

ALBERTA ENVIRONMENTAL APPEAL BOARD DECISION

**Preliminary Meeting via Written Submissions — May 9, 2002
Date of Decision — June 25, 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 a Notice of Appeal filed by the Municipal District of Rocky View No. 44, with respect to *Water Act* Approval No. 00137206-00-00 issued to Apple Creek Golf and Country Club by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club.*

EXECUTIVE SUMMARY

Alberta Environment issued to Apple Creek Golf and Country Club a Preliminary Certificate under the *Water Act* authorizing the diversion of 119,929 cubic metres of water annually from McPherson Coulee in SE 35-27-1-W5M and an Approval under the *Water Act* authorizing the construction of a channel improvement, control gates, dykes and a diversion pipe on McPherson Coulee and an unnamed water body in SE 35-27-1-W5M near Airdrie, Alberta.

Eleven appeals were filed with respect to this Preliminary Certificate and Approval. One of the appeals filed was from the Municipal District of Rocky View No. 44. It was received by the Board on April 17, 2002, after the appeal period for the Approval had passed.

The Board asked for, and received, submissions from the parties to these appeals regarding whether to allow an extension of the time to file the appeal for the Municipal District. After reviewing the submissions, the Board decided to dismiss the portion of the Municipal District's Notice of Appeal that dealt with the Approval because it was filed out of time and no legitimate reason was given to grant an extension. This decision does not affect the Municipal District's appeal in respect to the Preliminary Certificate.

**PRELIMINARY MEETING VIA
WRITTEN SUBMISSIONS BEFORE:**

Dr. John P. Ogilvie, Vice-Chair.

PARTIES:

Appellant: Municipal District of Rocky View No. 44,
represented by Mr. Peter Kivisto, Municipal
Manager.

Director: Ms. May Mah-Paulson, Director, Southern
Region, Regional Services, Alberta
Environment, represented by, Ms. Charlene
Graham, Alberta Justice.

Approval Holder: Apple Creek Golf and Country Club, represented
by Mr. Rick Skauge.

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I. **BACKGROUND**

[1] On March 18, 2002, the Director, Southern Region, Regional Services, Alberta Environment (the "Director") issued Approval No. 00137206-00-00 (the "Approval") and Preliminary Certificate No. 00137211-00-00 (the "Certificate"), under the *Water Act*, R.S.A. 2000, c. W-3,¹ to the Apple Creek Golf and Country Club (the "Approval Holder") authorizing the construction of channel improvements, control gates, dykes, and a diversion pipe on McPherson Coulee and an unnamed water body, and upon compliance with certain conditions, allowing the diversion of 119,929 cubic metres of water annually from McPherson Coulee in SE 35-27-1-W5M near Airdrie, Alberta.

[2] The Environmental Appeal Board (the "Board") received Notices of Appeal dated March 25, 2002, from Mr. Ronald Hanson, Ms. Irene Hanson and Mr. Wayne Hanson, Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, and Mr. Soren Davy, a Notice of Appeal dated March 26, 2002, from Mr. Ken Reid, and a Notice of Appeal dated March 27, 2002, from Mr. Robert Copley. On March 28, 2002, all of the above appellants provided the Board with revised Notices of Appeal, which included the Preliminary Certificate as well as the Approval. On April 3, 2002, Mr. Jeff Green, Co-ordinator, Planning Services for the City of Airdrie and on April 17, 2002, Mr. Peter Kivisto, Municipal Manager, Municipal District of Rocky View No. 44 provided the Board with Notices of Appeal.²

[3] On April 5, 2002, the Board acknowledged receipt of these appeals and requested the Director provide copies of the records (the "Record") relating to these appeals. The Board also notified the Approval Holder of the appeals and provided copies of the appeals. In the same letter, the Board requested that the Appellants, Director, and Approval Holder advise the Board if there are other persons that may have an interest in these appeals.

[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

¹ As of 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 Mr. Ronald Hanson, Ms. Irene Hanson and Mr. Wayne Hanson, Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy, Mr. Ken Reid, Mr. Robert Copley, the City of Airdrie, and the Municipal District of Rocky View No. 44 are the Appellants (the "Appellants").

been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.

[5] On April 12, 2002, the Board acknowledged receipt of the letter dated April 11, 2002, from the Director, which provided two additional approvals issued to Apple Creek Golf and Country Club. These approvals were issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA")³ and authorized the construction, operation and reclamation of a wastewater system and a waterworks system for the Apple Creek Golf and Country Club. Copies of these approvals were provided to the Appellants as well as information regarding the timelines for filing appeals on these approvals.

