

2020 ABEAB 24

September 2, 2020

**Via Email or Courier**

Mr. Brian Orr  
Box 928  
Bragg Creek, AB T0L 0K0  
(*Appellant*)

Ms. Alison Altmiks  
Alberta Justice and Solicitor General  
Environmental Law Section  
8<sup>th</sup> Floor, Oxbridge Place  
9820 – 106 Street  
Edmonton, AB T5K 2J6  
(*counsel for the Director, AEP*)

Mr. Davin MacIntosh  
Bow Water & Land G.P. Ltd.  
Durum Capital Inc.  
#500, 1414 – 8 Street SW  
Calgary, AB T2R 1J6  
(*Licence Holder*)

Ms. Maureen Bell  
Water Rights Inc.  
(*Representing Pirmez Creek Irrigation Society*)

Dear Ladies and Gentlemen:

**Re: Decision Letter\* – Bow Water & Land G.P. Ltd./Water Act Licence  
No. 00400952-00-00/Our File No.: EAB 20-005**

This is the decision of the Environmental Appeals Board (the “Board”) on the preliminary motions of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”) and Bow Water & Land G.P. Ltd. (the “Licence Holder”) requesting the Board dismiss the appeal filed by Mr. Brian Orr (the “Appellant”). The decision was made by the Acting Chair, Ms. Meg Barker.

The Board acknowledges receipt of: Mr. Orr’s August 21, 2020 and August 20, 2020 letters; Ms. Altmiks’ July 23 and August 10, 2020 emails; Ms. Bell’s August 10, 2020 email; and Mr. MacIntosh’s August 13, 2020 email. Copies of this correspondence are attached.

**Background**

On January 27, 2020, the Director issued Licence No. 00400952–00–00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3 (“*Water Act*”) to the Licence Holder. The Licence authorized the Licence Holder to operate works and to divert up to 1,332,158 cubic metres of water at a rate of diversion of 0.14 cubic metres per second from the Elbow River for

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\* Cite as: *Brian Orr v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks re: Bow Water & Land G.P. Ltd.* (2 September 2020), Appeal No. 20-005-DL1 (A.E.A.B.), 2020 ABEAB 24.

recreation and irrigation purposes. The Licence is a result of the transfer of a water allocation from a licence dated November 20, 1984, with Priority Number 1939-02-04-001 issued to the Pirmez Creek Irrigation Society ("Pirmez"). The Director issued a Notice of Decision on January 27, 2020, the same date as the Licence was transferred and issued to the Licence Holder.

On February 26, 2020, the Board received a letter from the Appellant, dated February 27, 2020, regarding the Licence. The Appellant's letter was marked "STRICTLY PRIVATE" and "ABSOLUTELY CONFIDENTIAL." In a letter dated March 2, 2020, the Board advised the Appellant that pursuant to section 35(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), it could not accept a Notice of Appeal on a confidential basis.<sup>1</sup> The Board requested the Appellant either provide confirmation that the Board could accept the letter publicly or complete the Notice of Appeal form.

On March 9, 2020, the Board received two letters from the Appellant. The first letter was dated March 8, 2020, and the second letter was dated February 27, 2020. In a letter dated March 12, 2020, the Board advised the Appellant that it was unclear to the Board whether the Appellant was still asserting that his correspondence was confidential. The Board restated to the Appellant that it could not accept a Notice of Appeal on a confidential basis. The Board provided a Notice of Appeal form and requested the Appellant complete the form.

On March 16, 2020, the Board received a further letter dated March 14, 2020, from the Appellant. The Board responded to the Appellant in a letter dated March 24, 2020, advising the Appellant that it was unclear to the Board why the Appellant was appealing the Licence and how the Appellant was directly affected by the Licence. The Board asked the Appellant to complete the Notice of Appeal form attached to the Board's letter or alternatively to answer the questions contained in the Notice of Appeal form and provide the information by April 17, 2020.

On April 2, 2020, the Board received a letter from the Appellant. The Board responded on April 9, 2020, and advised the Appellant that the Board was still unclear as to why the Appellant was appealing the Licence and how the Appellant was directly affected by the Licence. The Board repeated its request that the Appellant complete the Notice of Appeal form attached to the Board's letter or alternatively answer the Board's questions contained in the Notice of Appeal form. The Board asked the Appellant to reply by April 30, 2020.

