

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – September 29, 2015

**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 section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** appeals filed by Valerie Pratch, Darren  
Pratch, and Aline Pratch with respect to Approval No. 00344519-  
00-00 and Amending Approval No. 00344519-00-01 issued under  
the *Water Act*, R.S.A. 2000, c. W-3, to ATCO Electric Limited by  
the Director, Northern Region, Alberta Environment and  
Sustainable Resource Development.

Cite as: *Pratch v. Director, Northern Region, Alberta Environment and Sustainable Resource Development, re: ATCO Electric Limited* (29 September 2015), Appeal Nos. 15-013-018-D (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Panel Chair.

**PARTICIPANTS:**

**Appellants:** Ms. Valerie Pratch, Mr. Darren Pratch, and Ms. Aline Pratch.

**Approval Holder:** ATCO Electric Limited, represented by Mr. Shawn Munro, Bennett Jones LLP.

**Director:** Mr. Steve Cook, Director, Northern Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

In February 2014, Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval under the *Water Act* to ATCO Electric Limited to alter a wetland in the County of St. Paul. An Amending Approval was issued on February 24, 2015, extending the expiry date of the Approval to April 30, 2016. Ms. Valerie Pratch, Mr. Darren Pratch, and Ms. Aline Pratch appealed the Approval and Amending Approval on June 4 and 5, 2015.

The appeals of the Approval were filed 16 months after the 7-day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked the Pratches to provide their reasons for filing their appeals past the prescribed time limit and why the Board should extend the deadline. They were also asked to explain their participation in the public hearing held by the Alberta Utilities Commission (AUC) in respect of the ATCO Electric Limited project to which the *Water Act* Approval related.

Only in exceptional circumstances will the Board extend the time to file a Notice of Appeal. After reviewing the Pratches' submissions, the Board found no exceptional reasons existed for filing the Notices of Appeal of the Approval 16 months after the time prescribed in the *Water Act*.

The Board expressed concern regarding AESRD's practice of asking local municipalities to post notice of a decision on their public bulletin boards but not requiring verification from them that notice was actually posted.

Pursuant to the legislation, if the Pratches participated in an AUC hearing at which all of the concerns raised in the Notices of Appeal were adequately dealt with, the Board must dismiss their appeals. The Board found the Pratches had participated in the AUC hearing and their issues were heard by the AUC. Therefore, the Board dismissed the appeals of the Approval.

The Board also noted that a decision of AESRD extending the expiry date on the Approval is not appealable.

The Board dismissed the appeals of the Approval and Amending Approval.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board’s decision regarding the appeals filed by Ms. Valerie Pratch, Mr. Darren Pratch, and Ms. Aline Pratch (the “Appellants”).

[2] Alberta Environment and Sustainable Resource Development (“AESRD”)<sup>1</sup> issued an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to ATCO Electric Limited (the “Approval Holder”) in February 2014 to alter a wetland in the County of St. Paul. On February 24, 2015, AESRD issued an Amending Approval extending the expiry date of the original Approval. The Appellants filed appeals of the Approval and Amending Approval.

[3] As the appeals of the Approval were filed outside the 7-day appeal period, the Environmental Appeals Board (the “Board”) asked the Appellants to provide reasons why the Board should exercise its discretion to extend the appeal period. The Appellants were also asked to provide further information regarding their participation at the public hearing on the Approval Holder’s project held by the Alberta Utilities Commission (“AUC”).

[4] The Board dismissed the appeals of the Approval because the Appellants did not demonstrate exceptional circumstances existed to extend the appeal period. The Board dismissed the appeals of the Amending Approval because a decision to extend the expiry date of an approval is not appealable under the legislation. The Board also found the appeals of the Approval had to be dismissed because the Appellants participated in the AUC hearing at which all of their issues were adequately dealt with.