[6] On April 18, 2002, the Board acknowledged receipt of the Notice of Appeal dated April 17, 2002, from the Municipal District of Rocky View No. 44 (the "Municipal District"), with respect to the Approval and the Certificate. The Notice of Appeal from the Municipal District acknowledged that the portion of the appeal relating to the Approval was late, as the seven-day filing period had already passed.⁴ In the acknowledgement of the Notice of Appeal, the Board requested that the Municipal District provide the reason to the Board as to why it should be granted an extension of time to appeal and that it provide an explanation as to why the appeal was filed outside the seven-day time limit. The Municipal District was also advised by the Board that, if its appeal was not accepted due to the expiration of the seven-day appeal period, and the matter proceeds to a hearing, that the Municipal District would have an opportunity to apply to the Board for intervenor status at that time.

[7] On April 24, 2002, the Board acknowledged receipt of the letter dated April 22, 2002, from the Municipal District, providing an explanation as to the reason for filing of the Notice of Appeal late. At this time the Board requested submissions from the Director and the Approval Holder regarding whether the Board should allow the late-filed portion of the

³ As of January 1, 2002, the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, was replaced with the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

⁴ See: Notice of Appeal filed for the Municipal District of Rocky View (E.A.B. Appeal Number 02-006) where the Municipal District states:

"The Municipality also, under Section 116(2) of the *Water Act*, respectfully requests that you accept this appeal for both the approval and the issuance of the preliminary certificate (although the approval appeal period has expired). Should the Board not accept this appeal due to expiration of the 7 day appeal period, the MD would respectfully request to be added as a Third Party to any

Municipal District's appeal, which related to the Approval. The Board also set out a time line for the Municipal District to provide the Board with rebuttal submissions, after which time the Board would make a decision on the status of the Notice of Appeal filed by the Municipal District.

[8] On April 30, 2002, the Board acknowledged receipt of the Record from the Director, and at that time provided a copy to the Appellants and the Approval Holder.

[9] On May 2, 2002, the Board acknowledged receipt of the Director's response submission with respect to the late filing of the appeal by the Municipal District. On May 3, 2002, the Approval Holder's response submissions with respect to the late filing were received and acknowledged by the Board.

[10] On May 9, 2002, the Board acknowledged receipt of the rebuttal submissions from the Municipal District with respect to the late filing issue and the submissions of the Director.

II. SUMMARY OF SUBMISSIONS

A. Submissions of the Director

[11] On April 30, 2002, the Board received the submissions of the Director regarding whether the Municipal District should be granted an extension of time to file the portion of their appeal that related specifically to the Approval.⁵ The Director submitted that, under the given circumstances, there was insufficient reason for the Board to grant an extension of the appeal period for the *Water Act* Approval beyond the seven-day statutory time limit. The Director suggested that the Municipal District had admitted to receiving notice of the March 18, 2002,⁶ decision of the Director by March 22, 2002. Despite this early notice, the Municipal District

appeal proceedings..."

⁵ See: Director's Letter, dated April 30, 2002.

⁶ See: Municipal District's Letter, dated April 22, 2002. The Municipal District where it states: "Alberta Environment's (AE) notice of decision in this regard dated March 18, 2002 was only received by the MD on March 22, 2002, stating that appeals had to be submitted within 7 days, the effective closing date being March 26."

failed to file a Notice of Appeal within the prescribed seven-day period, and instead to filed its Notice of Appeal on April 17, 2002.

[12] The Director also submitted that the Municipal District was aware of the regulatory process regarding the *Water Act* Approval. The Director indicated that in September 2000, there was correspondence between the Director, and the Municipal District that asked the Municipal District to comment on the Approval Holder's application. These comments were received by the Director on September 26, 2000. The Municipal District also sent a letter of concern to the Director on October 13, 2000, which expressed their concerns over the Approval Holder's application.⁷ This Statement of Concern was filed outside of the prescribed time limit and, as such, in a letter dated December 4, 2000, the Director informed the Municipal District that it was not going to be considered directly affected and that their letter would not be considered a Statement of Concern.⁸ They were informed, however, that they could get a report on the status of the Approval Holder's application at any time by contacting the Director. The Municipal District was issued a copy of the letter sent to the Approval Holder in March, 2002. Based on this history of communication, between the Director and the Municipal District, the Director submitted that the Municipal District was well aware of the proceedings, their role within the proceedings, and the deadlines involved. As a result, the Director submitted that the Municipal District should not be granted an extension of time as it relates to their appeal of the Approval.

B. Submissions of the Approval Holder

[13] The Board received the submissions of the Approval Holder on May 2, 2002. The Approval Holder suggested that the Municipal District "...had ample time to file an appeal, failed to do so, and should be denied the right to appeal."⁹ Thus, the Approval Holder submitted that the Municipal District should not be granted an extension of time to file their appeal as it relates to the Approval.

⁷ See: Statement of Concern Letter, dated October 13, 2000, which was filed late, from the Municipal District to Alberta Environment, expressing concerns over the Apple Creek application.

⁸ See: Director's Letter to the Municipal District, dated December 4, 2000.

⁹ See: Approval Holder's Letter, dated May 2, 2002.

