

ALBERTA
ENVIRONMENTAL APPEAL BOARD
DECISION

Preliminary Meeting: October 1, 1998

Date of Decision: October 21, 1998

IN THE MATTER OF Sections 84, 85, and 87 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and -

IN THE MATTER OF an appeal filed by Mr. Alan Gaskell with respect to Approval No. 11851-01-00 issued by the Regional Director, Northern East Slopes Region, Alberta Environmental Protection to TransAlta Utilities Corporation.

Cite as:

Gaskell v. Regional Director, Northern East Slopes Region, Alberta

Environmental Protection *re: TransAlta Utilities Corporation.*

PRELIMINARY MEETING BEFORE

Dr. William A. Tilleman, Chair
Dr. Steve E. Hruddy
Mr. Ron V. Peiluck

APPEARANCES

Appellant: Mr. Grant Dunlop, counsel, Ogilvie and Company,
representing, Mr. Alan Gaskell

Department: Ms. Joanne Esbaugh, counsel, Alberta Justice,
representing the Regional Director of Northern East
Slopes, Alberta Environmental Protection

Other Parties: Ms. Letha MacLachlan, counsel, Macleod Dixon,
representing TransAlta Utilities Corporation

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PROCEDURAL FACTS

[1] On July 9, 1998, Mr. Alan Gaskell of Whitewood Links Golf and R.V. Park (the Appellant), filed a Notice of Appeal with the Environmental Appeal Board (the Board) with respect to Approval No. 11851-01-011 issued to TransAlta Utilities Corporation for the construction, operation, and reclamation of the Whitewood Coal Mine. The Approval was issued on June 30, 1998 pursuant to the *Environmental Protection and Enhancement Act* (the Act)¹ by Mr. W.S. Macdonald, Regional Director, Northern East Slopes Region, Alberta Environmental Protection.

[2] The Board wrote to Mr. Gaskell on July 10, 1998, acknowledging receipt of the appeal and by copy of that letter requested all related correspondence, documents and materials from the Department of Environmental Protection (Department). On that same date the Board wrote to TransAlta Utilities Corporation (Approval Holder) advising them that an appeal had been filed by Mr. Gaskell and providing it with a copy of the appeal.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board (NRCB) and the Alberta Energy and Utilities Board (AEUB) asking whether this matter had been the subject of a hearing or review under their respective Boards' legislation. Replies were subsequently received from the NRCB and the AEUB. The NRCB advised that they did not hold any hearing or review under either of their Board's legislation. The AEUB advised that they issued five-year licence #9732 to TransAlta Utilities Corporation on December 16, 1997, for the continued operation of the Whitewood Mine in the existing area. The licence was issued without any objections.

¹ S.A. 1992, ch. E-13.3 as amended.

[4] All requested correspondence was received from the Department on July 14, 1998 and a copy was forwarded to the Appellant and the Approval Holder. In the Board's letter of August 6, 1998, addressed to Mr. Gaskell and copied to the parties, the Board requested that the parties advise whether they wanted a mediation meeting under section 11 of the Environmental Appeal Board Regulation,² and if there were any other persons who may have an interest in the appeal.

[5] The Board received responses from the parties and forwarded a further letter to Mr. Gaskell on August 21, 1998 requesting that he respond to assertions raised by the respondent that the issues raised in Mr. Gaskell's "appeal do not fall within the Board's jurisdiction." The Appellant replied on August 24, 1998.

[6] On October 1, 1998, the Board held a preliminary meeting to consider the parties' positions on the jurisdiction of the Board to hear the appeal.

TRANSACTIONAL FACTS

The Applicant

[7] The Whitewood and Highvale Coal Mines are owned by TransAlta and supply fuel to the Sundance, Keephills and Wabamun thermal generating plants. These two mines produce 15.2 million tonnes of coal annually.