## **II. BACKGROUND**

[5] On February 4, 2014, the Director, Northern Region, Alberta Environment and Sustainable Resource Development (the “Director”), issued Approval No. 00344519-00-00 under the *Water Act* (the “Approval”) to ATCO Electric Limited to alter a wetland. The Approval allowed for the placing, constructing, operating, maintaining, removing, and disturbing

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<sup>1</sup> At the time the Approval and Amending Approval were issued, the Department was called Alberta Environment and Sustainable Resource Development. As of May 24, 2015, it is now called Alberta Environment and Parks.

works in or on any land, water, or water body for the purpose of altering wetlands located at 58-9-W4M, 59-9-W4M, 60-9-W4M, and 61-9-W4M in the County of St. Paul. On February 24, 2015, the Director issued Amending Approval 00344519-00-01 (the “Amending Approval”) extending the expiry date of the Approval to April 30, 2016.

[6] On June 4 and 5, 2015, the Board received Notices of Appeal from the Appellants appealing the Approval and Amending Approval and requesting a stay of the Director’s decision.

[7] In correspondence dated June 8, 2015, the Board acknowledged receipt of the Notices of Appeal and notified the Approval Holder and Director. In this letter, the Board noted the Notices of Appeal were filed after the 7-day appeal period for approvals issued under the *Water Act*.<sup>2</sup> The Board asked the Appellants to explain why the appeals were filed after the time limit and to provide reasons why the Board should exercise its statutory discretion to extend the appeal period. The Board also noted that it appeared the Amending Approval extended the expiry date of the Approval, and the extension of an expiry date is not a decision that can be appealed to the Board. The Appellants were asked to provide further information regarding the appeals of the Amending Approval. The Board also asked the Appellants to provide answers to the stay questions.<sup>3</sup>

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<sup>2</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 ...

(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....”

<sup>3</sup> The stay questions asked were:

- “1. What are the serious concerns of Ms. Valerie Pratch, Mr. Darren Pratch and Ms. Aline Pratch that should be heard by the Board?
2. Would Ms. Valerie Pratch, Mr. Darren Pratch and Ms. Aline Pratch suffer irreparable harm if the stay is refused?
3. Would Ms. Valerie Pratch, Mr. Darren Pratch and Ms. Aline Pratch suffer greater harm if the stay was refused pending a decision of the Board, than ATCO would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?”

[8] The Board noted that it appeared the Appellants were parties to a hearing held by the AUC relating to the Approval Holder's project. The Board asked the Appellants to provide submissions as to whether they received notice of or participated in or had the opportunity to participate in a hearing or review under an Act administered by the AUC at which all of the matters included in the Notices of Appeal were adequately dealt with.<sup>4</sup>

[9] The Appellants provided their responses to the Board on June 11, 2015.

[10] On June 15, 2015, the Board requested the Director provide a copy of the instructions the Director sent to the Approval Holder on how it was to provide notice of the decision. The Board also requested the Approval Holder confirm the instructions were carried out.

[11] In a letter dated July 17, 2015, the Director explained AESRD sent the Notice of Decision to the County of St. Paul (the "County") and requested that it be posted on the County bulletin board for seven days. The Director stated that public notice of the Amending Approval was not provided because it only authorized the extension of the expiry date of the Approval.

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<sup>4</sup> Section 95(2)(a) of EPEA states:

"Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review...."

Section 95(5)(b)(i) of EPEA provides:

"The Board shall dismiss a notice of appeal if in the Board's opinion

- (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with...."

[12] On July 22, 2015, the Approval Holder confirmed no instructions were received and no further actions were carried out in respect of the Notice of Decision. The Approval Holder said that some, but not all, of the relevant landowner consents had been obtained. As a result of the Appellants' Notices of Appeal and a review of its record, the Approval Holder advised the Director that its previous communication indicating all landowner consents had been received was in error. The Approval Holder noted that landowner consent was only one of the factors considered by the Director when assessing the requirement to provide public notice of the application.

