

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 7, 2007

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 appeals filed by M. G. Slemko and L. L. Slemko with respect to *Water Act* Licence Amendment No. 00153082-00-01 issued to Elkwater Water Co-operative Ltd. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Slemko v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Elkwater Water Co-operative Ltd.* (07 August 2007), Appeal Nos. 06-086 & 06-087-ID1 (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair.

SUBMISSIONS BY:

Appellants:

Mr. M. G. Slemko and Ms. L. L. Slemko.

Director:

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

Licence Holder:

Elkwater Water Co-operative Ltd., represented by Mr. Robert Pender, President.

EXECUTIVE SUMMARY

Alberta Environment issued Licence Amendment No. 00153085-00-01 to the Elkwater Water Co-operative Ltd. relating to the diversion of water from Elkwater Lake. The Board received Notices of Appeal from Mr. M. G. Slemko and Ms. L. L. Slemko.

The Board received a request from Alberta Environment to determine the issues prior to proceeding to a Hearing of the appeals. In response to the request, the Board asked the parties to provide written submission on the issues.

The Board reviewed the written submissions and determined the issues that will be heard at the Hearing are:

1. What is an appropriate cut off level to allow for the diversion of water from Elkwater Lake?
2. Is additional clarification regarding the term “water conservation measures” required, and if so, how should it be defined?

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I. BACKGROUND

[1] On February 28, 2007, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Licence Amendment No. 00153082-00-01 (the “Licence Amendment”) under the *Water Act*, R.S.A. 2000, c. W-3, to Elkwater Water Co-operative Ltd. (the “Licence Holder”), in relation to the diversion of water from Elkwater Lake near Cypress Hills, Alberta.

[2] On March 26 and 28, 2007, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Marshall G. Slemko and Ms. L. L. Slemko (the “Appellants”) appealing the Licence Amendment.

[3] On March 28, 2007, the Board wrote to the Appellants, the Licence Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals, and that the Parties provide available dates for a preliminary meeting, 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 responded in the negative.

[5] On April 10, 2007, the Board received a telephone call from the Licence Holder, providing available dates and advising it did not believe mediation would be successful and requesting the Board proceed directly to a hearing.

[6] On April 20, 2007, the Board received a copy of the Record from the Director, and on May 2, 2007, the Board forwarded a copy to the Appellants and the Licence Holder. The Director also requested the Board determine the issues for the appeal before proceeding to a hearing or mediation.

[7] On April 24, 2007, the Board received a letter from the Appellants requesting further information and documents.¹

[8] On May 2, 2007, in response to the Director's April 20, 2007 letter, and subsequent telephone conversation with the Licence Holder on April 26, 2007, regarding mediation, the Board wrote to the Parties advising it had decided to schedule a written submission process to determine the issues of the appeals prior to proceeding to a hearing. The Board gave the Parties an opportunity to provide the Board with any further preliminary motions by May 9, 2007. The Board also asked the Licence Holder and the Director if they were in a position to provide the additional information requested by the Appellants.

[9] On May 3, 2007, the Board received a telephone call from the Appellants regarding the deadline to provide their preliminary motions to the Board. The Appellants also advised they would have liked the Board to proceed to mediation. As a result of the telephone conversation, the Board wrote to the Parties on May 7, 2007, extending the deadline for the Parties to provide further preliminary motions to the Board until they had an opportunity to review the Record and any additional information that may be provided to them. The Board also addressed the issue of mediation and advised:

“...All participants are free to provide the Board with their requests for process and the Board will make the final decision on how it will proceed with an appeal. In this case, the Board decided not to conduct a mediation meeting because the Elkwater Water Co-operative indicated they do not wish to participate in mediation. Mediation is a voluntary process which is usually only successful and productive if all participants are willing to participate....”

