

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – May 20, 2015

**IN THE MATTER OF** sections 91, 92, 93, 94, 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 Palmer Ranch (1984) Ltd. with respect to *Water Act* Preliminary Certificate No. 00348439-00-00 issued to Palmer Ranch (1984) Ltd. by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: *Palmer Ranch (1984) Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development* (20 May 2015), Appeal No. 14-009-D (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Acting Board Chair.

**SUBMISSIONS BY:**

**Appellant:** Palmer Ranch (1984) Ltd. represented by Ms. Maureen Bell.

**Director:** Ms. Kathleen Murphy\*, Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

\* The Director who original signed the Preliminary Certificate, Mr. Rob Burland, is no longer a designated Director under the *Water Act*. The current designated Director is Ms. Kathleen Murphy.

## **EXECUTIVE SUMMARY**

Alberta Environment and Sustainable Resource Development (AESRD) issued a preliminary certificate to Palmer Ranch (1984) Ltd. (Palmer Ranch) under the *Water Act* to divert 730 cubic metres of water annually for water bottling purposes, upon meeting certain conditions.

Palmer Ranch appealed the terms and conditions of the preliminary certificate. A mediation meeting was held, but no resolution was reached.

With the consent of the parties, the Environmental Appeals Board (the Board) set a hearing through written submissions to consider submissions on the following issues:

1. Was the Director's decision to issue the Preliminary Certificate reasonable and in accordance with the *Water Act* and applicable government policies?
2. Are the terms and conditions of the Preliminary Certificate and proposed licence appropriate?

In setting the hearing, the Board set specific deadlines for receiving the parties' submissions. There were no objections to these deadlines by either of the parties. Palmer Ranch failed to provide its submission by the set deadline. AESRD filed a motion to dismiss the appeal for failing to respond to the Board in a timely manner pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act* (EPEA).

Based on Palmer Ranch's failure to provide the submission on time without a valid reason and its repeated late-filed responses and failures to respond to the Board's requests for information or updates throughout the appeal process, the Board dismissed the appeal pursuant to sections 92 and 95(5)(a)(iv) of EPEA and closed its file.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's decision in relation to the dismissal of the appeal filed regarding the issuance of Preliminary Certificate No. 00348439-00-00 (the "Certificate") to Palmer Ranch (1984) Ltd. ("Palmer Ranch" or the "Appellant"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Certificate to Palmer Ranch under the *Water Act*, R.S.A. 2000, c. W-3, to divert water for a commercial purpose (water bottling). The Certificate provided that a licence to divert the water would be granted when the conditions in the Certificate were met.

[2] Palmer Ranch appealed the terms and conditions of the Certificate and the "commercial purpose" designation.

[3] The Environmental Appeals Board (the "Board") set a hearing through written submissions, on the following issues:

1. Was the Director's decision to issue the Preliminary Certificate reasonable and in accordance with the *Water Act* and applicable government policies?
2. Are the terms and conditions of the Preliminary Certificate and proposed licence appropriate?

[4] The Appellant failed to provide its submission by the deadline set by the Board. AESRD applied to the Board to have the appeal dismissed pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12 ("EPEA"). Based on Palmer Ranch's failure to provide the submission on time without a valid reason and its repeated late-filed responses and failures to respond to the Board's requests for information or updates throughout the appeal process, the Board dismissed the appeal pursuant to sections 92 and 95(5)(a)(iv) of EPEA and closed its file.

## **II. BACKGROUND**

[5] On March 31, 2014, the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the "Director"), issued the Certificate to the Appellant authorizing the diversion of 730 m<sup>3</sup> of water annually from a well located in NE

29-03-28-W4M in the Municipal District of Pincher Creek for commercial purposes (water bottling).

[6] On May 27, 2014, the Board received a Notice of Appeal from Palmer Ranch appealing the terms and conditions in the Certificate and the specified purpose.

[7] On May 28, 2014, the Board wrote to the Appellant and the Director (the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board asked the Director to provide a copy of the documents upon which his decision was based (the “Record”). At that time, the Board advised the Parties that the Board has strict timelines, and failure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of EPEA.<sup>1</sup>

[8] On May 30, 2014, the Director notified the Board that the Record would be available on June 20, 2014, and the Director also provided dates she would be available for a mediation meeting.