[13] On July 29, 2015, the Board wrote to the County asking it to confirm the Notice of Decision was posted on its public bulletin board as required in AESRD's February 19, 2014 letter.

[14] On August 14, 2015, the County notified the Board that the February 19, 2014, email was no longer in its email system, and the person who would have received the email had retired from the County. The County stated it could not confirm whether the Notice of Decision was posted.

### **III. SUBMISSION**

[15] The Appellants explained they did not receive notice of the Approval until June 2, 2015, and they submitted their Notices of Appeal within the 7-day time limit. They stated they were not notified of the Approval and only became aware of it through their own initiative.

[16] The Appellants confirmed they attended the AUC hearing on November 5, 2013, but they questioned how their participation in the AUC hearing could possibly deal with an application made under the *Water Act* that was approved on February 4, 2014. The Appellants stated they appealed the Approval because they did not have the opportunity to object to the application as landowners, and they were not notified of the application under the *Water Act*.

[17] The Appellants noted that in AUC Decision 2013-446, the AUC viewed the wetlands as important considerations for the route, and the AUC expected the Approval Holder to honour the commitments set out in the Provincial Wetland Restoration/Compensation Guide.



The Appellants said they expected the Approval Holder would have given fair notice to the landowners, who are stewards of the wetlands, and given them an opportunity to represent themselves.

[18] The Appellants noted that, in the Approval application, it stated that landowner signatures had been acquired when in fact they had not. The Appellants said that eight of the wetlands under review could not be accessed by the Approval Holder, and they questioned whether Julien Lake was reviewed or not. The Appellants also questioned when an environmental review was completed and whether a copy of the review was provided.

## **IV. Analysis**

### **A. Late Filed Appeals**

[19] Section 116 of the *Water Act* sets the time limits for filing a Notice of Appeal.<sup>5</sup> The appeal period for an approval issued under the *Water Act* is seven days. The appeal period starts upon receipt of notice of the decision or the last provision of notice of the decision that is appealed from.

[20] Section 116(2) of the *Water Act* allows the Board to extend the appeal period if there are sufficient grounds to do so.<sup>6</sup>

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<sup>5</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...

(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...”

<sup>6</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.”

[21] The Appellants filed their Notices of Appeal 16 months after the Approval was issued. The Appellants stated they were not notified when the Approval was issued even though the wetland impacted by the Approval is on their property.

[22] When an approval is issued, the project proponent may then proceed with the approved project. A prudent proponent would wait until the statutory appeal period has passed before proceeding with the project because, if an appeal is filed and is successful, the proponent may be required to return the site to its 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 has expired. 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.

[23] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.<sup>7</sup> The onus is on the Appellants to demonstrate to the Board that the time limit should be extended to allow the appeal. Of particular concern in this case is that the Appellants filed their Notices of Appeal 16 months after the Approval was issued.

[24] After reviewing the Appellants' submission, the Board has determined the appeals must be dismissed and bases this decision on two grounds – the need for certainty in the appeal process and the Appellants' failure to meet the onus in applying for an extension.

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<sup>7</sup> See: *Town of Valleyview v. Director, Northern Region, Regional Services, Alberta Environment* (1 August 2003), Appeal No. 03-009-D (A.E.A.B.); Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Dyck v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.); *Shennan et al. v. Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc.* (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association v. Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.).

1. Certainty

[25] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. Once a decision is made to issue or not to issue an approval, there is an appeal period in which the applicant for the approval or anyone who is directly affected (and who filed a statement of concern) can file an appeal. The specific appeal period is stipulated in the legislation so that all parties – the applicant, persons who are directly affected by the decision, and the regulator – know when the process is complete.

[26] Once this process is complete, the approval can be acted upon and all of the parties can move forward on that basis. The approval holder can carry on with its business affairs and make decisions based on the known terms and conditions of the approval. If no time limits were placed on the appeal period, a successful applicant for an approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the approval.