[10] On June 11, 2007, as the Board did not receive any further preliminary motions from the Parties, the Board scheduled the written submission process to determine the issues for

¹ The Appellants requested the following documents:

- Elkwater Water Co-operative Ltd. By-Laws;
- Number of allowable membership with list of members and shares held;
- Water consumption of the Elkwater Co-operative consumed monthly during 1988 and March 2007;
- Summary of Water Oxygen Concentration in Elkwater Lake;
- Full size copy of Hydrographic Survey of Elkwater Lake showing the Elkwater Lake Co-operative outlet and the revised present main lake boat dock; and
- Full size copy of updated Hydrographic Survey marked in color to illustrate the depth rings of the entire lake.

the appeals. The Parties provided their initial written submissions on June 15 and 18, 2007, and on June 22 and 25, 2007, the Board received response submissions from the Licence Holder and Director. The Appellants did not provide a response submission.

II. SUBMISSIONS

[11] The Appellants stated their objective is to ensure a specific cut off level is maintained in Elkwater Lake in present and future licences and approvals.

[12] Ms. Slemko listed the following concerns in her submission:

- “A. The Alberta Government and Elkwater Water Co-operative’s compliance with The Alberta Government Water Act and Provincial Parks Act, Guidelines and processes...
- B. Use of a temporary Diversion License during drought as an alternative to removing the cut off level.
- C. Use of an impartial agent to monitor the Elkwater Water Co-operative’s Ltd. guidelines.
- D. Importance of The Elkwater Water Co-operative Ltd. having a water cut off level for Elkwater Lake.
- E. The need for Environmental Assessments...”²

[13] In response, the Director stated the issue of compliance with the *Water Act* and the *Provincial Parks Act* is not a valid issue, because the Board does not have jurisdiction under the *Provincial Parks Act* and questions relating to the Government’s compliance with its own licences is not relevant to the Amending Approval.

[14] The Director argued future possible decisions regarding temporary diversion licences are not appealable to the Board, and other decisions made under the *Water Act* may be made by other Directors and may not be appealable to the Board.

[15] The Director stated it was not clear what guidelines were being referred to in Ms. Slemko’s third issue. The Director explained that if she was referring to the Licence Holder’s internal guidelines for water conservation, how it intends to be duly diligent under its original licence and the Amending Licence, or how it intends to be aware of its water situation, these are not part of the Director’s decision and are not appealable to the Board.

[16] The Director stated that the issue of the cut off levels for diversion is a proper issue for the Board to consider.

[17] The Director stated it was not clear what type of environmental assessment Ms. Slemko was referring to in her fifth issue. The Director explained that if she was referring to an assessment that the Director must do under the *Water Act* when considering the application, then it is a proper issue, but if Ms. Slemko was referring to an environmental assessment as described in Part 2, Division 1 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), then it is not a proper issue before the Board.

[18] Ms. Slemko also referred to a letter written by her on September 12, 2003, to Alberta Environment.³ In response, the Director argued that restating a list of 26 questions or concerns does not provide any degree of specificity as to what the issues should be so that the other Parties could respond.

[19] Mr. Slemko listed his issues as follows:

- “1. Factual history of Elkwater Lake and a general description of Elkwater Lake today....
2. Review the original proposal of the Elkwater Ltd. Pipeline Project to 45 farms (54 shares)...
3. Review final as built of the Pipeline (Final Location of Lake intake Design)...
4. Review original 1998 Water License No. 00153082-00-00 and its on going concerns.
5. Present and review a bar graph of Elkwater Water Co-operative Ltd. Water consumption 2001-2006 (Demand increasing each year)
6. Present a Hydrographic Survey of Elkwater Lake illustrating various water levels and its direct impact on the fishery, ecology of the Lake, Park and the general public recreation.
7. Closing remarks, recommendations, questions and concerns that need to be addressed and future projected issues.”⁴

² Ms. Slemko’s submission, dated June 16, 2007.

³ See: Director’s Record at Tab 24. In this letter, Ms. Slemko listed 26 questions and concerns. These concerns included issues regarding the health and stability of Elkwater Lake, water conservation methods used, acceptable water withdrawal levels, and balancing interests between agriculture and recreation.

⁴ Mr. Slemko’s submission, dated June 16, 2007.

[20] The Director stated a general description of the nature of the water body is relevant, but a retelling of the long history of the lake is not relevant to the Director's decision.