[9] On June 4, 2014, the Board asked the Appellant if it would be available for a mediation meeting in July 2014. The Board asked both Parties to advise where they would like the mediation meeting to be held. A response was to be provided to the Board by June 11, 2014. The Director responded to the Board’s request on June 5, 2014, and the Appellant provided its response on June 10, 2014.

[10] On June 11, 2014, the Board notified the Parties that, based on the available dates provided by the Parties, the mediation meeting would be held on July 17, 2014, in Lethbridge.

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<sup>1</sup> Section 95(5)(a)(iv) of EPEA provides:

“The Board

(a) may dismiss a notice of appeal if ...

(iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92....”

Section 92 of EPEA states:

“Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice.”

The Board asked the Parties to provide the names of those who would be participating at the mediation meeting by July 3, 2014.

[11] On June 20, 2014, the Board received a copy of the Record. The Director also notified the Board that the Appellant had requested certain documents included in the Record in support of its licence application be kept confidential.<sup>2</sup> The Director stated she indicated to the Appellant that the documents that had been identified as confidential would be submitted as part of the Record, but she would flag them for the Board and the Appellant could then ask the Board how it would deal with the documents before the Record was made public. The Director also stated that redacting portions of the Record was done to preserve privilege or to comply with protecting personal information related to other files under the *Freedom of Information and Protection of Privacy Act*, S.A. 2000, c. F-25.

[12] The Board provided a copy of the Record to the Appellant on June 24, 2014. The Board asked the Appellant to identify which documents it wanted to be confidential by July 3, 2014. The Board stated that once the documents were identified by the Appellant, they would be removed from the public file and the issue of the confidentiality of the documents would be dealt with as a preliminary matter if the appeal proceeded to a hearing.

[13] On July 4, 2014, the Board reminded the Parties to provide the names of the people who would be attending the mediation meeting. The Director confirmed she provided the names of those attending on behalf of AESRD on June 20, 2014.

[14] On July 7, 2014, the Appellant provided the names of the persons who would be attending the mediation meeting on behalf of the Appellant. In this email, the Appellant stated its February 12, 2014 email to AESRD confirmed its request that all commercial contracts related to the application be kept confidential. The Appellant stated the request for confidentiality extended to the publication of the mediation and the record for a public hearing. The Appellant specifically identified three tabs in the Record that included confidential information.

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<sup>2</sup> The Director noted the Appellant was advised on November 4, 2013, that a formal application would need to be made under the *Water (Ministerial) Regulation*, Alta. Reg. 205/1998, to AESRD to authorize AESRD to keep the documents confidential. There was no evidence in the Record to show that Palmer Ranch had made such an

[15] On July 10, 2014, the Board notified the Appellant that, after a review of the Record and a conversation with counsel for the Director, the Board understood the redactions in the Record related to other files or were protected by legal privilege. The Board had no concerns with the redactions.

[16] On July 11, 2014, the Board wrote to the Parties on the following:

1. The Board sought confirmation from the Appellant as to who would be attending the mediation meeting, given the Appellant indicated the attendees “will include;”
2. According to the Director, AESRD did not understand the February 12, 2014 email was a formal request for confidentiality under section 35(4) of EPEA.<sup>3</sup> The Board explained that a formal request to AESRD to hold records in confidence is separate and apart from a formal request to the Board to hold records in confidence.
3. Based on the Appellant’s July 7, 2014 email, the Board would remove the three tabs referenced by the Appellant from the public record and would not release these documents unless a formal application was made and would be decided with full notice to the Appellant. The Board instructed the Appellant that if the Appellant wanted further documents in the Record to be held in confidence, the Appellant would have to identify the specific documents. The Board provided the Appellant with a copy of the Record with some of the items highlighted where possible confidential information was located.
4. The Board confirmed the mediation and documents relating to the mediation would be held in confidence, but depending on the nature of the resolution reached, the resolution itself may or may not be held in confidence. The Board advised that it did not specifically advertise that a mediation was being held, but the status of appeals is published on the Board’s website, including the fact the appeal was scheduled for mediation.
5. With respect to the request for confidentiality regarding the hearing, the Board stated the Board’s legislation and the principles of natural justice and procedural fairness require the Board’s hearings be held in public.

