

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 25, 2013

IN THE MATTER OF sections 91, 92, 93, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Ted and Marianne Wray with respect to Approval No. 00262217-00-00 issued under the *Water Act*, R.S.A. 2000, c. W-3, and Registration No. 261764-00-00 issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Clearwater County by the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Wray v. Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Clearwater County* (25 July 2013), Appeal Nos. 12-044 and 12-045-D (A.E.A.B).

BEFORE: Ms. A.J. Fox, Panel Chair.

SUBMISSIONS BY:

Appellants: Mr. Ted and Ms. Marianne Wray.

Director: Mr. Todd Aasen, Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Mr. Darin Stepaniuk, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

In August 2011, Alberta Environment and Sustainable Resource Development issued a registration under the *Environmental Protection and Enhancement Act* and an approval under the *Water Act* to Clearwater County for the construction and operation of a gravel pit and the construction and maintenance of an end pit lake for a gravel pit in Clearwater County. Mr. Ted and Ms. Marianne Wray appealed the approval and registration on March 21, 2013.

The appeal of the approval was filed past the 7-day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked the Wrays to provide their reasons for filing their appeal past the prescribed time limit and why the Board should be persuaded to extend the deadline.

Only in exceptional circumstances would the Board extend the time to file a Notice of Appeal. After reviewing the Wrays' submissions, the Board found no exceptional reasons existed for filing the appeal of the approval 19 months after the appeal period ended.

The Board also asked the Wrays to comment on whether the registration is appealable. After reviewing the Wrays' comments and the relevant legislation, the Board determined the registration is not appealable.

The Board dismissed the appeals of the registration and approval.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding the appeals filed by Mr. Ted and Ms. Marianne Wray (the "Appellants").

[2] Alberta Environment and Sustainable Resource Development ("AESRD") issued a Registration under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") and an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to Clearwater County (the "Approval Holder") in August 2011 for a gravel pit operation.

[3] As the appeal for the approval was filed outside of the 7-day appeal period, the Environmental Appeals Board (the "Board") asked the Appellants to provide reasons why the Board should extend the appeal period. The Appellants were also asked to provide any further information regarding the appeal of the Registration because it appears that, under the legislation, a Registration is not appealable.

[4] The Board dismissed the appeal of the Approval because the Appellants did not demonstrate exceptional circumstances existed to extend the appeal period and dismissed the appeal of the Registration because it is not a decision that can be appealed.

II. BACKGROUND

[5] On August 10, 2011, the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Approval No. 00262217-00-00 under the *Water Act* (the "Approval") to Clearwater County to construct and maintain an end pit lake. On the same date, the Director also issued Registration No. 261764-00-00 (the "Registration") to the Approval Holder under EPEA for the construction, operation, and reclamation of a gravel pit located in the NW 2-37-6 W5M in the County of Clearwater near Caroline, Alberta.

[6] On March 21, 2013, the Board received Notices of Appeal from Mr. Ted and Ms. Marianne Wray appealing the Registration and Approval.

[7] On March 26, 2013, the Board acknowledged the appeals and notified the Approval Holder and Director of the appeals. 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*.¹ The Board asked the Appellants to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted. The Board also noted that it appeared the Registration was not appealable, and the Appellants were asked to provide further information regarding the appeal of the Registration.

[8] The Appellants provided their response on April 15, 2013. Additional comments were provided on May 1, 2013. As the additional comments were provided after the April 15, 2013 submission deadline, the Board notified the Appellants, Approval Holder, and Director (collectively, the “Parties”) that the information was provided to the panel reviewing the appeals, and the panel would decide if the information would be accepted.

[9] On May 2, 2013, the Board notified the Parties the appeals were dismissed with reasons to follow. These are the Board’s reasons.

III. Discussion

A. Submission

¹ 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.”

[10] The Appellant explained they live on the quarter section adjoining the gravel pit and have been living there for 10 years.

[11] The Appellants noted the Registration cannot be appealed, but they questioned why.

[12] The Appellants explained they were unaware the Approval was issued until they made inquiries and were told by the Director on March 8, 2013, that the Approval was granted on August 10, 2011.

[13] The Appellants stated they did not receive any written notice from the Approval Holder, the Director, or any other organization regarding the proposed gravel pit development, but they received some information from attending public meetings.