[27] The time limits included in the legislation, and the certainty they create, balance the interests of all the parties.

[28] In this case, the Board is concerned with the amount of time that has passed between the end of the legislated appeal period and the filing of the Notices of Appeal.

[29] The Approval Holder went through a public hearing process before the AUC. That hearing involved the review of technical and scientific information and the public was allowed to participate at the hearing. The issuance of the Approval resulted from the Director's review of all the available information, including the information provided at the AUC hearing and the report prepared by the AUC containing its recommendations.

[30] The Appellants were aware of the proposed project and actually participated in the AUC hearing on the project.<sup>8</sup> If the Appellants had concerns about the proposed project, these concerns should have been raised during the AUC hearing.

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<sup>8</sup> See: ATCO Electric Ltd. (St. Paul Transmission Project) AUC Decision 2013-446 (December 20, 2013) at Appendix A – Proceeding Participants.

[31] Although the Board understands the position of the Appellants that they should have direct notice of the decision when the project runs through their lands, this is not required by the legislation. The Board has stated in previous decisions that direct notice is not practical in most cases, and it generally cannot be used as a reason to extend the appeal period. In this case, public notice of the Director's decision was provided by requesting the County of St. Paul to post the Notice of Decision on its public bulletin board, although It Is unknown whether It was actually posted.

[32] The Appellants were aware of the Approval Holder's intent to apply for an Approval from AESRD to cross the wetlands.<sup>9</sup> The Appellants must take some responsibility to see if an approval was subsequently issued, either by looking on the AESRD website or by contacting AESRD to check on the status of the approval process.

[33] Therefore, taking into consideration the importance of providing a reasonable level of certainty in any decision made by the Director, the Appellants have not presented sufficient reasons to justify allowing the appeal to proceed at this late date. Accordingly, the appeals must be dismissed.

[34] The Board is concerned with how public notice of the decision to issue the Approval was provided. The Board acknowledges that posting on the County's public bulletin board may not be the most effective manner to ensure those who are directly affected are made aware of a decision, it is, nonetheless, one method of providing notice. What concerns the Board is that the Director requested the County post the Notice of Decision on the bulletin board, but did not require it to provide proof that it was, in fact, posted. It may be advisable that, in the future, the Director also request the County to provide a letter indicating the notice was posted in the manner required by the Director. This could then be kept on file and become part of the Director's record. Having the letter on file could prevent circumstances such as this where no one can confirm if the Notice of Decision was actually posted. The Board notes that where no

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<sup>9</sup> See: ATCO Electric Ltd. (St. Paul Transmission Project) AUC Decision 2013-446 (December 20, 2013) at paragraph 194.

evidence can be brought to demonstrate the notice was actually posted, it may be possible to argue the appeal period has not yet started to run.<sup>10</sup>

## 2. Extension of Time

[35] The second consideration the Board examined was whether the Appellants had provided sufficient reasons to grant an extension of time to file an appeal. The Appellants must show that extenuating or special circumstances existed that prevented them from filing their appeals within the legislated timeframe.

[36] The Appellants were asked to provide reasons why an extension of time should be allowed. In response, the Appellants simply stated they were not aware the Approval was issued, and they expected, as owners of land near the site of the proposed project, they would have been notified directly. The Board does not regard these reasons as demonstrating the special circumstances necessary to warrant the Board extending the appeal period, especially more than 16 months after the appeal period ended. Without a valid reason for extending the appeal period, the Board will not do so.

[37] Based on the above, the Appellants have not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeals must, therefore, be dismissed.

## **B. AUC Hearing**

[38] The Appellants acknowledged they had participated in a hearing held by the AUC in 2013 regarding the proposed project.<sup>11</sup>

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<sup>10</sup> See: *Tomlinson and Jackson v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *County of St. Paul* (05 March 2015), Appeal Nos. 14-021 and 12-022-D (A.E.A.B).