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application to AESRD.

<sup>3</sup> Section 35(4) of EPEA provides:

“Where information referred to in subsection (1) or (3) is provided to the Department and relates to a trade secret, process or technique that the person submitting the information keeps confidential, the person submitting the information may make a request in writing to the Director that the information be kept confidential and not be disclosed.”



However, if the documents the Appellant identified as being confidential needed to be discussed, an application could be made for the panel hearing the appeal to hold a portion of the hearing *in camera*.

[17] On July 14, 2014, the Appellant stated its counsel was away and did not have the opportunity to comment on the redactions. The Appellant expressed concern that the redactions under Tab 6 of the Record contained information that may have influenced the Director's decision. The Appellant stated the redactions under Tab 8 of the Record may be relevant to its application if the notes referred to another file, and it was difficult for applicants to determine how other decisions have been made in similar circumstances.

[18] On July 16, 2014, the Board noted the Appellant's concerns regarding the redactions and requested the Parties discuss the matter at the mediation meeting. The Board instructed the Appellant to notify the Board if the concerns were not adequately addressed at the mediation meeting.

[19] The mediation meeting was held on July 17, 2014, in Lethbridge. The Parties agreed to continue discussions and to hold a second mediation meeting.

[20] On July 25, 2014, the Board asked the Parties to provide status reports by August 25, 2014, regarding the continuing discussions. The Board also asked the Parties to provide available dates for the second mediation meeting by August 1, 2014.

[21] On July 25, 2014, the Board also requested the Appellant advise the Board, by August 1, 2014, as to whether the Appellant's concern regarding the redactions were adequately addressed at the mediation meeting.

[22] On July 30, 2014, the Director provided her available dates for the second mediation meeting.

[23] On August 6, 2014, the Board acknowledged the response from the Director regarding the Board's July 25, 2014 letter requesting available dates for the second mediation meeting. The Appellant had not provided its response by the August 1, 2014 deadline. The Board requested the Appellant advise the Board by August 8, 2014, if the Appellant was available on the days identified by the Director. The Board also asked the Appellant to advise

the Board by August 8, 2014, as to whether the redactions were adequately addressed at the July 17, 2014 mediation meeting.

[24] On August 15, 2014, the Board again requested the Appellant advise the Board if the Appellant was available for the second mediation meeting on any of the dates previously identified by the Board. The Appellant was asked to respond by August 25, 2014.

[25] On August 15, 2014, the Board noted it had not received any further information from the Appellant regarding the confidentiality of the documents in the Record or the redacted documents. The Board notified the Appellant that if further information was not received by August 25, 2014, the Board would consider the issue closed and only the three previously identified documents would be held in confidence and the three redacted documents would be accepted in redacted form.

[26] In its August 15, 2015 letter, the Board also reminded the Parties to provide status reports by August 25, 2014. On August 18, 2014, the Board extended the deadline to provide status reports to September 5, 2014, because the Director's counsel advised the Board that she would be out of the office until September 2, 2014.

[27] On August 19, 2014, the Board acknowledged a telephone call with the Appellant's counsel wherein the Appellant advised it was not available for a mediation meeting in December. The Board advised the Parties that the second mediation meeting would be held on November 26, 2014. The Board also reminded the Parties that status reports regarding mediation discussions were due on September 5, 2014.

[28] In its August 19, 2014 letter, the Board reminded the Appellant that if no further information regarding the confidentiality of documents or the redacted documents was received by August 25, 2014, the issue would be closed.

[29] On September 5, 2014, the Director advised the Board that she had not received any further documentation from the Appellant related to the mediation discussions. The Appellant did not provide an update.

[30] On September 22, 2014, the Board requested the Parties provide an update on their mediation discussions by September 26, 2014.

[31] On September 26, 2014, the Director notified the Board that she had not received any further documentation from the Appellant.

[32] On September 29, 2014, the Board noted the Appellant had not provided a status report. The Board requested the Appellant provide an update with respect to the mediation discussions by October 1, 2014. The Board reminded the Parties that a further update was due October 27, 2014.

[33] On October 3, 2014, the Board noted the Appellant had not provided a status report as requested by the Board. The Board explained it would cancel the second mediation meeting and proceed to a hearing if the Appellant did not respond to the Board with respect to mediation discussions with the Director by October 10, 2014.

