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# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – August 28, 2018

**IN THE MATTER OF** sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** an appeal filed by Beaverlodge River Arctic Grayling Renewal Society with respect to a decision on *Water Act* Application No. 001-00374356 by the Director, Peace Region, Alberta Environment and Parks.

Cite as: *Beaverlodge River Arctic Grayling Renewal Society v. Director, Peace Region, Alberta Environment and Parks* (28 August 2018), Appeal No. 16-025-D (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Board Chair.

**SUBMISSIONS BY:**

**Appellant:** Beaverlodge River Arctic Grayling Renewal Society, represented by Mr. Jerry Third.

**Director:** Mr. Okey Obiajulu, Director, Peace Region, Alberta Environment and Parks, represented by Mr. Gabriel Hill, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

Alberta Environment and Parks (AEP) deemed an application for an approval submitted by the Beaverlodge River Arctic Grayling Renewal Society (the Society) for the construction of a fish ladder as incomplete and closed the file.

The Society appealed the decision and AEP filed a motion to dismiss the appeal on the basis that its decision was not appealable.

The Board received and reviewed submissions on whether the appeal was properly before the Board.

Based on the submissions provided, the Board found the Society did not complete the application as requested by AEP since the Society had not provided documentation demonstrating the owner of the fish ladder (the Town of Beaverlodge) allowed access to the site. The decision of AEP to return the application as incomplete due to failure to comply with the requirement to obtain the consent of the owner of the undertaking is not an appealable decision under the legislation. The Board dismissed the appeal.

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## **I. INTRODUCTION**

[1] This decision and supporting reasons relate to a preliminary matter raised in respect to *Water Act* Application No. 001-00374356 (the “Application”) made under the *Water Act*, R.S.A. 2000, c. W-3. The Application was submitted by the Beaverlodge River Arctic Grayling Renewal Society (the “Appellant”) for the construction of a fish ladder in the Beaverlodge River. The Director, Peace Region, Alberta Environment and Parks (“AEP” or the “Director”) deemed the application incomplete because the Appellant did not obtain consent from the disposition holder and licence holder, which in both cases is the Town of Beaverlodge (the “Town”).

[2] The Appellant filed a Notice of Appeal with the Environmental Appeals Board (the “Board”) appealing the Director’s decision to return the application as incomplete.

[3] The Director raised a preliminary motion asking the Board to dismiss the appeal on the basis the Board lacked jurisdiction to hear the matter as, under section 115(1)(g) of the *Water Act*,<sup>1</sup> the Appellant did not have standing to appeal the decision.

[4] In response to the motion, the Board received and reviewed written submissions from the Appellant and the Director.

## **II. BACKGROUND**

[5] On August 3, 2016, the Director notified the Appellant the Application was deemed incomplete because it did not satisfy section 37(4) of the *Water Act*.<sup>2</sup> The Director noted the Appellant required consent from the Town of Beaverlodge, as disposition holder and Licence

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<sup>1</sup> Section 115(1)(g) of the *Water Act* states:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ... the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate....”

<sup>2</sup> Section 37(4) of the *Water Act* provides:

“If an applicant for an approval does not own the land in fee simple or the undertaking to which the approval is to be appurtenant, if required by the Director, the applicant must submit the written consent of the owner of the land or of the undertaking as part of the application for the approval.”

holder, in order to complete the Application requirements. The Director stated in his letter that, “[s]ince this additional information cannot be provided by the applicant, the application is deemed incomplete and is being returned to you and the file will be closed.”

[6] On August 9, 2016, the Board received a Notice of Appeal from the Appellant.

[7] On August 10, 2016, the Board acknowledged receipt of the Notice of Appeal and notified the Director of the appeal. In its letter, the Board noted the Director's decision may not be appealable. The Board asked the Appellant to provide written comments and asked the Appellant to provide a letter it received from the Director directing the Appellant to satisfy section 37(4) of the *Water Act* as part of the Application.

[8] The Appellant provided a written submission on September 12, 2016. Based on the submission, the Board asked the Director to provide a response and subsequently received a written submission from the Director on September 23, 2016. The Appellant was given the opportunity to provide a written rebuttal submission and did so.

### **III. SUBMISSIONS**

#### **A. Appellant**

[9] The Appellant stated the Director “passed” the responsibility for the fish ladder to the Town, and there was no way the Appellant could get consent from the Town for its application as the Town was “influenced” by employees of AEP.

[10] The Appellant explained it is a group of people who are very interested in getting the fish run going, and they want the fish to live in all the streams and rivers in the area.

[11] The Appellant said the permit for the fish ladder should be taken from the Town, and the Appellant would take over getting the permit and prove that its design would ensure successful fish runs every year.

