

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 29, 2012

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 Walter Hohloch with respect to *Water Act* Licence Amendment No. 00071066-00-01 issued to the Eastern Irrigation District by the Director, Southern Region, Environmental Management, Alberta Environment and Water.

Cite as: Intervenor Decision: *Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Water*, re: *Eastern Irrigation District* (29 March 2012), Appeal No. 10-043-ID2 (A.E.A.B.).

**INTERVENOR DECISION
BEFORE:**

Justice Delmar W. Perras (ret.), Chair.

SUBMISSIONS BY:

Appellant: Mr. Walter Hohloch, represented by Mr. Barry Robinson, Ecojustice.

Director: Mr. Kevin Wilkinson, Director, Southern Region, Environmental Management, Alberta Environment and Water, represented by Ms. Charlene Graham, Alberta Justice.

Licence Holder: Eastern Irrigation District, represented by Mr. C. Richard Jones, Vipond Jones LLP.

Intervenor Applicants: Water Matters Society of Alberta, represented by Mr. Shaun Fluker and Ms. Sarah Nykolaishen; and Western Irrigation District, represented by Mr. C. Richard Jones, Vipond Jones LLP.

EXECUTIVE SUMMARY

Alberta Environment and Water issued a Licence Amendment to the Eastern Irrigation District (EID) authorizing the provision of water for municipal, agricultural, commercial, industrial, habitat enhancement, and recreational purposes.

The Board received a Notice of Appeal from Mr. Walter Hohloch. After finding Mr. Hohloch directly affected, the Board set the hearing for April 23 and 24, 2012.

In response to the Notice of Hearing, the Board received intervenor applications from the Water Matters Society of Alberta and the Western Irrigation District (WID).

After receiving and reviewing the submissions from the parties, the Board denied the intervenor requests. Water Matters stated it intended to bring evidence regarding the development and implementation of Alberta Environment and Water's policies, but the Board does not have jurisdiction to change legislation or policy. Water Matters did not indicate how its participation would be relevant to the appeal before the Board.

The WID intended to bring evidence on whether the Licence Amendment was in accordance with applicable legislation and policies, and its grounds for requesting intervenor status was that it held licences with similar amendments. The licences held by the WID were not an issue in this appeal and could not form the basis of granting the WID intervenor status.

Both of the applicants were or are represented by counsel who now represent Mr. Hohloch and the EID respectively. If any broader issues are raised at the hearing that are relevant to Mr. Hohloch's appeal, these counsel would be able to provide the required legal arguments.

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I. BACKGROUND

[1] On November 18, 2010, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), issued Licence Amendment No. 00071066-00-01 (the “Licence Amendment”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Eastern Irrigation District (the “Licence Holder” or “EID”) authorizing the provision of water for municipal, agricultural, commercial, industrial, habitat enhancement, and recreational purposes. The Licence Amendment amends the original licence issued to the EID for the limited purpose of irrigation.

[2] On December 17, 2010, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Walter Hohloch (the “Appellant”) appealing the Licence Amendment. The Board also received appeals from the Alberta Wilderness Association, Trout Unlimited Canada, Water Matters Society of Alberta, Ms. Cheryl Bradley, Mr. Lorne Fitch. These appeals were dismissed.¹

[3] On January 9, 2012, the Board notified the Appellant, Licence Holder, and Director (collectively, the “Parties”) that the Appellant was directly affected.

[4] The Notice of Hearing was published in the Bassano Times, Brooks Bulletin, Brooks Regional, and the Brooks & County Chronicle, and a news release was placed on the Alberta Government and Board websites and distributed to the media throughout the Province. In response to the notice, the Board received intervenor requests from the Water Matters Society of Alberta (“Water Matters”) and the Western Irrigation District (“WID”).

¹ See: *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

II. SUBMISSIONS

A. Applicants

1. Water Matters Society of Alberta

[5] Water Matters stated it has a tangible interest in the appeal for the following reasons:

1. its involvement in the development of policy with respect to water licence amendments, transfers, and management of water resources in Alberta;
2. its efforts towards ensuring water licence amendments are consistent with the *Water Act*; and
3. its interest in the lawful administration of the *Water Act*.

[6] Water Matters submitted its participation would assist the Board given its history concerning the Licence Amendment, including opposing the initial application in August 2007. Water Matters stated its policy expertise will assist the Board in determining whether the Licence Amendment was a reasonable exercise of the Director's discretion.

[7] Water Matters explained its concerns in the appeal relate to the public's interest in the lawful administration of the transfer provisions in the *Water Act*. It stated its submissions would ensure the public has a role in decision making as envisioned by section 2(d) of the *Water Act*, particularly where the Board is being asked to hold the executive to account.

[8] Water Matters confirmed it supports the Appellant's position that the Licence Amendment be reversed.

[9] Water Matters stated it would restrict its submissions to the interpretation and application of the *Water Act* and relevant policies.

2. Western Irrigation District

[10] The WID requested intervenor status to make written representations opposing the Appellant's appeal. It stated it has a tangible interest in the appeal given the Director recently amended the WID's licences to allow the delivery of water for non-irrigation purposes.²

[11] The WID intended to present evidence with respect to whether the Licence Amendment is in accordance with the *Water Act* and applicable policies.

