

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – March 15, 2002

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 Mr. Donald Graham, Ms. Helen Brock and Mr. Barry Cunningham, and Mr. Douglas Brock with respect to *Water Act* Approval 140153-00-00 issued by the Director, Parkland Region, Regional Services, Alberta Environment to Mr. Shawn Morton for the exploration of groundwater at NE 19-38-25-W4M, near Red Deer, Alberta.

Cite as: *Graham et al. v. Director, Parkland Region, Regional Services, Alberta Environment re: Shawn Morton.*

**PRELIMINARY MEETING BY
WRITTEN SUBMISSION ONLY
BEFORE:**

William A. Tilleman, Q.C., Chairman.

PARTIES:

Appellants: Mr. Donald Graham, Ms. Helen Brock and Mr. Barry Cunningham, and Mr. Douglas Brock.

Director: Mr. Kenn Looten, Director, Parkland Region, Regional Services, Alberta Environment, represented by Ms. Renee Craig, Alberta Justice.

Approval Holder: Mr. Shawn Morton.

EXECUTIVE SUMMARY

Alberta Environment issued a *Water Act* Approval to Mr. Shawn Morton for the exploration of groundwater near Red Deer, Alberta for agriculture purposes.

The Environmental Appeal Board received Notices of Appeal from Mr. Donald Graham, Ms. Helen Brock and Mr. Barry Cunningham, and Mr. Douglas Brock regarding the Approval. Upon notification from these parties of their Application for Leave to the Court of Appeal with respect to municipal approvals issued for this operation, the Board held the appeals and the applications for a Stay in abeyance pending the decision of the Court of Appeal.

However, the Board subsequently received notification from Mr. Shawn Morton that the exploration under the Approval had been complete. The Board then set a schedule for submissions from the parties with respect to the question of whether the appeals are moot given the fact that the work under the Approval was complete.

The Board, upon review of the submissions, dismissed the Notices of Appeal for being moot, without merit or not properly before the Board. The Board notes that the parties are free to file Notices of Appeal in relation to the water licence, should it be issued in the future.

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I. BACKGROUND

[1] On January 9, 2001, the Director, Parkland Region, Regional Services, Alberta Environment (the “Director”) issued Approval 00140153-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c.W-3,¹ to Mr. Shawn Morton (the “Approval Holder”) for the exploration of groundwater at NE 19-38-25-W4M for agriculture purposes near Red Deer, Alberta.

[2] On January 19 and 24, 2001, the Environmental Appeal Board (the “Board”) received Notices of Appeal from Mr. Donald Graham, Ms. Helen Brock and Mr. Barry Cunningham, and Mr. Douglas Brock (collectively the “Appellants”) appealing the Approval.

[3] The Board acknowledged the appeals on January 22 and 24, 2001, provided the Approval Holder and the Director with a copy of the appeals, and requested the Director provide a copy of the record (the “Record”) related to these appeals. On February 12, 2001, the Board received the Record and copies were provided to the Approval Holder and the Appellants.

[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 a review under their respective Boards’ legislation. Both Boards responded in the negative.

[5] On February 13, 2001, the Board wrote to Mr. Graham acknowledging receipt of a second Notice of Appeal providing additional information. On the same date, in separate letters, the Board wrote to Mr. Brock and Ms. Brock, and Mr. Cunningham, seeking clarification regarding their Notices of Appeal. The Board noted that the appeals related to the proposed diversion of water and the impact of the diversion and did not appear to relate to the work authorized in the Approval.²

¹ On January 1, 2002, the *Water Act*, R.S.A. 2000, c. W-3 replaced the *Water Act*, S.A. 1996, c. W-3.5.

² “Upon reviewing your Notice of Appeal it would appear that the main concern expressed relates to the proposed diversion of water by Mr. Shawn Morton and the impact that this diversion of water would have on you.

Some of the concerns that have been expressed in your appeal do not appear to relate to work that is authorized by the ‘approval to explore’ that has been issued. They appear to relate to the

[6] On March 6, 2001, the Board wrote to all the parties acknowledging letters of February 26, 2001 from the Appellants and the Director, and the Appellants' request for a Stay of the Approval. The Board noted that the Appellants had also referred to an application for Leave to Appeal (the land development permit upheld by the Municipal Subdivision Appeal Board) currently filed in the Court of Appeal. The letter went on to advise that given that the Leave to Appeal application is before the Court, the Board proposes to hold the Stay applications in abeyance until the Court of Appeal issues a ruling on the Leave Application, and then the Board would review the Stay applications. In closing, the Board requested the parties advise of any objections to this course of action.

[7] On March 7, 2001, the Board wrote to Ms. Brock and Mr. Cunningham acknowledging a telephone conversation wherein the Board stated that there does not appear to be any response from the Approval Holder related to their Statement of Concern. The Board, in this letter, provided a copy of the application filed by the Approval Holder with the Director. The Director wrote to the Board responding to Mr. Cunningham and Ms. Brock's inquiry and stated that "...[t]he Director's staff regard that the issues raised in Statements of Concern are relevant to the licence to divert water, not to the issuance of the ground water exploration

'licence to divert' that has, to the Board's knowledge, not yet been issued.