The Approval

[8] The Whitewood Coal Mine, located on the north shore of Wabamun Lake, is the subject of the appeal of this application. The mine is operated as Mine Number 1757 under AEUB Permit C 78-16 which encompasses approximately 4700 hectares in the Wabamun area. Currently,

² AR 114/93 (hereinafter "the regulations").

approximately 2,800,000 tonnes of coal are produced annually to supply the Wabamun Thermal Generating Plant. The Whitewood Mine supplies fuel to generate approximately 13% of Alberta's electrical requirement and provides employment for 97 people.

[9] For the purposes of the Activities Designation Regulation, the Whitewood Mine referred to in TransAlta's application included: all areas that are mined or otherwise disturbed by mining activity; mine infrastructure required for operating the mine such as coal haul roads, powerlines, surface water diversion systems, mine water retention ponds and pipelines, mine service buildings and warehouses; mine equipment and storage area; coal handling facilities; non-certified reclaimed mined lands; asbestos disposal site and ash disposal sites.

[10] The mine is regulated under the *Coal Conservation Act*,³ the *Coal Mines Safety Act*,⁴ and the *Occupational Health and Safety Act*,⁵ and the *Water Resources Act*⁶. TransAlta applied under the *Environmental Protection and Enhancement Act* as required by Division 3 of the Activities Designation Regulation and Conservation and Reclamation Regulation, for approval to operate the Whitewood Mine for the period January 1, 1998 to December 31, 2007.

[11] TransAlta's previous applications for the Development and Reclamation Approval and Mine Licence have included comprehensive long-range plans within the mine permit area, which provided detailed baseline inventory information for geology, hydrology, hydrogeology, soils, vegetation, wildlife and land use. The application included a summary of this information.

[12] For whatever reason, an environmental impact assessment report (EIS) was not required prior to the issuance of Energy Resources Conservation Board Permit C 78-16 for the

³ RSA, C. C.-14.

⁴ RSA, C. C.-15.

⁵ RSA, C. O.-2.

⁶ RSA, C. W.-5.

Whitewood mine. (The permit was issued based on the presence of pre-existing mining operations.)

Surface Water Resources

[13] The Whitewood Mine is situated on the regional divide between the two catchments of Wabamun Lake and Lac Ste. Anne. Wabamun Lake to the south of the mine drains via Wabamun Creek to the North Saskatchewan River. Lac Ste. Anne, north of the mine, drains into the Sturgeon River which enters the North Saskatchewan River downstream of Edmonton. A large part of the 5 year mine area drains internally to wetlands where the water is lost to evaporation, transpiration and groundwater recharge. Streams located in and around the Whitewood Mine are generally intermittent in nature, flowing mostly during snowmelt in the spring and after heavy rains in the summer. The drainage area north of Highway 16 has no defined streams. The central part of the project area includes catchments and basins remaining after drainage of Whitewood Lake and a large bog. The stream channels are poorly defined and neither Whitewood Lake nor the bog area had any outflow channels.

[14] The northern part of the Whitewood Mine includes catchments which are low lying with large areas of bog and/or marsh draining to Goose Lake and then to Lac Ste. Anne through a complex of interconnected wetlands. Extensive beaver dam activity between the active mine area and the mine property boundary north of the mine has created a series of small ponds immediately downstream of the bog and fen complex which drains to the north. This drainage system is utilized by two cattle operations downstream of the mine area. The largest of these operations relies on this source of water throughout the winter for cattle watering.

Water Management

[15] Surface water and groundwater on the minesite is drained to prepare the area for mining. Surface runoff and groundwater within the Lac Ste. Anne watershed is diverted by a series of collector ditches to a large sump near the centre of Section 29. (Section 29 is immediately southwest of the Appellant's land.) The sump overflows unassisted into an old beaver pond and then through a series of wetland complexes within the Goose Lake/Lac Ste. Anne basin. Diversion to the wetland area on reclaimed lands was done to enhance the establishment of the wetland and also to minimize the amount of groundwater which is diverted away from the mine. A series of drainage ditches was constructed in the late winter/early spring of 1997 to improve the surface drainage in a large bog in the southwest of Section 29. This drainage is part of the Lac Ste. Anne basin and drains roughly to the west and north. The Appellant's land lies to the northeast of Section 29.