B. Appellant

[12] The Appellant took no position on the intervenor requests.

C. Licence Holder

[13] The Licence Holder did not provide comments regarding the intervenor request of the WID.

[14] The Licence Holder objected to the intervention request of Water Matters. The Licence Holder noted the Board determined Water Matters failed to demonstrate it was directly affected by the Licence Amendment. The Licence Holder noted Water Matters admitted it is a public policy organization and does not represent the interests of any person directly impacted by this appeal.

[15] The Licence Holder stated Water Matters failed to demonstrate how it or its members, who have not been identified, have an interest in the Licence Amendment. The Licence Holder believed any evidence presented by Water Matters would only duplicate the Appellant's evidence since his legal counsel, EcoJustice, was legal counsel for Water Matters for the preliminary matters.

[16] The Licence Holder stated that, if the Board grants intervenor status to Water Matters, it should be restricted to providing written submissions only. Full intervenor status would lengthen the appeal and would not materially assist the Board.

² The Board notes that some of the same appellants who appealed the EID Licence Amendment but were dismissed, also appealed a similar amendment to the WID's licences.

D. Director

[17] The Director stated the decision in this appeal will have no effect on the WID's licence, because it is a separate legal document, and the amendment was subject to a separate appeal and possible judicial review. The Director argued that, if the WID is granted intervenor status because this appeal may impact the WID, then the Board would need to directly advise all of the other irrigation districts of this hearing, because 11 of the 13 irrigation districts have already been granted similar purpose amendments to their licences and the 12th irrigation district has submitted an application for a similar amendment.

[18] The Director opposed any intervention by Water Matters, because it is only concerned with the purpose amendment policy and how it was created. The Director questioned how Water Matters could have a tangible interest in the appeal given Water Matters did not mention the Appellant in its intervention request.

[19] With respect to Water Matters' argument that it should be granted intervenor status on the grounds it has a direct interest in the lawful administration of the *Water Act* and to ensure the public has a role in decision making under the *Water Act*, the Director argued:

1. all Albertans have a direct and tangible interest in the lawful administration of the laws of Alberta;
2. the public had a role in this application by the numerous letters submitted by the public and the Statement of Concern filers;
3. one member of the public has a valid appeal before the Board;
4. an intervention by Water Matters does not meet the Board's intervention test; and
5. an intervention by Water Matters is not needed to ensure the public has a role in the process.

[20] The Director argued Water Matters' arguments regarding its involvement in policy development and discussions and opposition to the Licence Amendment do not meet the Board's intervention test. The Director stated is appeared Water Matters was appealing the contents of the policy because they were discontented with the way the policy turned out. The Director argued the appeal cannot be used as a collateral attack on the policy and undermine the process by which policy is created in Alberta.

[21] The Director stated the history of how the policy was formed, what discussions lead to the creation of the policy, if the policy was offside of the *Water Act*, and Water Matters' involvement in policy discussions is irrelevant to this appeal and cannot form the basis for being granted intervenor status.

E. Analysis

[22] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[23] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

- “(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[24] The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;

- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

[25] The WID is requesting intervenor status because it has a similar amendment to its licences. The WID intended to present its own evidence on whether the amendment is in accordance with the *Water Act*. One of the criteria the Board uses to determine if an applicant should be granted intervenor status is whether the intended evidence will duplicate the evidence of the parties. In this case, it appears the evidence the WID intends to bring forth would be similar, if not almost identical, to the evidence that can be brought forward by the Licence Holder. The Board also notes counsel for the WID is the same as for the Licence Holder. Therefore, it seems any arguments on whether the amendment complies with the *Water Act* that applies to the Licence Holder will also apply to the WID and could be argued by counsel for the Licence Holder. Therefore, the Board denies the intervenor application of the WID.

[26] The Board also denies the intervention request by Water Matters. The issue for the hearing is how the Director’s decision impacts the Appellant. It is not a review of the policy allowing this type of amendment to a licence. The submission by Water Matters only discussed policy matters, how it participated in the development of the policy, and its concerns regarding the interpretation of the policy. As the Board stated in its preliminary issues decision, the Board cannot change legislation or Alberta Environment and Water’s policy.

[27] The Board notes counsel for the Appellant had also represented Water Matters in the preliminary matters. Therefore, it seems reasonable to expect that counsel for the Appellant will be capable of bringing the broader issues forward at the hearing if they relate to the Appellant’s appeal. This does not mean counsel can argue all of the policy issues raised by Water Matters. The appeal is in relation to the issues and concerns expressed by the Appellant only and as identified by the Board in its previous decision.³

³ See: *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal Nos. 10-038-043-ID1 (A.E.A.B.).

III. CONCLUSION

[28] The Board denies the intervenor requests of Water Matters Society of Alberta and the Western Irrigation District. Counsel for the Licence Holder and the Appellant are aware of the concerns raised by the intervenor applicants and, if relevant to the current appeal, are capable of bringing the concerns forward to the extent they are relevant and related to the Appellant's appeal.

Dated on March 29, 2012, at Edmonton, Alberta.

“original signed by”

D.W. Perras
Chair