[34] On October 21, 2014, the Board noted the Appellant had not responded to its October 3, 2014 letter by the October 10, 2014 deadline.

[35] In its October 21, 2014 letter, the Board notified the Parties that it was cancelling the mediation meeting and proceeding to schedule a hearing because the Appellant did not provide a response to the Board's requests for status reports, and there did not appear to be any further mediation discussions taking place between the Parties. The Board requested the Parties provide available dates for a hearing by October 31, 2014.

[36] On October 27, 2014, the Director made a motion that the appeal should be dismissed pursuant to section 95(5)(a)(iv) of EPEA, because the Appellant failed to respond to the Board's letters dated July 25, 2014, September 22, 2014, September 29, 2014, and October 3, 2014.

[37] On October 27, 2014, the Appellant explained to the Board that computer difficulties resulted in the delay of responding to the Board.

[38] On October 28, 2014, the Board notified the Parties that it is not normal practice for the Board to dismiss an appeal at the mediation stage for failing to respond. The Board denied the Director's motion to dismiss the appeal. The Board cautioned the Appellant that as the mediation stage was completed and the Board was proceeding to a hearing, that failure to

respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of EPEA.

[39] In its October 28, 2014 letter, the Board extended the deadline for providing dates for the hearing to November 7, 2014. The Board advised the Appellant that failure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of EPEA. The Appellant was warned that if it failed to meet any further deadlines set by the Board, the file would be provided to the Board's Chair with a request that he reconsider the Director's October 27, 2014 motion to dismiss the appeal

[40] On October 29, 2014, the Director requested a written hearing.

[41] On October 30, 2014, the Board reconfirmed the mediation was closed. The Appellant was asked to advise the Board by November 7, 2014, if it agreed to a written hearing.

[42] On October 31, 2014, the Board acknowledged a conversation with the Appellant's counsel wherein she requested an opportunity to speak with the mediator. The Parties were asked to provide available times for a one-on-one telephone conversation with the mediator by noon on November 7, 2014. The Appellant responded on November 4, 2014, and the Director responded on November 6, 2014. Conversations with the mediator took place on November 18, 2014. Following these conversations, the Board again confirmed the mediation was closed.

[43] On November 12, 2014, the Board noted the Appellant had not responded to the Board's letter of October 30, 2014, asking if the Appellant agreed to hold the hearing via written submissions. The Board requested the Appellant provide comments by 4:30 on November 18, 2014. The Board cautioned the Appellant that failure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of EPEA. The Appellant was warned that if it failed to meet any further deadlines set by the Board, the file would be provided to the Board's Chair with a request that he reconsider the Director's October 27, 2014 motion to dismiss the appeal.

[44] On November 17, 2014, the Appellant agreed to hold the hearing through written submissions. In its November 17, 2014 letter, the Appellant stated its counsel was unavailable to file a submission between February 1 and March 31, 2015.

[45] On November 19, 2014, the Board confirmed the appeal would proceed to a written hearing. The Board requested the Parties provide any preliminary motions by November 26, 2014. The Board again advised the Appellant that failure to respond in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of EPEA. The Appellant was warned that if it failed to meet any further deadlines set by the Board, the file would be provided to the Board's Chair with a request that he reconsider the Director's October 27, 2014 motion to dismiss the appeal.

[46] On November 19, 2014, the Director provided her preliminary motions, requested staggered submissions, and requested the right to cross-examine on any affidavit evidence submitted by the Appellant.

[47] On November 26, 2014, the Appellant wrote to the Board, confirming it had a signed contract with a bottler capable of bottling the volume of water applied for in its Licence application. The Appellant asked whether a preliminary application to the Board would allow consideration of the contract and thereby resolve one of the issues under appeal.

[48] On December 19, 2014, the Board reiterated that the mediation process was closed and, therefore, the Board could not resolve the issue regarding the contract as a preliminary matter. The Board asked the Parties to provide comments on the issues to be considered at the hearing by January 9, 2015.

