
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – August 1, 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 the Town of Valleyview with respect to *Water Act* Licence No. 00080224-00-00 issued to the Town of Valleyview by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Town of Valleyview v. Director, Northern Region, Regional Services, Alberta Environment* (1 August 2003), Appeal No. 03-009-D (A.E.A.B.).

BEFORE:

Dr. William A. Tilleman, Chair.

PARTIES:

Appellant:

Town of Valleyview.

Director:

Mr. Nico Wyngaardon, Director, Northern Region,
Regional Services, Alberta Environment,
represented by Mr. Martin Chamberlain, Alberta
Justice.

EXECUTIVE SUMMARY

Alberta Environment issued a water licence to the Town of Valleyview (the Town) authorizing the diversion of water up to a maximum of 668,400 cubic metres annually from the Little Smoky River at SE 12-70-22-W5M near Valleyview, Alberta, on January 31, 2001.

The Board received a Notice of Appeal from the Town appealing the licence on June 16, 2003. The time period in which an appeal may be filed with the Board with respect to a water licence is 30 days, unless the Board finds there is sufficient reason for extending this filing period. The Board requested that the Town provide reasons as to why the Board should extend the time limit for filing the appeal.

After reviewing the reasons provided by the Town, the Board found that the Town did not present sufficient reasons to demonstrate that special circumstances existed to warrant an extension of the time limit. Therefore, the Board dismissed the appeal for being filed outside the time limit.

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I. BACKGROUND

[1] On January 31, 2001, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued Licence No. 00080224-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of Valleyview, authorizing the diversion of up to 668,400 cubic metres of water annually from the Little Smoky River at SE 12-70-22-W5M near Valleyview, Alberta.

[2] On June 16, 2003, some 28 months later, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from the Town of Valleyview (the “Appellant”) appealing the Licence.

[3] On June 17, 2003, the Board wrote to the Appellant and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal. The Board requested that the Director provide the Board with a copy of the records (the “Record”) relating to this appeal.

[4] In the Board’s letter of June 17, 2003, the Board advised the Appellant that it appeared that the Notice of Appeal had been filed significantly outside the time limit prescribed in the *Water Act*. The Board’s letter stated:

“The normal time limit prescribed in the *Water Act* for filing such an appeal is 30 days. As the Licence was issued on January 31, 2001, this Notice of Appeal appears to be significantly outside the time limit prescribed in the *Water Act*, Mr. Peterson [(representing the Appellant)] is requested to advise the Board if he wishes to request an extension of time to appeal? Please indicate to the Board the reasons for the extension of time to appeal and provide a more detailed explanation as to why the appeal was filed outside of the 30-day time limit. The granting of the extension of time is at the discretion of the Board and is not routinely granted. Mr. Peterson is requested to provide this information in writing to the Environmental Appeal Board by June 30, 2003.” (Emphasis deleted.)

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative.¹

¹ The AEUB did not respond prior to this Board making its decision. Given the Board’s decision in this matter, the issue of whether the AEUB has heard the matter previously does not have to be considered in this case.

[6] On June 18, 2003, the Board received a letter from the Appellant stating:

“The reason for the request for extension is the 30-day appeal period permitted in the licence did not permit sufficient time to assess the conditions of the licence. *Our Engineers identified at the time of the license issuance that based on the historical data for the Little Smoky River, they felt the license to divert was not sufficient for the Town’s system.* ... Therefore now based on 3 years of actual experience and having to request a number of temporary diversion permits, we can clearly show the conditions in the licence are not practical.” (Emphasis added.)

[7] After reviewing the reasons provided by the Appellant, the Board notified the Parties on June 25, 2003, that the Board was not prepared to grant an extension of time to appeal and dismissed the appeal for filing the Notice of Appeal late.

II. ANALYSIS

A. Statutory Background

[8] Section 116(1) of the *Water Act* provides:

“A Notice of Appeal must be submitted to the Environmental Appeal Board

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

Therefore, in the case of a water licence issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is 30 days.

