Q.C.  
Chair