<sup>11</sup> See: *ATCO Electric Ltd. (St. Paul Transmission Project)* AUC Decision 2013-446 (December 20, 2013) at Appendix A – Proceeding Participants.

[39] The legislation does not allow the Board to hear appeals of issues that have been adequately dealt with by another tribunal such as the AUC. This is done to prevent duplication of public hearing processes.

[40] In a previous decision, *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection*,<sup>12</sup> the Board noted that what is now section 95(5)(b)(i) was intended to avoid duplication in the hearing process. The Board stated:

“The jurisdiction of this Board to become involved in a ‘review’ of [Energy Resources Conservation Board (“ERCB”) (now AER)] decisions that led to approvals which are eventually appealed here is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence.”<sup>13</sup>

[41] The Board also stated: “The Board interprets section 87(5)(b)(i) [(now section 95(5)(b)(i))] of the *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually.”<sup>14</sup> The Board concluded that: “...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB [(now AER)].”<sup>15</sup> Although these discussions related to the ERCB (now AER), the same principles apply to appeals relating to projects reviewed in hearings held before the AUC.

[42] The Appellants did not argue that the issues they raised in their Notices of Appeal were not adequately with at the AUC hearing. In reviewing the AUC’s decision, it appears to address the impact of the project on wetlands in the area, including impacts on the wetlands themselves and the birds and animals that rely on the wetlands.<sup>16</sup> Mitigation measures were also

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<sup>12</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), (the “*Carter Group*”).

<sup>13</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 6.

<sup>14</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 7.

<sup>15</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 7.

<sup>16</sup> See: ATCO Electric Ltd. (St. Paul Transmission Project) AUC Decision 2013-446 (December 20, 2013) at paragraphs 174, 177, 183, 184, 187, 192-195, 198, 201, 203-206, 209, 211-213, and 220-222.

looked at by the AUC. The Board is of the view that the issues raised by the Appellants that are within this Board's jurisdiction to consider were adequately dealt with by the AUC.

[43] Since all of the Appellants' issues were adequately dealt with by the AUC, pursuant to section 95(2)(a) and 95(5)(b)(i) of EPEA, the Board must dismiss the appeals.

### **C. Amending Approval**

[44] Section 115 of the *Water Act* identifies the decisions made by AESRD that can be appealed. A decision to amend an approval to extend its expiry date is expressly listed as not being appealable.<sup>17</sup> As the Board's jurisdiction is limited to what is set out in the enabling legislation, the Board cannot accept an appeal of an amending approval if the sole purpose of the amendment was to extend the expiry date.

[45] As the Amending Approval only extends the expiry date of the Approval, it cannot be appealed and the Board must dismiss the appeals.

## **V. STAY APPLICATION**

[46] The Appellants applied for a stay of the Approval. A stay can only be considered when there is a valid appeal before the Board. In this case the appeals have been dismissed and, therefore, the Board cannot consider the stay request.

## **VI. DECISION**

[47] The Board denies the request for an extension of the time limit for the Appellants to file their Notices of Appeal of the Approval, and therefore, the Board cannot accept the Notices of Appeal as being validly before the Board. The Board also finds it must dismiss the

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<sup>17</sup> Section 115(2) of the *Water Act* provides:

“Notwithstanding subsection (1), a notice of appeal may not be submitted...

(c) with respect to an amendment...

(i) to extend the expiry date of an approval, preliminary certificate or licence....”

appeals because the Appellants participated in the AUC hearing in which all of their concerns were adequately addressed.

[48] The Board cannot accept the appeal of the Amending Approval because it is not an appealable decision under EPEA.

[49] Therefore, the Board dismisses the Appellants' Notices of Appeal for the Approval and Amending Approval.

Dated on September 29, 2015, at Edmonton, Alberta

Original signed by  
Alex MacWilliam  
Panel Chair