By way of background, it is the Board's understanding that frequently, when Alberta Environment receives an application for a 'licence to divert' water from a groundwater source, that prior to deciding whether to issue the 'licence to divert' water they issue an 'approval to explore' for groundwater. The purpose of the 'approval to explore' [is] usually [to] permit, among other things, the applicant to drill a well and test the aquifer to determine if there is sufficient water to provide for the applicant's 'licence to divert'. The work that is carried out under the 'approval to explore' in order to test the aquifer is principally a pump test which measures the ability of the aquifer to produce water for a specific period of time. When the test is complete, the applicant submits a report detailing the results of the pump test and Alberta Environment makes its decision whether to grant the 'licence to divert' based on that report. The decision whether or not to grant a 'licence to divert' is made at a later date.

As stated, your appeal has been filed in response to the 'approval to explore' being issued. It is the Board's understanding that the 'licence to divert' has not been issued yet. **In order for your appeal to proceed, you need to demonstrate to the Board how you will be directly affected (impacted) by the work that is authorized under the approval.** In other words, how will you be impacted by the testing activities contained within the approval to explore. Please provide this information to the Board in writing by **February 26, 2001.**

Please note that if you wish to appeal the 'licence to divert' you will have to submit a separate appeal of that decision, if and when the licence is issued. It is the Board's understanding that you will receive a separate notice from Alberta Environment if they decide to issue the 'licence to divert'. Any decisions that the Board makes in relation to the 'approval to explore' will not affect

approval. Therefore Mr. Morton's response would be expected to be submitted after the data from the ground water exploration is available. This response would form part of the information on which the Director bases the decision in the application for the diversion licence.”

[8] The Board wrote to the parties on March 27, 2001, confirming its understanding that the Appellants' Leave to Appeal application in the Court of Appeal was to be considered on March 14, 2001, and requested the parties provide a status report. The Director advised on March 30, 2001, that he did not have any information regarding the application. On April 2, 2001, Ms. Brock advised the Board that the Court of Appeal heard the appeal on March 14, 2001, however, no decision was made and additional submissions were ordered. The Board again wrote to the parties on April 3, 2001 acknowledging Ms. Brock's letter of April 2, 2001, and requested the parties advise if they wished to have their appeals held in abeyance pending the decision on the Leave to Appeal application.

[9] Letters were received from the Appellants on April 20, 25, and June 20, 2001, and from Mr. Malcolm McIlroy on April 19 and 23, 2001, in response to the Board's letter of April 3, 2001. The Board acknowledged the letters and as the Court of Appeal granted a Leave to Appeal on May 31, 2001, requested that parties provide a written status report by October 2, 2001. Status reports were received on October 2, 2001, advising that no court date had been set for the Court of Appeal matter, and the Board again requested status reports by November 1, 2001. The Director provided a status report on November 1, 2001, advising that he had no new information.

[10] The Board received a letter on November 5, 2001, from the Approval Holder advising that the exploration under the Approval had been complete, that the hydrological report has been submitted to the Director, and development was under construction. In response to the Approval Holder's letter, the Board wrote to all the parties setting a schedule for written submissions on the motion of "...whether or not these appeals are now moot given that the exploration is complete.” Submissions were received from the parties and on December 12,

2001, the Board advised the parties that a decision regarding the moot issue would be issued in due course.

II. ANALYSIS

[11] The Board appreciates the comments and opinions presented by all of the parties to these appeals.

[12] Under the *Water Act*, persons applying for an approval to explore or a licence to divert water must advertise the request.³ In the notice that was published, the Approval Holder included notice of the application for the Approval to explore as well as notice of his application for a Licence to divert water. It appears to be standard procedure to notify the public of both applications at the same time, even though each application is separate and is considered individually by the Director. Although the Approval to explore may be granted, it does *not* mean that the Licence will be granted. The decision to grant or not grant the Licence will depend largely on the information collected from the work carried out under the Approval. Appellants have 7 days to file a Statement of Concern with respect to the Approval to explore and 30 days to appeal any Licence to divert that may be issued.⁴

³ Section 108(1) of the *Water Act* provides:

“An applicant

- (a) for an approval,
- (b) for a licence,
- (c) for a renewal of a licence if the Director has decided to conduct a public review of the licence renewal,
- (d) for an amendment
 - (i) an approval,
 - (ii) a preliminary certificate, or
 - (iii) a licence,

or

- (e) for a transfer of an allocation of water under a licence,
- shall provide notice of the application in accordance with the regulations.”