[21] The Director argued a review of the original proposal is not a proper issue, because the appeal can only deal with the Director's decision to issue an amendment, not any decisions made when the original project was built.

[22] The Director was unsure what Mr. Slemko was referring to when he requested a review of the final location of the lake intake design, but the Director stated that if Mr. Slemko was referring to what was originally built, then it goes back to the original decision of the project which is not appealable and should not be heard by the Board.

[23] The Director argued that the terms of the original licence that have not been amended are not the subject of the appeal, as the Board does not have the ability to open up and review the terms of the 1998 licence that have not been amended.

[24] In his response, the Director stated he has no concerns with the bar graph of water consumption and the hydrographic survey of the lake being presented as evidence at the Hearing.

[25] The Director did not have concerns with closing remarks and recommendations being presented by the Appellants, but he was concerned with how these concerns relate to "future projected issues." The Director explained future possible amendments that may or may not take place are not proper issues before the Board because a hearing cannot be based on speculation of future appealable issues.

[26] The Licence Holder did not oppose anything in the submissions of the Appellants or the Director.

III. ISSUES

1. Statutory Basis

[27] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing. Section 95 provides:

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....
- (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

2. Discussion

[28] The Appellants listed a number of concerns related to Elkwater Lake and the withdrawal of water under the Licence Amendment the original licence. However, the Board’s jurisdiction is limited to the Amending Licence itself and the conditions specified in the Licence Amendment. Only those terms and conditions in the original licence that are changed as a result of this Licence Amendment can be considered by the Board.

[29] As the current appeal relates to the Licence Amendment issued to the Licence Holder, the Board cannot evaluate other approvals or licences issued to other entities, including the Government of Alberta, or under other legislation beyond the *Water Act*, EPEA, the *Climate Change and Emissions Management Act*,⁵ and very limited circumstances under the *Government Organization Act*.⁶ Therefore, the first issue raised by Ms. Slemko cannot be heard by the Board. The Board cannot review other approvals or licences issued to the Government of Alberta or the Licence Holder. The only decision that can be reviewed by the Board at this time is the Director’s decision to issue the current Licence Amendment.

[30] The matter of a temporary diversion licence is not part of the Licence Amendment, and it is something that may or may not be issued by a Director in the future. The Board cannot have an issue based on speculation of what might be decided in the future. Therefore, the Board cannot consider temporary water diversion licences at the Hearing. A temporary diversion licence has not been issued by the Director, and according to section 115(2)(b) of the *Water Act*, the issuance of a temporary diversion licence is not appealable. If the Appellants are raising the possibility of having the Director issue a temporary diversion licence so as not to require the amendments, then it can be raised as an alternative to the restrictions included in the Licence Amendment. It may be a remedy that the Appellants may

⁵ See: *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7.

want to raise at the Hearing, but it cannot be the basis of an issue because it is not part of the Licence Amendment.

[31] It is unclear as to what is meant by the concern expressed regarding monitoring of the Licence Holder's guidelines. The Board cannot hear arguments on internal guidelines established by a Licence Holder on how it will actually ensure that the terms and conditions of its licence and Licence Amendment are followed, as long as the conditions are followed. The Licence Amendment does not specify monitoring requirements, but these requirements are stipulated in the original licences, and as those conditions have not been amended, the Licence Holder is still required to follow those conditions. As the monitoring conditions have not been amended, they cannot be appealed under an appeal of the Amending Licence.

[32] The Amending Licence stipulates when conservation measures need to be taken and the elevation of the water in the lake when these measures apply. Therefore, the issue regarding the water cut off levels for Elkwater Lake is related to the Amending Licence and is within the Board's jurisdiction to consider. Therefore, the Board will accept as an issue at the Hearing the appropriate cut off level for Elkwater Lake. Also related to this matter is the concern expressed in the Appellants' Notices of Appeal and September 12, 2003 letter about what the phrase "water conservation measures" actually means and entails. Therefore, the Board is willing to accept as an additional issue the question whether the term "water conservation measures" requires further clarification.