[14] The Appellants stated that in the fall of 2009, they tried to have their concerns regarding water issues on their property addressed by contacting the Director. The Appellants explained they were told no application for an approval had been made, but a note would be put on the file. The Appellants said they were told by the Director's staff that they would be given formal notice of the application, and they would have an opportunity to have their concerns addressed. The Appellants believed a representative from AESRD would attend the site of the gravel pit and inspect the Appellants' land. The Appellants stated the public notice was published less than three weeks after their discussion with the Director, but no one notified them even though they did everything they felt they could to be involved in the process.

[15] The Appellants stated the Approval Holder was aware of their concerns regarding the development, and the Appellants had requested they be notified of any actions taken by the Approval Holder regarding the development.

[16] The Appellants said they did not receive any formal written notice of the application or any operation plans, other related plans, or documents until March 8, 2013. They were unaware of the location of the components of the operation, the location and details of a man-made pond or lake, or the impact on surface water, groundwater, and drainage on the Appellants' property.

[17] The Appellants explained they heard in January 2013 that the gravel pit was fully authorized and operations would start in spring 2013. They contacted the Director to confirm the information. The Appellants stated the Director told them that, although they called to voice their concerns in November 2009, there would not be a record of the calls on the file and, therefore, AESRD was not accountable to the Appellants in these circumstances and it had no policy or obligation to inform adjacent landowners. The Appellants said the Director told them that notice requirements were satisfied by the placement of an advertisement in the newspaper notifying anyone with concerns to respond in seven days from the date of the notice being published in the newspaper.

[18] The Appellants stated that on March 7, 2013, they received a copy of a document from the Director dated November 25, 2009, confirming the Appellants had expressed concerns regarding the gravel pit and the potential impacts of the development on the springs on the Appellants' property. The Appellants noted the document contradicts the Director's statements that there was no record of the Appellants contacting AESRD with their concerns.

[19] The Appellants believed their concerns and request for assistance would be given attention in due course. From 2010 until 2012, the Appellants believed the Director had not started his assessment of the application, had not concluded an environmental impact assessment, or granted the Approval.

[20] The Appellants did not dispute public notice was published in the Mountaineer Newspaper, but that newspaper is not widely distributed in the Caroline community which is served by the Western Star newspaper. The Appellants argued failing to publish in the Western Star resulted in an extreme prejudice to them and the Director had an obligation to inform them of the status of the Approval Holder's application.

[21] The Appellants stated neither the Director nor the Approval Holder provided notice to the Appellants personally as adjacent landowners, and both entities ignored the Appellants' requests for notice, thereby excluding them from participating in the process.

[22] The Appellants said a study of the proposed development is required for the interests of landowners surrounding the site and for the Approval Holder itself to ensure there are

appropriate conditions governing the operation of the pit and, if water issues exist, the Approval Holder might be required to relocate the pit.

[23] The Appellants noted the water well reports they reviewed in the Director's record and which the Director relied on, contained incorrect information regarding the wells on the Appellants' property. The Appellants explained they have one well on their property that they rely on for drinking water and for watering livestock in winter.

[24] The Appellants stated the Director relied on a Prairie Farm Rehabilitation Administration topographical map to conclude the borderline of two water basins runs between the proposed pit location and the Appellants' property so the drainage on one side will not impact the other side. The Appellants argued there is natural drainage onto their property from the Approval Holder's property and this could be confirmed using site elevations. The Appellants stated the decreased elevation resulting from the construction of a man-made lake and removal of gravel from the site will reverse the drainage and cause the stream that runs through the Appellants' property to be permanently destroyed.

[25] The Appellants expressed concern regarding the impacts on groundwater and water table resulting from the pumping and containment of water to access the gravel. In addition, loss of the stream will impact the water available for the Appellants' livestock.

[26] The Appellants stated the Director did not mention the appeal or complaint process when they talked with him. The Appellants noted their concerns regarding the development included:

1. impacts on the underground springs between the proposed site and the Appellants' property will impact the creek that flows into wetlands and ponds on their property;
2. removing gravel below the water table will affect water in the area with detrimental affects to wildlife and possibly the Appellants' drinking water. They cannot be certain of the impacts because they do not know exactly where the underground springs flow, and once the springs are affected, the Appellants' ponds could dry up; and

3. the site will be turned into a campground, affecting the Appellants' privacy and increasing the risk of fires.