Requested Changes to Existing Approvals

[16] In their application, TransAlta sought changes to their existing mine licences and approvals, summarized as follows:

- an EPEA approval period from January 1, 1998 to December 31, 2007;
- a mine license approval period from January 1, 1998 to December 31, 2002;
- approval for conservation and reclamation concepts and practices as outlined in this document;
- approval for mine water and waste management concepts and practices as outlined in this application;
- extension of permission for diversion of groundwater from December 31, 1997 to December 31, 2007 in order to be consistent with the EPEA Approval period; and,
- approval for application of herbicide for weed control adjacent to open bodies of water as required in land reclamation and revegetation operations within the Whitewood mine.

[17] Approval No. 11851-01-00 was finally issued by the Director to consolidate "all air,

land, water quality, and waste considerations for this mine.”⁷

ISSUE TO BE DECIDED

[18] The only issue to be decided at this time is whether this Board has jurisdiction to proceed with this appeal.

RELIEF CLAIMED BY THE APPELLANT

⁷

June 30, 1998 letter from W.S. Macdonald to P. Clark.

[19] The appellant seeks an adequate supply of water for irrigation purposes related to his golf course.⁸ Essentially, he wants the release of surface waters timed to ensure sufficient water to accommodate his summer (July through September) irrigation needs.

SUMMARY OF ARGUMENTS

Appellant

⁸ Mr. Gaskell's grounds of appeal stated in his July 9, 1998, Notice of Appeal were:

"Operation of the Whitewood Mine has reduced the surface run off during the period that it is required for irrigation."

Further, his statement of concern from his October 17, 1997 letter reads: "I have concern that the operation of the Whitewood Mine has a direct and negative affect on my operation as follows:

1. Surface water drainage has been diverted which has reduced the water available for irrigation of my property.
2. The unwatering program carried out in the mine may have affected the water wells on my property."

Mr. Gaskell elaborates his concerns in his January 28, 1998 letter:

"There however remains some concerns that were not specifically addressed:

1. *"Surface water drainage has been diverted which has reduced the water available for irrigation of my property." ...*

In conclusion, I respect that the operation of the Whitewood Mine should not be interrupted, but I feel that it has caused me some considerable inconvenience and expense. I do not think it is unreasonable to ask that these matters should be mitigated ..."

[20] At the preliminary meeting, the Appellant and his counsel narrowed Mr. Gaskell's previous position⁹ by stressing that the main issue in this appeal is "timing" of water--not the quantity. In other words, the Appellant:

- takes no issue with the quality of water;
- is not appealing TransAlta's water license;
- is not questioning priority among users;
- is not questioning ownership of water; and
- does not really take issue with TransAlta's "operational" Approval.

Director

[21] Not surprisingly, the Director advances the opposite point of view. Ms. Esbaugh argued that this appeal can be boiled down to a direct attack on water allocation and quantity, over which the Director, she repeats, has no jurisdiction. She tells the Board that the Appellant is forcing the Approval holder to appear before this Board to solve a problem that can only be legally addressed through the Controller of Water Resources pursuant to the *Water Resources Act*.

TransAlta Utilities Corporation

[22] According to the Approval Holder, the Appellant has no claim to relief before this Board. Ms. MacLachlan relies on section 84 (1)(a) of the Act, (which states the criteria for appealing) to conclude that Mr. Gaskell is not properly before this tribunal, and is probably not directly affected in any event.

[23] Ms. MacLachlan echoed the Director's jurisdictional argument that Mr. Gaskell's concern over the allocation of water and the adjudication of those disputes, go to the Controller of Water Resources and not to the Director.

⁹ See note 4.