[33] As for the matter of environmental assessments under Part 2, Division 1 of the EPEA, the Board does not have jurisdiction to determine whether an environmental assessment should be done. That decision is made by a different director in Alberta Environment and is not appealable to this Board. If Ms. Slemko was referring to the assessment completed by the Director prior to issuing the Licence Amendment, then her concerns, including the adequacy of the Director's assessments as they relate to the two issues noted above, can be expressed as part of her arguments at the Hearing.

[34] The questions and concerns stated in Ms. Slemko's September 12, 2003 letter essentially centre around the health and stability of Elkwater Lake, the water conservation

⁶ See: *Government Organization Act*, R.S.A. 2000, c. G-10.

methods used, acceptable water withdrawal levels, and balancing interests between agriculture and recreation. The health and stability of the lake are connected to the acceptable water withdrawal levels, an issue already identified by the Board. The Board has also determined clarification of the water conservation methods is a valid issue that will be heard at the Hearing. Although balancing the interests of agriculture and recreational needs is not an issue to be addressed at the Hearing, the Board is aware that, in its deliberations, it must balance competing interests because section 2 of EPEA and the *Water Act* requires the Board to consider economic growth and prosperity as well as the protection of the environment.⁷

[35] Mr. Slemko's submission appeared to be an outline of his intended submission for the Hearing. The Board is not opposed to the Appellants providing a brief history of the Elkwater Lake and a general description of the lake may be useful. However, it is important for the Appellants to realize that the Board allots specific time limits on the actual presentation at the Hearing. This should be kept in mind when the Appellants, and the other Parties, are preparing for the Hearing so that time is appropriately spent presenting evidence and arguments on the

⁷ Section 2 of EPEA states:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;...
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment...."

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;
- (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...."

identified issues instead of using the allotted time for information that is not relevant to the appeal of the Licence Amendment.

[36] Mr. Slemko raised the matter of the original proposal of the pipeline and the final location of the lake intake design. These are matters that were determined at the time the original licence was being assessed. The pipeline is not being amended by the Licence Amendment, and is therefore, not a matter that can be heard by the Board. The Board can only hear issues that relate to the Licence Amendment, not what currently exists that is not being amended. This also applies to the original licence. Only those parts of the licence that are being amended can be reviewed by the Board. As previously stated by the Board in *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.*⁸:

“In the Board’s view, when an approval is amended, the issues that are appropriately included in an appeal of the amending approval are those environmental effects that directly or indirectly result from the amendment. And these issues would go to the *amendment* being confirmed, reversed, or varied.”⁹
[Emphasis in original.]

[37] The Appellants can bring any evidence they require that will support their position with respect to the issues as identified by the Board. If the Appellants consider the bar graph indicating the Elkwater Water Co-operative Ltd. water consumption 2001-2006 and the hydrographic survey of Elkwater Lake relevant, they are certainly free to bring the information forward.

[38] Mr. Slemko referred to “future projected issues.” The Board cannot determine issues on speculative issues that may or may not occur. The Appellants should focus their presentation on the issues as defined by the Board.

[39] Therefore, the issues that will be heard at the Hearing are:

1. What is an appropriate cut off level to allow for the diversion of water from Elkwater Lake?

⁸ See: Preliminary Motions: *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (16 April 2002), Appeal No. 01-097, 098 and 101-D (A.E.A.B.).

⁹ Preliminary Motions: *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (16 April 2002), Appeal No. 01-097, 098 and 101-D (A.E.A.B.) At paragraph

2. Is additional clarification regarding the term “water conservation measures” required, and if so, how should it be defined?

[40] Pursuant to section 95(4) of EPEA,¹⁰ the Parties will be allowed to make representations on these two issues only. Any submissions that go beyond these defined issues will not be considered by the Board in its deliberations.

IV. DECISION

[41] The issues that will be heard at the Hearing will be:

1. What is an appropriate cut off level to allow for the diversion of water from Elkwater Lake?
2. Is additional clarification regarding the term “water conservation measures” required, and if so, how should it be defined?

Dated on August 7, 2007, at Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudehy, FRSC, PEng
Chair

38.

¹⁰ Section 95(4) of EPEA provides:
“Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”