[27] The Appellants stated the Director explained that if there were adverse effects, it would be the responsibility of the Approval Holder to return the creek and pond to their normal state. The Appellants questioned whether this would be possible since once the area has dried up, the existing habitat would be destroyed and replacing the underground springs may not be possible.

[28] The Appellants expressed concern that no environmental assessment was completed to determine the effects the pit mining will have on the hydrology east of the site. According to the Appellants, the Director stated he could get all the information he needs from the topographical map that shows a creek that begins at the berm and runs east. The Appellants stated the plan is to dig down into the aquifer and below the water table. The Appellants stated that, according to the report completed by the Approval Holder's consultant, the springs will be redirected and the Appellants' creek will go dry as the water will go west and be directed into the flood plain.

[29] The Appellants argued the Approval Holder did not fulfill its obligation to notify persons who live close to the proposed project. The Appellants stated that, even though the Approval Holder was adamant it had sent a letter to them regarding the project, they never received the letter and neither did others living in the area.

[30] The Appellants asked that their well be tested prior to the operations starting at the site to ensure their well is not affected.

[31] The Appellants submitted they were denied notice of the process to make submissions respecting the Approval and they do have legitimate concerns to present on appeal.

B. Analysis

1. Approval

[32] Section 116 of the *Water Act* sets the time lines for filing a Notice of Appeal.² 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.

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

[34] The Appellants in these appeals effectively presented their concerns regarding the issuance of the Approval. Based on the information the Appellants provided, the Board is concerned with the level of notice the Appellants received of the application for the Approval and the issuance of the Approval.

[35] The Board has stated in previous decisions that direct notice is not practicable in most cases. However, when there is a record of concern on file, the Director should ensure the applicant for a project has contacted the person, particularly when there is a likelihood the person is directly affected by the proposed project. In this case, the Approval Holder should have contacted the Appellants to explain the proposed project. The Approval Holder was aware the Appellants had concerns with the project. The Appellants explained the Approval Holder claimed to have sent the information to the Appellants, but according to the Appellants, they never received the information. If the information was sent by registered mail, there would have

² Section 116(1) of the *Water Act* states:

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

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- 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.”

³ 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.”

been a record as to whether the Appellants actually received the documents. Proof of delivery of registered mail included in the application would demonstrate to the Director that potentially impacted people have been notified of the proposed project and the proponent has dealt with the issues raised.

[36] The Board appreciates the efforts taken by the Appellants to file their appeal when they became aware of the issuance of the Approval and that they had a right of appeal. However, 19 months after the appeal period introduces a great deal of uncertainty into the approval process. The Board must balance the interests of the Appellants with those of the Approval Holder. If the time was shorter, the Board may consider extending the time to accept the appeal.

[37] In this case the Director and Approval Holder were aware of the Appellants' concerns. The Appellants made concerted efforts to become involved in the process. The Director had a note on file of the Appellants' concerns. The Board has acknowledged the Director is not required to impose the requirement to have the Approval Holder notify each person individually who may be directly affected.⁴ The Appellants had contacted the Director shortly before notice of the application was published. Given the short time period between the conversation with the Appellants and the publication of the notice, the Director must have been aware that notice of the application was going to be published soon, even if the exact date was not known. This would have at least put the Appellants on notice that notice of the application would be published soon and it would be their responsibility to look for the notice or periodically contact the Director for an update on the status of the application. At the time the Director talked with the Appellants, he could have mentioned the application had been received, public notice was imminent, the timelines for filing a Statement of Concern, and the short appeal period.

[38] The Appellants argued that publishing the Notice of Application once is insufficient. Section 2(1) of the of the *Environmental Protection and Enhancement (Miscellaneous) Regulation*, Alta. Reg. 118/93 (the "Regulation") requires the Notice of Application to be published in "one or more issues of a newspaper..." There is no requirement

⁴ See: *Grant and Yule v. Director, Bow Region, Natural Resources Service, Alberta Environment*, re: *Village of Standard* (15 May 2001) Appeal Nos. 01-015 and 01-016-D (A.E.A.B.).

in the Regulation that requires a proponent to publish the public notice more than once. Therefore, the Licence Holder met the minimum standard for notice.