[24] Further, the Approval Holder makes the point that the mine has over the last 30 years established “vested” rights including with respect to water quantity. This argument is advanced in relation to the history of the mine. For example:

- TransAlta’s water rights date back to 1965;
- TransAlta’s WRA licence was issued in 1982;
- all prior licenses take into account “decades worth” of activities by her client;
- plus, the 1982 licence issued to her client pre-dates the Appellant’s own water licence¹⁰ by ten years.

[25] Finally, as to the remedy, the Approval Holder makes the point that if this Board grants relief, the Approval holder will have to go to the Water Controller to remedy the problem.¹¹

ANALYSIS

[26] The Board notes from this appeal that the issues related to water are complex; there is increasing demand on the water resource, and we need a better understanding of how to manage it. No one will deny the importance of water in our daily life, now, and in the future. Hence, as we move to the year 2000 and beyond, the Board sees an urgency to address water use with greater clarity and efficiency to ensure achievement of sustainable use objectives. Nevertheless, the Board has reached the conclusion that it does not have jurisdiction over this appeal for the reasons that follow.

¹⁰ Mr. Gaskell holds Water Licence No. 19438 with an allocation of 3.0 acre feet of water with the mean annual inflow of the drainage basin estimated at 133 acre-feet.

¹¹ No party disputes the position that any decision of the Water Controller is not appealable to this Board.

[27] First, the Board has reached the conclusion that Mr. Gaskell became aware of the lack of water and/or timing problems related to irrigation several years before this particular application was submitted for approval.¹² In other words, Mr. Gaskell’s complaint over the amount of surface water should have been filed several years earlier when he noticed a decrease in surface water, and when he had a chance to clarify the problem with TransAlta and seek relief from the Controller of Water Resources. On a related point, the Board notes the significance of TransAlta’s historical use of surface water which was authorized several years before the Act¹³ and Board came into existence-- and decades before Mr. Gaskell owned his land and complained of his irrigation concerns.

[28] Second, Mr. Gaskell has not exhausted his remedies. He has not even raised his concerns over surface waters with the person who is statutorily equipped to handle regulatory problems related to the quantity of water, and that person is the Controller of Water Resources. The Board notes in particular the specific conditions found in TransAlta’s *water* licence. Section 2 states:¹⁴

“The licensee is responsible for the *time and manner* in which water is released and for any damages that may result therefrom.” (emphasis added)

Indeed, section 3 of the *water* license includes three clauses or conditions specific to “timing,” quantity, and diversions of water.¹⁵ Thus, the complaints of water shortage, timing, quantity, and the

¹² According to Mr. Gaskell’s evidence, he first became aware of the lack of water five years ago.

¹³ S.A. 1992, ch. E-13.3 as amended.

¹⁴ Licence to Divert and Use Water Pursuant to the Water Resources Act #11965.

¹⁵ “3. The licensee shall submit an annual water use return to the Controller of Water Resources, Alberta Environment on or before January 31st in each year for the preceding calendar year showing:

- (a) periods and rates of diversion;
- (b) periods and rates of diversion;
- (c) the total monthly quantity of water diverted;
- (d) the total annual quantity of water diverted;
- (e) periods and rates of diversion;
- (f) the total monthly quantity of water returned;

manner in which TransAlta releases surface water is a matter directly regulated by provisions of the water licence and governed through the Controller of Water Resources, not via appeals to this Board.

[29] On the question of “damages,” the Board notes from the Appellant’s own admissions that the real point in issue is the *cost* of enlarging his dugout. In other words, this appeal would be resolved if TransAlta would help pay for increasing the size of his water storage reservoir because a larger reservoir would give the Appellant more water capacity, which could be used as necessary to ensure a steady irrigation through periods of drought. Unfortunately for the Appellant, this Board has no jurisdiction over such remedies. Any issue of damages to the Appellant is to be ironed out between TransAlta, the Appellant, and the courts. Not the Board.

