

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – October 11, 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 Gerald Borgel with  
respect to *Water Act* Approval No. 00214629-00-00 issued to  
Prairie Mines and Royalty Ltd., by the Director, Central Region,  
Operations Division, Alberta Environment and Sustainable  
Resource Development.

Cite as: *Borgel v. Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Prairie Mines and Royalty Ltd.* (11 October 2012), Appeal No. 12-013-ID1 (A.E.A.B.).

**BEFORE:**

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

**SUBMISSIONS BY:**

**Appellant:** Mr. Gerald Borgel.

**Approval Holder:** Prairie Mines and Royalty Ltd., represented by  
Mr. Stuart Chambers, McLennan Ross.

**Director:** Mr. David Helmer, Director, Central Region,  
Operations Division, Alberta Environment and  
Sustainable Resource Development,  
represented by Ms. Jodie Hierlmeier and Ms.  
Shannon Keehn, Alberta Justice and Solicitor  
General.

## **EXECUTIVE SUMMARY**

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval under the *Water Act* to Prairie Mines and Royalty Ltd. (Prairie Mines) to divert and manage water and develop end pit lakes.

Mr. Gerald Borgel appealed the decision to issue the Approval.

The appeal was filed past the 7 day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked Mr. Borgel to explain why the appeal was filed late. The Director and Prairie Mines were given an opportunity to respond.

Mr. Borgel understood he had 30 days to file an appeal, and AESRD had different opportunities, including at a meeting held within the appeal period, to explain the appeal period was 7 days. Based on the explanations provided, comments received, and actions taken, the Board allowed the extension of time for Mr. Borgel to file his Notice of Appeal.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	SUBMISSIONS .....	2
A.	Appellant.....	2
B.	Approval Holder .....	3
C.	Director .....	4
D.	Rebuttal Submission .....	4
IV.	ANALYSIS.....	6
A.	Legal Basis.....	6
A.	Analysis .....	6
V.	DECISION.....	8

## **I. INTRODUCTION**

[1] Under the *Water Act*, R.S.A. 2000, c. W-3, an approval is required when an activity alters the flow, direction of flow, level of water, or changes the location of the water for certain purposes. Alberta Environment and Sustainable Resource Development (“AESRD”) issued an approval to Prairie Mines and Royalty Ltd. under the *Water Act* for the diversion and management of water and for the development of end pit lakes.

[2] An appeal was filed with the Environmental Appeals Board (the “Board”) but it was filed past the 7 day legislated timeframe for filing Notices of Appeal of an approval under the *Water Act*. The appellant asked the Board to extend the time for filing the appeal, and this is the Board’s decision.

## **II. BACKGROUND**

[3] On June 6, 2012, the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued Approval No. 00214629-00-00 (the “Approval”) under the *Water Act* to Prairie Mines and Royalty Ltd. (the “Approval Holder”). The Approval allows the Approval Holder to place, construct, operate, maintain, remove, disturb works, reclaim, dewater, realign a channel, manage surface water in or on any land, water, or water body within the fence line of the Paintearth Mine Project, excluding crossings as defined in the *Water (Ministerial) Regulation*, Alta. Reg. 205/98, for the purpose of the diversion and management of water and the development of end pit lakes.

[4] On July 11, 2012, the Board received a Notice of Appeal from Mr. Gerald Borgel (the “Appellant”) appealing the Approval.

[5] On July 17, 2012, the Board wrote to the Appellant, Approval Holder, and Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal. In this letter the Board noted the Notice of Appeal was filed after the 7 day appeal period for approvals issued under the *Water*

*Act*.<sup>1</sup> The Board asked the Appellant to provide an explanation as to why the appeal was filed after the time limit and to provide reasons why an extension should be granted.

[6] The Appellant provided his response on July 19, 2012. Based on the Appellant's response, the Board determined there was sufficient information to consider extending the appeal period. The Board asked the Director and Approval Holder to provide response submissions. The response submissions were received on August 31, 2012. The Appellant provided final comments on September 14, 2012.