[49] On December 23, 2014, the Board wrote to the Parties to address outstanding matters. The Board noted the documents may contain confidential business information that the Appellant failed to identify to the Board despite numerous requests. The Board confirmed the three documents previously identified would be removed from the public file and would not be provided to persons other than the Parties and the panel members without an order of the Board, following notice to the Parties. The Board noted the Appellant indicated there may be other documents in the Record that contained confidential business information, but after repeated

requests for the Appellant to identify these documents, the Appellant's response was either unacceptable (i.e. the expectation that the Board vet the Record for documents containing a certain name) or the Appellant failed to respond to the Board's request. The Board advised that all documents contained in the Board's file, with the exception of the three identified documents in the Record and documents related to the mediation, would be considered public and would be disclosed.

[50] In its December 23, 2014 letter, the Board noted the Appellant's concern regarding the three redacted documents in the Record, and the Appellant's questioning of the appropriateness of the redactions. The Appellant was not prepared to accept the representations of the Director's counsel that the redacted portions of the documents did not have to be disclosed. It was agreed the Board's counsel would review the redacted portions of the documents and provide his opinion as to whether the complete documents should be disclosed. Board counsel concluded the redactions were all appropriate and none of the complete documents should be disclosed.

[51] On January 7, 2015, the Director provided her comments on the proposed issues for the hearing. The Director agreed to change the purpose stated on the Certificate from "commercial (water bottling)" to "industrial (water bottling)" even though she believed commercial water bottling better described the proposed purpose of use of the water and "commercial" purpose is consistent with similar licences. The Director noted "water bottling" is the critical aspect of the description of the purpose.

[52] On January 9, 2015, the Appellant provided its response to the proposed issues. The Appellant concurred with the Director's comments on the issues. The Appellant added the Board should not fetter its authority or discretion by limiting the matters to be considered in the appeal.

[53] On January 13, 2015, the Board notified the Parties that, based on their submissions, the proposed issues for the hearing would be:

1. Was the Director's decision to issue the Preliminary Certificate reasonable and in accordance with the *Water Act* and applicable government policies?

2. Are the terms and conditions of the Preliminary Certificate and proposed licence appropriate?

The Board asked the Parties to advise the Board in writing by 4:30 pm on January 20, 2015, if the proposed issues were acceptable. The Board included a warning that, if the Appellant failed to respond by the deadline, the Board had the authority to dismiss the appeal.

[54] On January 13, 2015, the Director provided her response, agreeing with the issues as identified by the Board in its January 13, 2015 letter. The Director noted the Appellant raised issues in its January 9, 2015, letter that were not included in the Notice of Appeal, including whether it is appropriate to specify an easement or right-of-way or whether a pipeline should be included.

[55] On January 14, 2015, the Board acknowledged the Director's letter and reminded the Appellant that a response to the Board's January 13, 2015 letter was due by 4:30 pm on January 20, 2015.

[56] On January 20, 2015, the Appellant responded. The Appellant expressed concern with the limitation of the issues, but agreed to try to restrict the matters to the issues identified in the Board's January 13, 2015 letter. The Appellant reserved its right to call upon the Board to consider all matters relevant to the original application.

[57] The Board published the Notice of Hearing in the Pincher Creek Echo and the Temple City Star. Notice was also provided to the Municipal District of Pincher Creek. A news release was forwarded to the Public Affairs Bureau for distribution to media throughout the Province and notice of the hearing was placed on the Board's website. The Notice of Hearing provided an opportunity for persons who wanted to make a representation before the Board to apply for intervenor status. The Board did not receive any intervenor requests.

[58] On January 29, 2015, the Board set the procedure for the written hearing, including the dates and times for receiving submissions from the Parties and the steps required for cross-examination. The Appellant was to provide its initial written submission and supporting affidavits by noon on April 17, 2025. The Director was to notify the Appellant by noon on April 22, 2015, if she intended to cross-examine on the affidavit. Cross-examination, if any, was to take place on April 27, 2015. The Director's response submission and supporting

affidavits were due May 12, 2015, with the Appellant notifying the Director of its intent to cross-examine by noon on May 15, 2015. Cross-examination, if any, would take place on May 21, 2015. The Appellant's rebuttal submission was due by noon on June 5, 2015. The Director was to notify the Appellant by noon on June 10, 2015, if she intended to cross-examine on the rebuttal affidavit. Cross-examination, if any, was to be conducted on June 15, 2015.