C. **Submissions of the Municipal District of Rocky View No. 44**

[14] The Board received the rebuttal submissions of the Municipal District on May 9, 2002. The Municipal District offered three counter-arguments in rebuttal to the submissions of the Director and the Approval Holder. The Municipal District submitted that it did not meet the seven-day appeal period as a result of the bureaucratic process that authorization for such an appeal has to go through.¹⁰

[15] Further, the Municipal District submitted that their Statement of Concern, which was admittedly filed late, was dismissed by the Director, and no directly affected status was granted to the Municipal District. The implication of this argument is that the Director prevented the Municipal District from actively voicing its concerns during the Statement of Concern filing process and if the Municipal District's appeal of the Approval is dismissed, the Municipal District would have no opportunity to voice its concerns.

[16] The Municipal District also submitted that it had met with the Director in order to consider "...Provincial reviews of Municipal referrals ... [and it] was concluded that AENV [(the Director)] would not comment on land use application referrals until the Municipal District has granted the land use."¹¹ The Municipal District has indicated that the Director agreed that she would not proceed with any environmental reviews without verification that the development can proceed. Ostensibly, the Municipal District is arguing that because they had not provided permission for the development to be undertaken, the Director, by its own word, was precluded from continuing to examine the Approval Holder's application under the *Water Act*.

¹⁰ See Municipal District's Rebuttal Submission, dated May 9, 2002, where it is stated that:

"The Municipality did not meet the 7 day appeal period deadline for submittal of our original appeal because the decision to appeal was required to pass through Municipal Council prior to submittal to the Environmental Appeal Board. The Water Act Approval notice was received on March 22, 2002, and the next available Council date was April 9, 2002. Staff proceeded with a report to Council on that date and received approval to submit a formal appeal for both the Water Act Approval and the Preliminary Certificate..."

¹¹ See: Municipal District's Rebuttal Submission, dated May 9, 2002.

III. ANALYSIS

[17] The Board has faced the issue of appeals filed out of time in previous decisions. In the appeal of *Grant and Yule*,¹² the Board was confronted with an appeal to an approval under the *Water Act*, that was filed late. The appellants, Grant and Yule, claimed a lack of notice as the reason that they failed to meet the statutory deadline, however, they could not demonstrate sufficient cause for an extension of the time to file. In that case the Board found that "...no special circumstances exist[ed] to extend statutory deadlines."¹³ The failure of the appellants to meet the appeal deadline, and their failure to provide sufficiently extenuating circumstances that would warrant an extension, resulted in the Board dismissing their appeal.

[18] The Board agrees with the submissions of the Director and the Approval Holder. Specifically, the Board finds that the Municipal District was fully informed of the requisite deadlines, and the potential outcomes, if they were to miss those deadlines. Although the Board accepts that the Municipal District may have a "bureaucratic system" that delayed their filing, the Board believes that there was nothing preventing the Municipal District from filing and then possibly withdrawing their appeal after the Council had met. The implication that the Municipal District has been kept from voicing their concerns during this process is unfounded, as it has been only the failure of the Municipal District to meet the deadlines prescribed in the legislation, that prevented in their Statement of Concern from being accepted.

[19] Finally, as stated, the Municipal District is arguing that because they had not provided permission for the development to be undertaken, the Director, by its own word, was precluded from continuing to examine the Approval Holder's application under the *Water Act*. The Board is unclear as to how this submission weighs in favor of extending the time for appealing the Approval to the Municipal District. The Board does not accept that the Director intended, or could for that matter, agree that she would delay processing the Approval Holder's application until the development decisions were made.

¹²

Grant and Yule v. Director, Bow Region, Natural Resources Service, Alberta Environment re: Village of Standard. (May 15, 2001), E.A.B. Appeal Nos. 01-015 and 016-D.

¹³

Grant and Yule v. Director, Bow Region, Natural Resources Service, Alberta Environment re: Village of Standard. (May 15, 2001), E.A.B. Appeal Nos. 01-015 and 016-D at paragraph 25.

[20] As a result, the Board finds that there were no extenuating circumstances in this case that would warrant granting an extension to the time limit prescribed in the *Water Act* for the filing of a Notice of Appeal with respect to the Approval. The Board must, therefore, dismiss the appeal. However, there is nothing to prevent the Municipal District applying for intervenor status in order to present its submission at a hearing.

IV. DECISION

[21] The Notice of Appeal was filed out of time, and there are no grounds for granting an extension of the timeline for filing the appeal, and therefore, pursuant to section 95(5)(a)¹⁵ of EPEA, the portion of the Municipal District's Notice of Appeal as it relates to Approval No. 00137206-00-00 is dismissed. This does not affect the portion of the Notice of Appeal of the Municipal District that relates to the Preliminary Certificate, which was filed within the prescribed 30 day time period.

Dated on June 24, 2002, at Edmonton, Alberta.

"original signed by"
Dr. John P. Ogilvie,
Vice-Chair

¹⁵ Section 95(5)(a) of EPEA provides:

"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, ...
 - (ii) the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
 - (iii) for any other reason the Board considers that the notice of appeal is not properly before it..."