### **III. SUBMISSIONS**

#### **A. Appellant**

[7] The Appellant understood he had 30 days from the date of receipt of the notice of the Approval being issued to file an appeal. He received notification of the Approval by mail on June 15, 2012, and filed his appeal on July 10, 2012. The Appellant acknowledged he was mistaken as to the time to file his appeal and requested the Board grant an extension.

[8] The Appellant stated he is directly affected by the Approval, but he was not involved in the approval process and received no notification of the application or submissions of the Approval Holder. The Appellant received a letter from the Director on June 15, 2012, notifying him of the Approval and if he objected, he would have to file an appeal.

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<sup>1</sup> Section 116(1) of the *Water Act* provides:

“A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order, or
  - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,
- or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

[9] The Appellant explained he arranged to meet with the Director and AESRD staff on the first available date, which was June 20, 2012, to determine how the Approval affected his operation and licenced dam. The Appellant noted there is an outstanding file with AESRD regarding the Approval Holder withholding water from the licenced dam, and this issue was not properly addressed in the Approval. The Appellant stated he believed he had time to seek clarification on the Approval given he had 30 days to file an appeal.

[10] The Appellant explained he received a copy of the Approval and a copy of a document he believed was part of a submission prepared by the Approval Holder's consultant at the June 20, 2012 meeting. He stated a further meeting was arranged at that time. The second meeting was held on July 10, 2012, at the Approval Holder's office. The Appellant explained he attended the meeting in good faith, but no solution was achieved for his long standing issues with the Approval Holder's water management in relation to his licenced dam. The Appellant informed the Director and Approval Holder at the meeting that he was filing an appeal.

[11] The Appellant stated he tried his best to inform himself and comply with what he understood to be the timeline for the appeal.

## **B. Approval Holder**

[12] The Approval Holder stated the Appellant had been involved in all the processes relevant to the Approval since at least the time he submitted his Statement of Concern. The Approval Holder noted the Appellant was represented by legal counsel. The Approval Holder stated the Director's June 6, 2012 letter to the Appellant explicitly refers the Appellant to section 115(1) of the *Water Act* addressing appeals and noted there are strict timelines for filing a Notice of Appeal.

[13] The Approval Holder submitted the Appellant had adequate warning of the need to appeal on a timely basis and, therefore, the Approval Holder opposed the application for an extension of the appeal period.

**C. Director**

[14] The Director took no position on the Appellant's application and would not oppose should the Board decide to grant the Appellant an extension.

**D. Rebuttal Submission**

[15] The Appellant explained his wife attended the meeting with the Director and AESRD staff as his wife and farming partner, not as legal counsel. The Appellant stated he left the meeting with the Director on June 20, 2012, with the understanding their meeting with the Approval Holder was within the time frame for an appeal.

[16] The Appellant stated that, after the July 10, 2012 meeting with the Approval Holder and Director did not result in a resolution, he started to prepare his Notice of Appeal.

[17] The Appellant stated that since he filed his Statement of Concern in December 2004, he was not provided with any information or invited to take part in any discussions with the Approval Holder or Director. He was not provided with information as to what was planned, transpired, or anticipated.

[18] The Appellant explained he has a licenced dam with a 6 acre foot allotment with a priority before the Approval Holder. He stated he has had issues with the Approval Holder changing the flow of water into the dam, and the pre-mining catchment area has decreased to less than 10 percent of what it was previously. The Appellant stated that prior to 2004, the Director discovered the Approval Holder constructed holding ponds within the natural water course.

[19] The Appellant stated that even though he had been directly affected by the Approval Holder's water management and had contacted the Director regarding his concern, he was not notified of the Approval Holder's Approval application. He noticed the ad in the local paper. At the time he filed his Statement of Concern, he did not know what studies had been completed or what the application meant to him. The Appellant thought his Statement of Concern would bring him into the process so he could give input to ensure his right to water was not affected.



[20] The Appellant stated that when he received notice of the Approval, he did not know what the Approval meant in relation to his licenced dam, so he arranged to meet with the Director on the first, mutually available, day. The Appellant explained that, at the meeting on June 20, 2012, he received a summary of the hydrologist's report confirming there was a severe alteration from the pre-mining catchment area covering several quarter sections.