[30] Third, the dispute over the jurisdictional authority of the Director (who issued this Approval) *versus* the Controller of Water Resources (who issued the water licence to both TransAlta and Mr. Gaskell) is worthy of some discussion. Counsel for both Respondents, the Director and TransAlta, would have us believe that TransAlta’s Approval has nothing at all to do with surface water. The Board rejects this assertion for several reasons:

-
- (g) the water surface elevation of the lake at the end of each month during open water season;
 - (h) such other information as may be required from time to time.”

1. Alberta Environmental Protection admits in writing that "... TransAlta's mining operation has had an effect on the surface water runoff characteristics in the area ..." ¹⁶;
2. The operational Approval triggers surface water issues at least in relation to the mine. For example, see Approval, sections 4.2.3 ¹⁷ (re: N. 29 wetland) and 5.2.1 ¹⁸ (re: drainage).
3. We do not accept the argument of TransAlta that water as defined in the *Water Resources Act* cannot include as a matter of law surface water runoff "processed" by the Approval Holder on the theory advanced by TransAlta that there is a legal distinction between natural water and water presumably affected by a mine. Water that is naturally or biologically cleansed, mixing in due course with surface waters of the watershed area, is still water. ¹⁹

¹⁶ March 27, 1998 memorandum from Lorne Edinga to Barb Tumm.

¹⁷ "4.2.3 The approval holder shall only discharge **mine wastewater** from the following **mine wastewater handling facilities** to the Lac Ste. Anne drainage, unless the **Director** has been otherwise notified in writing:

- (a) SW Section 29 Sump;
- (b) NW Section 29 Sump; and
- (c) N Section 29 *Wetland*." (emphasis added)

¹⁸ "5.2.1 The approval holder shall reclaim land through appropriate conservation and reclamation methods to construct land having characteristics (soils, topography and *drainage*) that results in a return of land capability equivalent to or better than that existing prior to disturbance." (emphasis added)

¹⁹ In any event, we do not have to rule on the precise definition of water as per section 1 of the *Water Resources Act*.

[31] Nevertheless, the Board still concludes that the remedy sought by the Appellant is one that should not be pursued against the Director; Mr. Gaskell's complaint should either be launched in the civil courts, or pursued before the Controller of Water Resources. The Controller is the person appointed by law to deal with the specific issue raised by the Appellant, and this issue in the Board's mind is water quantity (or as the Appellant prefers to frame the issue, "timing" of surface water releases from the mine). Finally, Courts of general jurisdiction (such as the Court of Queen's Bench) are constitutionally capable of ruling on any claim advanced by Mr. Gaskell.²⁰

[32] Fourth, the Board cannot accept the position asserted by the Appellant that previous Board and Court decisions allow the Board to entertain water quantity appeals. The decisions or precedents raised by the Appellant to support his position can be distinguished as follows.

[33] In *Nick Zon et al v. Director of Air and Water Approvals Division, Alberta Environmental Protection*,²¹ the Board established that "lake level" was not within the jurisdiction of the Board and that lake level could only be raised among a number of other issues which were clearly within the Board's mandate, if there was "a factual determination as to whether or not the terms of the Approval, if they relate to lake level, impact the integrity of the Wabamun Lake ecosystem, and how they relate to the health of those parties directly affected by the Approval." The Board placed the onus on appellants to "identify with specificity those provisions or bona fide omissions of the Approval that affect the lake levels per se." The Board decisions were the result of the case made by the appellants to establish a relevant connection to the Approval being appealed. In contrast, Mr. Gaskell was asked to indicate what specific provision or omission within the powers of the Director to include in the Approval in question would affect his concern with water runoff timing and no satisfactory answer was provided to the Board.

²⁰ We make no comment on the merits of any potential civil claims.

²¹ *Nick Zon et al v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (September 26, 1997), Appeal Nos. 97-005-016.