⁴ Section 109 of the *Water Act* provides:

“(1) If notice is provided

- (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
- (b) under section 108(2), the approval holder, preliminary certificate holder or licensee,

[13] The Director, before making any final decision with respect to the Licence, is required to assess all relevant information. He must ensure all data necessary to make a valid decision is before him before he can determine whether or not a Licence should be granted. Information relating to the aquifer is essential before the decision is made to grant or refuse the licence to divert water. To be able to determine the capability of the aquifer to withstand the water diversion, tests must be completed. The permit to explore is given, then, to allow the applicant to collect the data that will give a true representation of the aquifer. By its nature, it seems that the actual testing of the aquifer will either have little direct effect or a short-term effect on other people in the area or the surrounding environment.

[14] In this case, the Approval Holder carried out the work authorized under the Approval and submitted results from the tests done on the aquifer. In a letter dated November 30, 2001, the Director confirmed that essentially all the work under the Approval has been completed. The actual pump testing is complete, and only field-verification of the site needs to be done.

[15] The remedies the Appellants have requested in their Statements of Concern include:

1. Monitoring of the water wells in the region for a minimum of five years.⁵
2. Test holes should be sealed completely.⁶
3. Water consumption by the Approval Holder should be monitored and metered.⁷

[16] These remedies asked for do not apply to the actual exploration of the water but apply to steps that can be taken *after* the exploration has been completed or the actual diversion

may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

- (2) A statement of concern must be submitted
 - (a) in the case of an approval, within 7 days after the last providing of the notice, and
 - (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice.”

⁵ Statement of Concern, submitted by Donald Graham, dated December 29, 2000.

⁶ Statement of Concern, submitted by Douglas and Sherry Brock, dated December 30, 2000; Statement of Concern, submitted by Donald Graham, dated December 29, 2000.

⁷ Statement of Concern, submitted by Douglas and Sherry Brock, received by Alberta Environment December 29, 2000.

of water. The Appellants also included as a remedy to have the exploration be delayed until the Alberta Court of Appeal makes a decision.⁸ As the testing has been completed, this remedy is now irrelevant. Another remedy offered by the Appellants was to have only those aquifers below 100 metres be tested and used for the development.⁹ But, actual testing was completed beyond this to 113 metres.¹⁰

[17] The Board has considered when a decision is moot in previous cases. In *the Butte Action Committee*,¹¹ for example, the Board stated that:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”¹²

[18] The moot issue was also discussed in *Kadutski*,¹³ where the Board stated :

“An appeal is moot when an appellant requests a remedy that the Board can not possibly grant because it is impossible, not practical, or would have no real effect.”¹⁴

[19] As the work is essentially completed, there are no remedies that the Board can give the Appellants to satisfy their concerns and remain fully within the Board’s statutory powers, ie. the Board cannot make the recommendation to reverse or vary the decision appealed in this circumstance as the work allowed under the Approval is finished. This type of work cannot be reversed.

[20] This does not mean that they would not succeed in an appeal to the Licence to *divert* water. If, and when, the Licence is granted, the Appellants can file an appeal with respect

⁸ Notice of Appeal, submitted by Donald Graham, dated January 17, 2001.

⁹ Statement of Concern, submitted by Barry Cunningham and Helen Brock, dated December 30, 2000.

¹⁰ Submission by Malcolm McIlroy, on behalf of Donald Graham, received by the Environmental Appeal Board December 7, 2001.

¹¹ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy* (January 9, 2001), E.A.B. Appeal No. 00-029 and 00-060-D.

¹² *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy* (January 9, 2001), E.A.B. Appeal No. 00-029 and 00-060-D at paragraph 28.

¹³ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited* (August 28, 2001), E.A.B. Appeal No. 00-055-D.

¹⁴ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited* (August 28, 2001), E.A.B. Appeal No. 00-055-D at paragraph 36.

to the Licence and bring their concerns to the Board. At that time, the Board would assess the information and data presented by all the parties and make recommendations to the Minister as to whether the Director was correct in granting the Licence or if the Director's decision should be reversed or varied.

[21] We note that since the Appellants have filed Statements of Concern, the Director has an obligation under the *Water Act* to notify the Appellants if and when a Licence to divert water is issued to the Approval Holder. Within 30 days of receiving the notice, the Appellants, if they want to pursue the appeal, must file a new Notice of Appeal with the Board. Such Notice of Appeal would be processed in the ordinary manner.

III. DECISION

[22] Section 95(5)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E12, states:

“The Board

- (a) may dismiss a notice of appeal if
 - (i) it considers the notice of appeal to be frivolous or vexatious or without merit ...
 - (iii) for any other reason the Board considers that the notice of appeal is not properly before it”

[23] For the reasons outlined above, the Board hereby dismisses the Notices of Appeal filed by Mr. Donald Graham, Mr. Barry Cunningham and Ms. Helen Brock, and Mr. Douglas Brock, as their appeals are either moot, not properly before the Board or without merit.

Dated on March 15, 2002, at Edmonton, Alberta.

William A. Tilleman, Q.C.
Chairman