[59] On February 20, 2015, the Board acknowledged a telephone call between Board counsel and the Appellant's counsel regarding how to provide confidential information in affidavit form. The Board advised the affidavits could be provided where portions are identified as confidential commercial information, and the information would not be made available to the public without an order of the Board, providing adequate notice to the Appellant before making such an order. The Parties were asked to advise the Board in writing, as soon as possible, if there were concerns with this approach.

[60] On March 9, 2015, the Director notified the Board that she had contacted the Appellant regarding extending the expiry date on the Preliminary Certificate.

[61] On April 14, 2015, the Board received an email from the Appellant to which a letter was attached confirming the Appellant's request to extend the expiry date to March 27, 2017. The letter also included a request to change a number of conditions set out in the Certificate.

[62] On April 14, 2015, the Director provided her response to the Appellant, noting the changes to the conditions go to the substance and nature of the appeal and would be decided when the Minister receives the Board's Report and Recommendations.

[63] On April 15, 2015, the Director provided an updated Record and included the document entitled Guideline Regarding Appurtenance (the "Guideline") policy. The updated documents referred to the extension of the expiry date on the Certificate.

[64] On April 17, 2015, at 10:27 am, the Appellant stated it did not receive the decision of the Director regarding the additional amendments, requested in a March 26, 2015, letter, until April 14, 2015. Further, the Appellant stated the Guideline was included in the updated Record, but the Appellant was not referred to the Guideline prior to April 14, 2015. The



Appellant stated it raised "...legal concern as the Guideline purports to interpret the Water Act in a manner that requires more careful consideration than time permits." The Appellant requested additional time to provide its submission in order to consider the Guideline since it appeared the Director relied on the Guideline to interpret the *Water Act* and direct the discretion of the Director in a manner that affects the appeal. The Appellant said it was prepared to provide the affidavit in support of the submission, but it wanted additional time to revise its arguments in light of the Guideline and given the late response to the request for the amendments.

[65] On April 17, 2015, the Director responded to the Appellant's email. The Director submitted that appurtenance is a central issue to the appeal. The Director explained she intended to attach the Guideline to her submission, but decided to add the Guideline as part of the Record as appurtenance is always an issue considered when issuing a licence or preliminary certificate even if the Guideline itself is not specifically consulted. The Director explained the Guideline is publicly available, and the Appellant had sufficient time to consider the issue of appurtenance in its submission. The Director stated that, if appurtenance was a new issue to the Appellant, it could be addressed in the Appellant's rebuttal submission.

[66] On April 17, 2015, at 1:48 pm, with no submission for the Appellants having been received, the Director requested the Board revisit the Director's motion to dismiss the appeal pursuant to section 95(5)(a)(iv) of EPEA and as stated in the Board's October 28, 2014 letter advising the Appellant that if further deadlines were not met, the Board would reconsider the Director's motion to dismiss the appeal. The Director noted the Board set deadlines for the submissions on January 29, 2015, and the Appellant did not raise any objections or concerns with the deadline. The Director stated that, given it was a staggered submission process, the Appellant could have addressed any new issues raised in the Director's submission in the Appellant's rebuttal. The Director noted the Appellant failed to meet the Board's deadline. The Director explained meeting the deadline was important so the Director could review the submission and affidavit and, if required, arrange for the court reporter and secure space for the cross-examination on the affidavit.

[67] On April 17, 2015, at 2:09 pm, the Appellant provided an affidavit. The Appellant stated the new information received by the Director on April 15, 2015, and reviewed

by the Appellant late April 16, 2015, regarding the Guideline and point of use raised an issue for the Appellant and the water bottling industry and was inconsistent with other licences. The Appellant said the Guideline provided insight into the reasons for the interpretation given by the Director which the Appellant did not previously have. The Appellant stated it would try to have a complete argument by the end of the day, but it would not be as complete as it would have been had the Appellant had prior knowledge of the Guideline. The Appellant said that, if the appeal is dismissed, the opportunity for new and diversifying business in the community would be lost.

[68] On April 17, 2015, at 2:24 pm, the Appellant asked the Board to respond to the request for additional time to file the Appellant's submission.