[34] In *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: GMB Property Rentals Ltd.*,²² the Director failed to convince the Board that the Approval issued by the Director had no bearing on the Appellant's complaint. An Approval was needed under the *Act* to authorize the discharge of treated sewage effluent across lands occupied by the Appellant. The Director's argument about the discharge being strictly a *Water Resources Act* issue was not accepted by the Board because water quality was clearly the main issue for the Appellant, both in terms of his concern for the passage of this wastewater over his land and from the perspective of its effect on fish in the lower reaches of the flow path, a concern raised by the Department's own staff. With respect to the common law rights issue mentioned in the *Stelter* decision, the Board's view was that: "it has the responsibility to ensure that the Director, in making his environmental quality decisions, does not contravene rights of others that may be protected by common law." In the case of Mr. Gaskell's appeal, no case has been made that any of the Director's "environmental quality decisions" have affected Mr. Gaskell's common law rights in a similar fashion. If the license under the *Water Resources Act* does, and that is debatable given the facts of this case, that is still not within the mandate of the Director to remedy through the Approval he has issued to TransAlta.

[35] The Appellant also raises the case of *Penno v. Manitoba*.²³ *Penno* is distinguishable, however, because that case rested on common law claims. The Board does not dispute the appellant's claim based on *Penno* that a neighbour can launch a nuisance or negligence action for damages where the activities of a defendant adversely affect a plaintiff's land.²⁴ Whether or not damages will be found in a *Penno*-type action is in the hands of a judge of a superior court.

²² *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: GMB Property Rentals Ltd.* (May 22, 1998), Appeal No. 97-051.

²³ 64 D.L.R. (3d) 256 (Man. C.A. 1975).

²⁴ See also *Pugliese et al v. National Capital Commission et al*, 17 O.R. (2d) 129 (Ont. C.A.).

[36] During the preliminary meeting there was some discussion of the potential for Alberta cases on water resources matters. The Board acknowledges the existence of a case dealing with upstream/downstream damages and the matter of proof of damages, but that case is a *Water Resources Act* prosecution (and appeal to a higher court) and is not relevant here.²⁵

[37] Finally, the area in Section 28²⁶ which Mr. Gaskell judged to be the headwaters of drainage which would have ultimately flowed across his property was already disturbed, according to an aerial photo.²⁷ Counsel for TransAlta offered the opinion that this area may already be reclaimed. Hence the only connection between TransAlta activities in this area (in Section 28) under the EPEA Approval and Mr. Gaskell's concerns, might fall under Part 5 of the Approval dealing with "reclamation." The Approval does refer²⁸ to an obligation on TransAlta to "reclaim land through appropriate conservation and reclamation methods to construct land having characteristics (soil, topography, drainage) that results in a return of land capability equivalent to or better than that existing prior to disturbance." Although this clause does refer to "drainage," it does so within the specific context of reclaiming the capability of the land which has been disturbed. The Board cannot envisage stretching that reference to drainage into a mandate for this Approval to control the quantity or timing of water flow offsite, particularly when that matter is specifically addressed under TransAlta's water licence, and where the Appellant has a quantity-based water licence of his own.

DECISION

[38] The appeal, accordingly, is dismissed.

²⁵ *R. v. Minchau*, 123 A.R. 159 (Q.B. 1992).

²⁶ Exhibit 4: TransAlta Whitewood Mine - Drainage Map.

²⁷ Exhibit 4: TransAlta Whitewood Mine - Drainage Map.

²⁸ See *supra* note 18.

OTHER MATTERS

[39] The Board thanks all counsel for their well-prepared briefs and arguments. In particular we feel compelled to comment on the quality of Mr. Dunlop's last-minute assistance including responsive answers to Board questions. Rarely do we encounter a case that is presented so well by counsel especially where Mr. Dunlop was retained or instructed so late in the process.

Dated on October 21, 1998, at Edmonton, Alberta.

Dr. William A. Tilleman

Dr. Steve E. Hrudehy

Mr. Ron V. Peiluck