[9] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states:

“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.”

B. Application

[10] After reviewing the submissions of the Parties, the Board has determined the appeal must be dismissed based on three grounds – the need for certainty in the appeal process; failing to meet the onus in applying for an extension; and the need for the Appellant to follow the proper amendment process in a case such as this.

[11] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.² The onus is on the Appellant to demonstrate to the Board that the time limit should be extended to allow the appeal. Of particular concern in this case is that the Appellant filed its Notice of Appeal more than 28 months after the Licence was issued.

1. Certainty

[12] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for a water licence to go through an application process. This process provides for a technical and scientific review of the application and a public notice process, which seeks out concerns (statements of concern) of anyone who may be directly affected by the proposed licence. Once a decision is made to issue, or for that matter not to issue, the licence, then there is an appeal period in which the applicant for the licence or anyone who is directly effected (and who filed a statement of concern) can file an appeal. The time limit in which an appeal must be

² See: Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *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.); *Shennan et al. v. Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc.* (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association v. Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.).

filed is prescribed so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

[13] Once this process is complete, the water licence “crystallizes” and all of the parties can move forward on that basis - the parties can carry on with their business affairs, making decisions based on the known terms and conditions of the water licence. If there were no time limits placed on the appeal period, the applicant for a water licence 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 licence.

[14] If a right of appeal was allowed to exist for an indefinite period of time, procedural fairness would require that not only would the Appellant have the right to file an appeal, but any individual who was directly affected (and who filed a statement of concern) would also have the ability to file an appeal at any time. The uncertainty this would create would make it impossible for the Appellant (a licence holder) to properly plan its investments, to carry out construction with respect to any works that are needed to exercise the water right granted by the Licence, and to ensure that they have a stable water supply.

[15] The time lines included in the legislation, and the certainty that they create, balance the interests of all the parties. This certainty was of benefit to the Appellant when it obtained the Licence, because the Appellant knew when the appeal period was over for those directly affected individuals who had filed a statement of concern. After the appeal period was over, the Appellant could proceed on the basis that the terms and conditions of the licence were certain (subject to any changes permitted by the *Water Act*).

[16] The *Water Act* recognizes the importance of integrating the conservation and management of water with the need for economic growth.³ Uncertainty would create

³ Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta’s economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;

unfavourable conditions for economic growth. Companies need to know that decisions that are made that affect the way they are required to operate will not be susceptible to continuous change.

[17] Therefore, taking into consideration the importance of certainty in any decision made by the Director and the potential impact uncertainty would bring for continued economic growth in this province, the Appellant has not presented sufficient reasons to justify allowing the appeal to proceed at this late date, and therefore the appeal must be dismissed.

2. Extension of Time

[18] The second consideration the Board examined was whether the Appellant had provided sufficient reasons to grant an extension of time to file an appeal. To allow an extension of time, the Appellant must be able to show that extenuating or special circumstances existed that prevented it from filing within the legislated timeframe. In its response to the Board's letter asking for reasons why an extension should be granted, the Appellant stated the "...30-day appeal period permitted in the licence did not permit sufficient time to assess the conditions of the licence." The Board does not accept this argument. The argument that 30 days was insufficient time to review the Licence does not demonstrate the special circumstances that are required for the Board to extend the time period. It is an argument that many appellants would, and do, argue, but it is not enough to discharge the Appellant's onus to convince the Board that time should be extended.

[19] The Board recognizes that the Appellant now has two years of potentially relevant data that could be used to support its appeal, but delaying filing an appeal until now does not constitute special circumstances. It constitutes delay. The *Water Act* states that appeals must be filed within 30 days of issuing a licence. The Appellant was explicitly informed of the deadlines

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- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
 - (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
 - (f) the important role of comprehensive and responsive action in administering this Act."

and the resulting consequences if the deadlines were not adhered to in the letter it received with the Licence in 2001.