**B. Director**

[12] The Director explained the Appellant submitted the Application for a *Water Act* approval of the Appellant's proposed refurbishment of the existing fish ladder, which is owned and operated by the Town. The Director said the fish ladder forms part of the Town's municipal water supply infrastructure, and the Town holds a Licence of Occupation under the *Public Lands Act*, R.S.A. 2000, c. P-40, in relation to the infrastructure and the public land on which it is located.

[13] The Director noted he had the following communications with the Appellant in which he explained to the Appellant that authorization from the Town was required to complete the Application:

1. December 8, 2015 email identified the information the Appellant was required to provide in support of the Application, including authorization letters from third parties;
2. January 7, 2016 email advising the Appellant that written consent from the Town allowing the Appellant access to the fish ladder and associated land was required and was critical to the Application's success. The email also noted that no written consent was included in the Application;
3. January 27, 2016 email indicating the Application remained incomplete, and advising the Appellant written consent (described as an "Access Agreement" with the Town), was required for the Application to be considered complete;
4. February 17, 2016 meeting with the Appellant in which the Director repeated the requirement for written consent from the Town in order for the Application to be complete and considered for approval; and
5. April 1, 2016 meeting with the Appellant in which the Director again informed the Appellant it needed to provide written consent from the Town for the Application to be complete.

[14] The Director stated the Town notified him on April 26, 2016, that it was proceeding with the fish ladder proposal provided by the Mighty Peace Watershed Alliance and would not be implementing the Appellant's proposal. The Director said that, based on this information, he concluded the Appellant would not have access to the fish ladder or have authorization to make its desired changes to the fish ladder.

[15] The Director explained he notified the Appellant on August 3, 2016, that, pursuant to section 37(1) of the *Water Act*,<sup>3</sup> the Application had not been submitted in a manner and form that was satisfactory to the Director and was, therefore, deemed incomplete and could not be considered for an approval.

[16] The Director submitted that a decision that an application is incomplete is not a decision that is included under section 115 of the *Water Act* and is, therefore, not appealable.

[17] The Director stated the Town owns and operates the fish ladder which is the subject of the Application and controls access to the land on which it is constructed. The Director said that, without consent from the Town, the Appellant would have no access to the fish ladder and no ability to implement the changes outlined in the Application.

[18] The Director noted section 37(4) of the *Water Act* requires an applicant, if required by the Director, to submit written consent from the owner of the land or the undertaking as part of the application if the applicant does not own the land or undertaking. The Director stated it was within his authority to require the Appellant to provide written consent from the Town as part of the Application.

[19] The Director said the Appellant was repeatedly told consent from the Town was a required part of the Application, but the Appellant did not indicate this written consent would be given. The Director noted no written consent from the Town was provided to him.

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<sup>3</sup> Section 37(1) of the *Water Act* states:

“A person who applies for an approval must

- (a) make an application to the Director in a form and manner satisfactory to the Director,
- (b) submit the information, including but not limited to plans and specifications, required by the Director,
- (c) pay the required fees, and



[20] The Director stated he properly exercised his discretion under section 37(4) of the *Water Act* to require written consent from the Town to access the fish ladder and land as a necessary part of the Application. The Director also stated he properly exercised his discretion under section 37(1)(a) of the *Water Act* to deem the Application incomplete when the Appellant failed to provide written consent from the Town as required.

[21] The Director noted a decision by the Director to deem an application incomplete is not a decision that is appealable to the Board.

[22] The Director requested the Board dismiss the appeal.

### **C. Rebuttal Submission**

[23] In its rebuttal submission, the Appellant outlined its concerns regarding the fish ladder project proposed by the Mighty Peace Watershed Alliance.

[24] The Appellant stated it was AEP's mandate to coordinate the return of the fish in the river and not the role of the Town.

[25] The Appellant stated it presented its design to Town council, but the Appellant was not provided enough time to explain the proposed project, because the Town was not interested in the design. The Appellant stated the Town council did not understand fish habits or water control.

[26] The Appellant believed the Director's decision in August 2016 interfered in the decision making of the Town to choose a contractor to construct the fish ladder. The Appellant questioned how it could get a letter of consent from the Town when the Town had been influenced by AEP, had blocked phone calls and emails from the Appellant, and had not met with the Appellant since April 2016.

[27] The Appellant felt the approval for the fish ladder should be taken from the Town and the Appellant be given the opportunity to demonstrate its design would be successful.

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(d) provide notice of the application in accordance with Part 8."

## IV. Analysis

[28] In order to have a valid appeal, the decision being appealed must be of the type set out in section 115 of the *Water Act*.<sup>4</sup> The Board does not have the jurisdiction to hear appeals of any decisions not included in this section.

