

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: November 10, 2000

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

-and-

IN THE MATTER OF an appeal filed by Mr. Glen Malo, on
behalf of the Elkana Resident's Water Co-Operative Limited with
respect to Amending Approval No. 49841-00-01 issued to Elkana
Resident's Water Co-Operative Limited on January 7, 2000, by the
Director, Bow Region, Alberta Environment.

Cite as: *Elkana Resident's Water Co-Operative Limited v. Director, Bow Region,
Alberta Environment.*

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I. BACKGROUND

[1] On January 7, 2000, Mr. Rob Kemp, the Director, Bow Region, Alberta Environment (the “Director”), issued Amending Approval No. 49841-00-01 to the Elkana Resident’s Water Co-Operative Limited. Amending Approval No. 49841-00-00 authorizes the construction, operation and reclamation of a Class I water treatment plant and distribution system for the Elkana Estates subdivision in the Municipal District of Rocky View No. 44, Alberta.

[2] On May 19, 2000, the Environmental Appeal Board (the “Board”) received a Notice of Appeal dated May 16, 2000 from Mr. Glen Malo, on behalf of Elkana Resident’s Water Co-Operative Limited, (the “Appellant”) requesting an amendment to the date for the pipeline construction stated in Section 3.2, Condition 3.2.1¹ of the Amending Approval.

[3] On May 19, 2000, the Board acknowledged receipt of the Notice of Appeal from Mr. Malo and, at that time requested a copy of all correspondence, documents, and materials relative to the appeal from the Director.

[4] According to standard practice, on May 19, 2000, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter has been the subject of a hearing or review under their respective legislation. Replies were subsequently received from the NRCB on May 29, 2000 and the AEUB on June 12, 2000 stating that they did not hold any hearing or review under their

¹ This condition reads:

“The approval holder shall construct a raw water pipeline commencing prior to the first residential connection to the treated water reservoir. The new raw water pipeline will bring disinfected water from the pumphouse to the reservoir prior to entering the distribution system. The upgrade shall be done in consultation with the Regional Engineer in accordance with condition 3.1.1. The construction of the upgrading work shall be completed on or before November 30, 2000.”

respective legislation.

[5] On June 1, 2000 the Board received a letter from the Director requesting that the Appeal be dismissed as the “Notice of Appeal was filed outside the thirty (30) day time limit. (s.84(4) EPEA).”²

[6] The Board wrote to the Appellant on June 2, 2000, advising of the Department’s letter of June 1, 2000 and requesting that the Appellant provide their submissions with respect to the Department’s request to dismiss the Appeal.

[7] On June 28, 2000, the Board received a letter from Mr. Mark Fletcher of Elkana Resident’s Water Co-Operative Limited, stating:

“...please consider this letter notice on behalf of the Elkana Water Co-Op that it wishes to withdraw the outstanding appeal of the above noted decision. At this time the Co-Op has chosen to pursue alternate avenues with Alberta Environment to get an extension of the water system construction deadline.

The withdrawal of this appeal at this time is without prejudice to any subsequent decision by the Co-Op to re-initiate the appeal process.”

[8] In a letter dated July 7, 2000, the Board acknowledged Mr. Fletcher’s letter of June 26, 2000 and advised the following:

“Please be advised that once you have advised the Board in writing of

² Section 84(4) provides:

“A notice of appeal must be submitted to the Board

- (a) not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h),
- (b) not later than one year after receipt of a copy of the reclamation certificate, in a case referred to in subsection (1)(i) relating to the issuing of a reclamation certificate, and
- (c) not later than 30 days after receipt of the notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case.”

your withdrawal there are no provisions in the legislation to “re-initiate” your appeal.”

[9] The Board received a further letter from Mr. Fletcher dated July 20, 2000, wherein Mr. Fletcher requested:

“... that the Board grant an extension to the appeal period, as allowed under section 85.1 of the *Environmental Protection and Enhancement Act*, due to the extenuating circumstances of recent developments in issues related to water in Bragg Creek, and ongoing studies that are occurring.”

[10] On August 28, 2000, the Board responded to Mr. Fletcher’s July 20, 2000 letter.³ The Board then went on to propose a schedule for written

3 The Board said:

“On June 2, 2000, the Board requested that you respond to the Director’s motion of June 1, 2000 to dismiss your appeal as it was filed outside of the 30 day time limit prescribed in section 84(4)(c) of the *Environmental Protection and Enhancement Act* (“EPEA”). In your response dated June 28, 2000, you advised the Board of the Co-op’s wish to withdraw your appeal “without prejudice to any subsequent decision by the Co-op to re-initiate the appeal process”.