[69] On April 17, 2015, the Board wrote to the Parties, noting the Appellant did not provide its submission by the deadline set out in the schedule provided by the Board on January 29, 2015. The Board stated that, if the Appellant considered the Guideline as new evidence, it could be responded to in the rebuttal submission, and it did not provide a reason to extend the deadline for filing the submission. The Appellant was advised to provide its submission as soon as possible in order to preserve any right it may have to continue the appeal. The Board also noted the affidavit was received two hours past the deadline even though the Appellant indicated it could have been provided in time.

[70] In this same letter the Board acknowledged the Director's request to have the Board reconsider the Director's application to dismiss the appeal for not meeting the Board's deadlines. The Board asked the Appellant to provide a response to the request by April 20, 2015, at 9:00 am. The Director was allowed to provide additional comments by the same deadline. The Parties were advised that the Board would be looking at whether deadlines were met throughout the appeal process.

[71] On April 20, 2015, at 8:34 am, the Board received the Appellant's submission for the hearing. No comments were received regarding the request to dismiss the appeal.

[72] On April 20, 2015, at 9:04 am, the Board received additional comments from the Director. The Director noted the Appellant missed five Board deadlines in the appeal process,

including four deadlines to provide status updates between the first mediation meeting and a second scheduled mediation meeting. The Director noted the failure to provide scheduled updates led the Board to close the mediation process and proceed to a hearing. The Director noted the last missed deadline was for the Appellant's written submission and supporting affidavit. The Director stated the Board has, in the past, exercised its discretion to dismiss an appeal when the appellant is not responding in a timely manner. The Director submitted the Appellant exhibited a pattern of behaviour whereby it had not moved the matter forward in a timely manner. The Director stated the Appellant was cautioned on numerous occasions about missing deadlines, but it continued to disregard the deadlines. The Director stated the Appellant did not provide cogent reasons for the delays or non-responses. The Director explained the delays in providing the written submission would likely delay the appeal process as the deadlines and the opportunity to cross-examine on affidavits all hinge on each party meeting their respective submission deadlines. The Director requested the Board dismiss the appeal for failing to comply with multiple written notices pursuant to section 95(5)(a)(iv) of EPEA. The Director did not believe extensions should be granted where the Appellant failed to meet deadlines on multiple occasions.

[73] On April 20, 2015, at 2:16 pm, the Appellant responded to the Director's request to dismiss the appeal. The Appellant said it was unavailable to respond to the Director's letter until the afternoon of April 20, 2015. The Appellant stated it would experience considerable prejudice if the appeal was dismissed, and the Director did not experience prejudice as a result of the affidavit being filed prior to the close of business on April 17, 2015, and receiving the submission on April 20, 2015.

[74] On April 21, 2015, at 8:05 am, the Board notified the Parties that, due to the Appellant's failure to comply with the submission filing deadline and non-compliance with other deadlines set by the Board in respect of this appeal, the Board allowed the application filed by the Director and dismissed the appeal pursuant to sections 92 and 95(5)(a)(iv) of EPEA. These are the Board's reasons.

### **III. ANALYSIS**

[75] Pursuant to section 95(5)(a)(iv) of EPEA, the Board has the authority to dismiss an appeal if the appellant fails to respond to the Board's request for information.

[76] In this case, the Appellant failed to meet numerous deadlines to provide information to the Board and failed to respond to the Board's questions. The Appellant did not provide any reason for failing to respond within the deadlines set by the Board, except on October 27, 2014, when the Appellant explained computer issues prevented it from filing the response to the Board's letters in time. The Appellant did not notify the Board by telephone of the computer problems nor ask for an extension because of the computer issues. The Board notes the Appellant responded only after the Director filed a motion to dismiss the appeal for failing to respond to a number of the Board's letters. The Board allowed the appeal to continue through the mediation process, but it was the Appellant's failure to respond to the Board's request for status reports, even after the Board extended the time limit to respond, that ended the mediation process and initiated the hearing process.

[77] Throughout the appeal process, including while the Parties were continuing discussions through mediation, the Board extended deadlines for the Appellant to respond. Even with the extensions, the Appellant did not respond on many occasions. In most instances when updates were required by the Parties, the Appellant did not respond at all.

[78] In the correspondence from the Board, the Board continued to warn the Appellant, in bolded text, that failure to respond by the timelines set by the Board could result in the appeal being dismissed. The Appellant failed to heed the Board's warnings.