[21] The Appellant disagreed with the Approval Holder's assessment that the Appellant was involved in all the processes relevant to the Approval. The Appellant stated no information had been provided to him, he was not invited to take part in any discussions or meetings, and no studies had been provided to him.

[22] The Appellant explained he initiated a number of meetings with the Approval Holder. The Approval Holder created a dug out to enhance the existing dam to minimize evaporation loss, but water flow is still required.

[23] The Appellant believed he should not have to defend his licence because it is being threatened. He stated the water allotment associated with the dam is critical to his farming operation. He explained that before the mining operation, there was water flow into the dam throughout the season, depending on the weather, but now there is minimal flow into the dam in the spring and only occasionally after a heavy summer rain.

[24] The Appellant argued water should not be withheld from its natural flow. He stated the Approval Holder continues to create end pit ponds and push water to its large reservoir to the west.

[25] The Appellant stated the Appellant Holder has had eight years to resolve his concerns, but the Approval Holder has made no effort to do so.

## IV. ANALYSIS

### A. Legal Basis

[26] Section 116 of the *Water Act* sets the time lines for filing a Notice of Appeal.<sup>2</sup> The appeal period for an approval issued under the *Water Act* is 7 days. The appeal period starts upon receipt of notice of the decision.

[27] Section 116(2) of the *Water Act* allows the Board to extend the appeal period if there are sufficient grounds to do so.<sup>3</sup>

### A. Analysis

[28] The Appellant stated he was under the belief that he had 30 days to file an appeal. There is no indication how the Appellant reached this conclusion.

[29] The letter notifying the Appellant of the Director's decision stated that under section 115 of the *Water Act*, the Appellant may have a right to file an appeal. The letter noted there was a strict timeline in which to file the appeal. Nowhere in the letter does it state the

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<sup>2</sup> Section 116(1) of the *Water Act* states:

“A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order, or
  - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,
- or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

<sup>3</sup> Section 116(2) of the *Water Act* states:

“The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

appeal period is only 7 days. The Board notes that in letters notifying Statement of Concern filers of the Director's decision in other appeals, the letter specifically states the appeal period. In this case, the Director chose not to clearly state the appeal period. Although the Director included the section under the *Water Act* that allowed the filing of an appeal, there was no reference to section 116, the section that stipulates the appeal period. Given the appeal period is so short, it would seem prudent for the Director to clearly state the appeal period in the letter.

[30] The Appellant notified the Director when they received the letter of the Director's decision. They clearly had issues with the Approval. They did not delay contacting the Director to set a time to meet to discuss the Approval. The Director met with the Appellants on June 20, 2012. At no time did the Director point out the 7 day appeal period. Even after the second meeting where the Appellant told the Director and Approval Holder of his intent to file an appeal, the 7 day appeal period did not appear to be mentioned.

[31] Based on the description of events provided by the Appellant, he did not sit idly by and wait for the appeal period to expire. He took proactive steps by contacting the Director and arranging a meeting at the first mutually available time to discuss the Approval and the potential impacts on the Appellant's licenced dam. The Board is unsure why the Director did not make it clear to the Appellant that the appeal period was only 7 days, particularly when the second meeting scheduled at the June 20, 2012 meeting was going to be past the appeal time period.

[32] The Board recognizes the Director may not want to encourage a person to file an appeal, but the Director knew of the Appellant's concerns with the Approval. Even if the Director thought the second meeting might have resolved the Appellant's concerns, the Director could have let the Appellant know of the short appeal period and told the Appellant that if the appeal is filed and the issues are resolved at the second meeting, the Appellant could withdraw his appeal.

[33] Therefore, under these circumstances, the Board will exercise its discretion under section 116(2) of the *Water Act*, and extend the appeal period for filing a Notice of Appeal to 30 days.

[34] The Notice of Appeal was filed with the Board on July 11, 2012, which is 25 days from the date the Appellant was notified of the Director's decision. Therefore, the Board will accept the Notice of Appeal.

## **V. Decision**

[35] The Board will grant the extension of the timeline for the Appellant to file his Notice of Appeal. Therefore, the Board accepts the Appellant's Notice of Appeal as having been filed in time.

Dated on October 11, 2012, at Edmonton, Alberta.

*“original signed by”*

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Delmar W. Perras  
Chair