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<sup>4</sup> Section 115 of the *Water Act* states:

- “(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:
- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
    - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108, or
    - (ii) by the approval holder or by any person who is directly affected by the Director’s decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;
  - (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted
    - (i) by the preliminary certificate holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108, or
    - (ii) by the preliminary certificate holder or by any person who is directly affected by the Director’s decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;
  - (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
    - (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108, or
    - (ii) by the licensee or by any person who is directly affected by the Director’s decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application or proposed changes was not provided;

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- (d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence;
  - (e) if the Director issues or refuses to issue a licence to the Government under section 51(2), the applicant for the licence and any directly affected person;
  - (f) the applicant, if the Director refuses to amend an approval, preliminary certificate or licence;
  - (g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate;
  - (h) the licensee, if the Director refuses to renew a licence;
  - (i) if the Director renews a licence where there has been a public review, any person who previously submitted a statement of concern in accordance with section 109;
  - (j) if the Minister takes over any works or undertaking, the approval holder, preliminary certificate holder or licensee or the owner of the works or undertaking;
  - (k) if the Director provides notice that no further applications for licences are to be accepted, a person who wishes to apply for a licence for any water that was the subject of the notice;
  - (l) the owner of the works, if the Minister issues an order with respect to the use of another person's works under section 52(3);
  - (m) if an inspector or the Director issues a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;
  - (n) if an inspector or the Director issues a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority;
  - (o) a person who is entitled to divert water pursuant to section 21 and who is affected by a declaration by the Director that a diversion of water must cease;
  - (p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing
    - (i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,
    - (ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,
    - (iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking, if the works or undertaking is the subject of an approval, or
    - (iv) the removal or otherwise rendering ineffective of any works or obstruction;
  - (q) if the Director requires a person to pay an administrative penalty, the person to whom the notice of the administrative penalty is directed;

[29] Although the Appellant expressed concern with the Director's arguments based on section 37 of the *Water Act*, this section of the Act is the starting point in assessing whether the Director was correct in declaring the Application incomplete. If the Application was incomplete, then there is no appeal right under section 115 of the *Water Act*.

[30] Under section 37(4) of the *Water Act*, the Director has the discretion to request the applicant provide proof it has acquired written consent from the person who owns the land or undertaking to which the approval will attach. In this case, the undertaking, which is the fish ladder, is owned by the Town and the Town holds a Licence of Occupation for the public land on which the undertaking is located. The Appellant does not disagree the Town has the responsibility of maintaining the fish ladder.

[31] The Director repeatedly told the Appellant, in writing and in person, that written consent from the Town was required before he could consider the Application complete. The onus was on the Appellant to obtain this consent and submit it to the Director. The Board understands there were issues between the Appellant and the Town which may have hindered the Appellant's ability to obtain written consent. However, there is no indication the Appellant tried to obtain consent other than attending one meeting to discuss the proposal. The Board understands it was a brief presentation, but there did not appear to be any further attempt to seek consent. The Appellant did not provide any written explanation to the Director why it could not obtain written consent from the Town.

[32] In this situation, where the Town owns the undertaking as well as the land where the undertaking is situated, it is reasonable for the Director to exercise his discretion to require written consent from the owner of the undertaking. If the Director proceeded processing the Application and decided to issue an approval, the Appellant would not have been able to conduct the work without consent from the Town. Obtaining an approval does not automatically give the applicant the right to access the site to conduct the approved work if the land is not under the applicant's control. Permission to access the site would still have to be obtained from the owner of the land or the undertaking.

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(r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in

[33] Under section 37(4) of the *Water Act* the Director can require the written consent of the owner of the undertaking or land before reviewing an application, and the Board considers that, in this case, it was a reasonable approach.

[34] The Board finds the Appellant did not submit a completed Application to the Director. The Director asked for, but never received, written confirmation the Appellants would have access to the site to conduct the proposed work. As such, the Director's decision to deem the Application incomplete was reasonable. There is no appeal right under section 115 of the *Water Act* from a decision of the Director to return an application as incomplete due to the failure to comply with section 37(4) of the *Water Act*. Therefore, the Board does not have jurisdiction to hear the appeal and, pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the appeal is dismissed.<sup>5</sup>

## V. CONCLUSION

[35] The Board finds the decision made by the Director to deem the Application incomplete cannot be appealed under section 115 of the *Water Act*. Therefore, the Board dismisses the appeal.

Dated on August 28, 2018, at Edmonton, Alberta.

"original signed by"  
Alex MacWilliam  
Board Chair

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accordance with section 109 who is directly affected by the Director's decision."<sup>5</sup>  
Section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act* provides:  
"The Board  
(a) may dismiss a notice of appeal if...  
(iii) for any reason the Board considers that the notice of appeal is not properly before it..."