[79] The Appellant raised concerns regarding confidential documents and redacted documents in the Record. The Board asked the Appellant repeatedly to provide additional comments regarding the Appellant's concern about the documents included in the Record. However, it was not until after many attempts to receive a response did the Appellant provide comments on the redacted documents. The Appellant did not provide additional comments on any other confidential documents in the Record other than those identified by the Director and kept as confidential by the Board. Even though the Appellant raised the confidential documents

and redacted issues as concerns, by failing to respond to the Board regarding these issues, it appeared the Appellant was not as concerned about the documents as first suggested.

[80] The Appellant's pattern of failing to meet the deadlines set by the Board continued to the submission process for the hearing. The Appellant failed to provide its submissions within the specified timeline. Two hours before the submission was due, the Appellant argued the Director had introduced new evidence, the Guideline, and as a result, additional time was required to provide the submission. The Board clearly instructed the Appellant to provide its submission as soon as possible, because receiving the Guideline two days prior to the deadline was not sufficient reason to delay filing the submission. The Appellant could have dealt with the Guideline in its rebuttal submission, as it would have had to do if the Director had included the Guideline as part of her response submission. The Appellant could have filed its initial submission on time, and then asked the Board for the opportunity to provide a supplemental submission to address the Guideline. Instead, the Appellant chose to delay providing its initial submission even after the Board advised the Appellant to file the initial submission as soon as possible and address the Guideline in the Appellant's rebuttal submission. The Appellant explained it had to revise its submission in order to address the Guideline. With respect, the Board cannot accept this as a valid reason for filing the submission for the hearing more than two days late.

[81] The Appellant stated in its 2:09 pm email that it would try to provide the submission by the end of the day on April 17, 2015, but it still delayed providing the initial submission for more than two days. Even the affidavit, which the Appellant stated was ready to be filed before the submission deadline, was not received until two hours after the deadline.

[82] The Board provided the Parties with the opportunity to provide comments on the Director's motion to dismiss the appeal, and the deadline was set for 9 am on April 20, 2015. This was the opportunity for the Appellant to argue its case that the appeal should not be dismissed. The Appellant failed to meet this deadline as well, being fully aware this was its chance to persuade the Board not to dismiss the appeal. Instead, the Appellant provided its

response at 2:16 pm, five hours after the set deadline, again demonstrating the Appellant's lack of regard for the deadlines set by the Board.<sup>4</sup>

[83] In its April 17, 2015 email to the Board, the Appellant said part of the delay in providing the initial submission was due to the delay in receiving a response from the Director regarding the Appellant's request to amend the Certificate. This explanation is not a valid reason for delaying the initial submission. Although it may have been the Appellant's attempt to limit arguments on the issues, the time for discussing the amendments was at mediation which had to be closed due to the Appellant's failure to act. The issues were set by the Board on January 13, 2015, and the Appellant was expected to address the issues and provide submissions as scheduled.

[84] The Board sets submission deadlines in order to have a fair process for all of the Parties. The Board provided the submission schedule to the Parties on January 29, 2015, and told the Parties to notify the Board if they had any concerns regarding the schedule. No concerns were received. The Board had set the schedule in order to accommodate the Appellant's counsel, who was unavailable in February and March 2015. Given the timelines in the schedule, it was important for the Parties to meet the deadlines to ensure the process remained fair for the both Parties.

[85] Based on the repeated pattern of failing to respond to the Board's requests for information and for failing to meet the deadline for filing its submission without a valid reason, the Board grants the Director's motion and dismisses the appeal under sections 92 and 95(5)(a)(iv) of EPEA.

#### **IV. DECISION**

[86] For the foregoing reasons and pursuant to sections 92 and 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal filed by Palmer Ranch (1984) Ltd. for failing to respond to the Board in a timely manner.

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<sup>4</sup> On the 25 requests made by the Board for updates or information, the Appellant responded on time with complete information six times. For 12 of the requests, the Board did not receive a response, four responses were late (including the hearing submission), two were deficient, and one was late and deficient.

Dated on May 20, 2015, at Edmonton, Alberta.

“original signed by”  
Alex MacWilliam  
Acting Board Chair