[39] The Board recognizes the Appellants have raised relevant issues regarding the development, and they took steps that they thought would ensure their involvement in the process. However, given the appeal period ended 19 months before the Notice of Appeal was filed, the Board would need to be persuaded that exceptional circumstances existed. In this case, the Appellants did not meet that onus.

[40] When an approval is issued, the project proponent can proceed with the approved project. A prudent proponent would wait until the appeal period has passed before proceeding with the project because, if the appeal was successful, the proponent may be required to put the site back to pre-disturbance condition. A proponent should, in most cases, be able to rely on the legislated appeal period. The proponent should not have to postpone development indefinitely in case an appeal is filed months or years after the appeal period is past. This does not mean the Board will not use its discretion under section 116(2) of the *Water Act* to extend the appeal period if circumstances warrant it.

[41] The concern here for the Board is the amount of time that has passed between the end of the legislated appeal period and the filing of the Notice of Appeal. Although the Board is concerned the Director claimed he was not aware of the written note in the Approval Holder's file indicating the Appellants' concerns, the Board does not consider this sufficient evidence of extraordinary circumstances that prevented the Appellants from filing the Notice of Appeal on time.

[42] The Board notes the Appellants became aware of the Approval on March 8, 2013, but the Notice of Appeal was not filed until March 21, 2013, still more than the 7-day appeal period.

[43] Under these circumstances, the Board cannot extend the appeal period and must dismiss the appeal of the Approval.

[44] Given the Appellants concern with the potential impacts on the water flow to their lands as a result of the project, it is important for the Appellants to know they have a right to

contact the Director if their surface or ground water is impacted by the operations at the site. There are procedures in place under the *Water Act* to ensure the Appellants are not impacted or are compensated for any impacts caused by the project.

2. Registration

[45] The Appellants acknowledged the Registration cannot be appealed and questioned why such a Registration is not appealable.

[46] Section 91 of EPEA identifies the decisions made by AESRD that can be appealed. Registrations are not listed. As the Board's jurisdiction is limited to the enabling legislation, the Board cannot accept an appeal of a registration.

[47] Registrations are issued for specific projects. The *Activities Designation Regulation*, Alta. Reg. 276/2003 specifies which types of projects or activities can proceed under a registration. Section 3(3)(d) identifies pits, such as the gravel pit in question in this appeal, as an activity requiring a registration.⁵ The environmental effects of these types of activities are known and understood. A holder of a registration knows the conditions under which it can operate. If the conditions are contravened, enforcement action can be taken by AESRD to ensure compliance.

[48] As the Registration cannot be appealed under EPEA, the Board must dismiss the appeal.

⁵ Section 3(3)(d) of the *Activities Designation Regulation* states:

“‘pit’ means an opening or excavation in or working of the surface or subsurface for the purpose of removing any sand, gravel, clay or marl, where the area of the pit and any associated infrastructure, including stockpiles, connected with the pit, is on or after November 1, 2004 greater than or equal to 5 hectares (12.5 acres), but does not include

- (i) a borrow excavation,
- (ii) a pit on public land,
- (iii) a pit, or a portion of a pit, where the surface or subsurface of the land has not been disturbed by pit operations since August 15, 1978, or
- (iv) a pit, or a portion of a pit, on which a waste management facility is operating or operated pursuant to a valid approval or registration under the Act.”

IV. OTHER MATTERS

[49] The Board received additional information from the Appellants after the deadline set by the Board. Since the Board's consideration in this case did not require submissions from the Approval Holder and Director, the Board determined there would be no prejudice in reviewing this additional information. The additional information did not affect or change the Board's decision in this case.

V. DECISION

[50] The Board denies the request for an extension of the timeline for the Appellants to file their Notice of Appeal of the Approval, and therefore, the Board cannot accept the Notice of Appeal as being validly before the Board.

[51] The Board cannot accept the appeal of the Registration because it is not an appealable decision under EPEA.

[52] Therefore, the Board dismisses the Appellants' Notices of Appeal.

Dated on July 25, 2013, at Edmonton, Alberta

"original signed by"
A.J. Fox
Panel Chair