[20] Further, in its submission, the Appellant stated: “Our Engineers identified at the time of the license issuance that based on the historical data for the Little Smoky River, they felt the license to divert was not sufficient for the Town’s system.”⁴ It therefore appears to the Board that the Appellant not only had adequate time to assess the conditions in the Licence when it was issued, but in fact did assess the conditions and found them, from their perspective, to be unsatisfactory. If this was the case, then the Appellant should have filed an appeal at that time, based on that assessment.

[21] The Appellant stated that it had concerns regarding the amount of water it was allowed to divert at the time the Licence was issued. The Board notes the current demand, as stated by the Appellant, is 400,000 cubic metres per year and the licence allows for 668,400 cubic metres.⁵ Based on these figures, over 40 percent of its allocated water is not presently being used. Therefore, it is unclear why the Appellant has needed to request a number of temporary diversion permits in the past, unless they were specifically related to the timing of the diversions. In any event, if the Appellant had concerns regarding the amount of allowable diverted water at the time the Licence was issued, it had the opportunity in January 2001 to file an appeal and present its concerns. It did not do so.

[22] Thus, based on the above observations, the Appellant has not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal must therefore be dismissed.

⁴ See: Appellant’s letter, dated June 18, 2003. In its letter, it states:

“Our Engineers identified at the time of the license issuance that based on the historical data for the Little Smoky River, they felt the license to divert was not sufficient for the Town’s system. The Town and their consultant have met with the Alberta Environment Regional Services and no action was taken. The Town of Valleyview also was required to conduct a Value Engineering Study by Alberta infrastructure which included members representing all departments of the Province and the problem of the diverting of the water or limitations were not identified by any member of Alberta Environment.”

⁵ See: Appellant’s letter, dated June 9, 2003.

3. Amendment Process

[23] The third consideration of the Board was to assess what the Appellant intended to achieve by filing the Notice of Appeal. Essentially, what the Appellant is, in effect, attempting to accomplish by way of its Notice of Appeal is what should more properly be characterized as an amendment to its Licence. The Appellant has operated under the Licence for over two years and is discovering that the terms and conditions of its Licence are not meeting its needs. However, filing an appeal more than two years after a licence was issued is not the proper procedure to follow to obtain an amendment, as this defeats the amendment process provided for in the *Water Act*.

[24] The Appellant can apply to the Director to amend the terms and conditions of its Licence. The Director will consider the amendment request of the Appellant providing the required information is provided in the proper form and manner, the required fees are paid, and, most importantly, notice is properly given as specified in the *Water Act*. If the Director decides to issue the amendment, the Appellant would have the water diversion it requested. Allowing the Appellant to obtain an amendment of its Licence at this point, through the Board's appeal process, would circumvent the formal notice process that is part of the application process and would defeat the purposes of the Act as stated in section 2 of the *Water Act*. The Appellant must also be aware that an amendment such as this, that results in an increase in the amount of water diverted, will be open to appeal by other directly affected individuals. Alternatively, if the Director decides not to grant the amendment, that is a new decision of the Director and would be open to appeal by the Appellant.

[25] Therefore, if the Appellant wants the Licence changed, it should file an application to the Director requesting an amendment. Any decision related to the amendment would be appealable, and providing the prerequisites are followed, including adherence to time limits for filing a notice of appeal, the Board would then have jurisdiction to consider the appeal.

III. CONCLUSION

[26] The Board finds that the statutory prerequisites for filing a Notice of Appeal have not been met as the appeal was filed out of time and no special circumstances exist to extend the

appeal deadline. The Board is of the opinion that certainty requires that the appeal timelines be adhered to, unless special circumstances exist to warrant an extension. Additionally, the issues of concern to the Appellant are more properly considered an amendment to an existing Licence, and the appeal process is not intended to defeat the amendment process that includes notification and consultation with the public. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal of the Town of Valleyview.

Dated on August 1, 2003, at Edmonton, Alberta.

“original signed by”

William A. Tilleman, Q.C.
Chair