The Board responded to your letter by advising you that once you have confirmed withdrawal of an appeal, there are no provisions within the Act to “re-initiate” your appeal on the current approval. The Co-op was given a July 12, 2000 deadline to confirm withdrawal of the appeal at which time a Discontinuance of Proceedings would be initiated. Subsequent telephone conversations with the Board confirmed the Co-op’s desire to withdraw the appeal.

However, further to your letter dated July 20, 2000, and after a further telephone conversation, the Board now understands that you are not prepared to withdraw your appeal and therefore, the appeal remains active. It is at this time [*sic*] the Board requests that the Co-op address the motion originally set forth by the Director on June 1, 2000 to dismiss the appeal due to an alleged contravention of section 84(4)(c) of the EPEA which states:

A notice of appeal must be submitted to the Board ...

- (c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case

submissions for the parties and advised that once the submissions had been received, a decision concerning the motions would be made.

[11] By October 16, 2000, all submissions were received from the parties and the Board advised in a letter to the parties of that date and that it would review the submissions and advise of its decision once the process had been completed.

II. ISSUE

[12] Should the appeal filed by the Appellant be dismissed as it was filed outside of the 30 day statutory time limit?

III. ANALYSIS

[13] On December 22, 1998, the Director issued an approval to the Appellant to construct, operate and reclaim a waterworks system including a water treatment plant and distribution system for the Elkana Estate subdivision west of Calgary, Alberta.

[14] Further, the Director issued a limited amendment to the original approval on January 7, 2000, which the Appellant received on or about January 12, 2000.

[15] On May 16, 2000, the Appellant appealed to the Board and sought relief relative to the "... date for the pipeline construction..." for reasons, *inter alia*, tied to subsequent and/or engineering feasibility studies.

Further, in your letter dated July 20, 2000 [*sic*]. The Co-op requests that "the Board grant an extension to the appeal period, as allowed under section 85.1 of the *Environmental Enhancement and Protection Act*.'"

[16] The applicable statutory requirement is section 84(4)(c) of the Act, which states:

“A Notice of Appeal must be submitted to the Board... (c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case.”

Section 84(5) also states:

“The Board may, on application made before or after the expiry of the period referred to in subsection (4), extend that period, where the Board is of the opinion that there are sufficient grounds to do so.”

[17] It is true that the Board may extend the deadline if the Board forms the opinion that there are sufficient grounds to do so. But this case does not meet that test for several reasons: First, filing a subsequent appeal triggered by a feasibility report – rather than the environmental approval - demonstrates that the main focus of the group is not the decision itself, but subsequent events or contingencies the results of which are unknown, and the results of which may change the approval. This potential change itself is the subject of specific and additional application requirements.⁴ If the Board extended the deadline for the appellants that fell into this category of people⁵, no matter how sincere they are in their lateness, the purpose of a statutory deadline would become a contingency itself, and the statutory purpose for allowing appeals from changes to approvals would be frustrated.⁶

[18] Second, the Appellant has completed construction of the new water pipeline, rendering any appeal from the January 7, 2000 amendment moot.⁷ What is left, then, are issues related to the December 22, 1998 decision of the Director. Extending the deadline for this decision would allow an appeal to proceed, which, from the date of the original decision, is

4 See Section 67(1) of the Act.

5 In other words, we refer to a party who did not intend to appeal originally.

6 See Section 84(1)(a)(iii) of the Act.

7 See the letter from the Director dated October 16, 2000.

almost two years old. More important, the appeal itself would be almost 1.5 years after the original approval, which seems grossly unfair because the terms of the original approval were never appealed.⁸

[19] Third, the equities in extending the statutory appeal period do not lie in cases where the party files late, changes its mind, withdraws its appeal, then changes its mind again.⁹

IV. DECISION

[18] For the reasons listed above, and pursuant to sections 84(4)(c), 87(5)(a)(i.2), and 87(7) of the Act, the Board dismisses the appeal.

Dated on November 10, 2000 at Edmonton, Alberta.

Dr. William A. Tilleman

8. In its May 16, 2000 Notice of Appeal, the Appellant states that they "...hereby appeal for an amendment to the date for the pipeline construction stated in Section 3.2, Condition 3.2.1 of the referenced Approval."

9. As indicated in the letter from the Appellant dated June 28, 2000, Mr. Fletcher "... wishes to withdraw the outstanding appeal of the abovenoted [*sic*] decision." Even though the Appellant made the statement without prejudice to any subsequent decision to "re-initiate" the appeal, the statement is unilateral and cannot override statutory provisions in any event.