On April 17, 2020, the Board received a further letter dated April 13, 2020, from the Appellant. This letter did not respond to the Board's request to complete the Notice of Appeal form, nor did it respond to the questions contained in the Notice of Appeal form. The Board acknowledged this correspondence on May 26, 2020.

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<sup>1</sup> Section 35(1) of the EPEA provides in part:

"35(1) Subject to this section,

- (a) the following documents and information in the possession of the Department that are provided to the Department in the administration of this Act must be disclosed to the public in the form and manner provided for in the regulations:

...

(viii) notices of appeal...."

None of the letters exchanged between the Appellant and the Board prior to the filing of the Notice of Appeal are a part of the appeal. However, the Board believes the history of the correspondence is relevant to explain the initial time delay between the Appellant's initial letter to the Board and the date the Notice of Appeal was accepted by the Board. The Board also believes it is relevant to illustrate the Appellant's repeated refusals to comply with a request of the Board for further information.

On June 29, 2020, the Board received a letter from the Appellant dated June 17, 2020. On July 2, 2020, the Board received a further letter from the Appellant dated June 30, 2020. The two letters indicated they were confidential and private. In the Board's letter dated July 6, 2020, it acknowledged receipt of the letters and returned the letters to the Appellant because they were marked confidential and private. The letters were not provided to the other parties to the appeal.

#### Notice of Appeal

On April 30, 2020, the Board received a letter from the Appellant which responded to the questions contained in the Notice of Appeal form. In a letter dated May 27, 2020, the Board acknowledged the appeal as being filed April 30, 2020, and notified the Licence Holder, Pirmez, and the Director of the appeal. In its letter, the Board indicated that its acceptance of the Notice of Appeal was subject to any preliminary motions the other parties to the appeal may wish to bring. The Board further requested that the Director provide the records related to the Licence.

On May 22, 2020, the Board received a letter from the Appellant dated May 16, 2020. On May 25, 2020, the Board received additional correspondence and documents from the Appellant, which he had intended to include with his May 16, 2020 letter. The Board acknowledged receipt of both letters on May 27, 2020, and forwarded the letters to the Licence Holder, Pirmez and the Director.

#### Motion to Dismiss

On June 5, 2020, the Board received correspondence from the Director, in which the Director brought a preliminary motion to dismiss the appeal. In the motion, the Director stated the Board had accepted the Notice of Appeal subject to any preliminary motions. In support of his motion, the Director commented that the Director's letter to the Appellant was dated January 27, 2020, and the Appellant received the letter on January 31, 2020. The Board understands the January 27, 2020 letter from the Director to be the Notice of Decision. The Director stated the deadline to file the Notice of Appeal for this type of decision is 30 days in accordance with section 116 of the *Water Act*. The Director further commented that while previous correspondence was exchanged between the Appellant and the Board, the Notice of Appeal filed and accepted by the Board is dated April 30, 2020.<sup>2</sup>

On June 17, 2020, the Board received correspondence from the Licence Holder in support of the Director's preliminary motion and providing further preliminary motions on behalf of the Licence Holder. The Licence Holder commented that it would be prejudicial to the Licence Holder to allow the appeal where there was no notice given to them of an appeal for four months. The Licence Holder further stated the Appellant had failed to provide reasons why

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<sup>2</sup> Director's email dated June 5, 2020.

the appeal period should be extended, and had failed to complete the Notice of Appeal form despite being asked to do so several times by the Board. The Licence Holder also stated the Director had given the Appellant considerable time and opportunity to set out his concerns, without new information being provided by the Appellant.<sup>3</sup> The Licence Holder further commented the Appellant was not a licensee, did not use the water authorized by the Licence for irrigation or any other purpose, did not have any right to use the water, and was not directly or adversely affected by the water transfer. The Licence Holder further stated the appeal was frivolous and vexatious.<sup>4</sup>

On June 18, 2020, the Board received correspondence from Pirmez, which concurred with, and adopted the Licence Holder's preliminary motions.<sup>5</sup>

On June 23, 2020, the Board acknowledged receipt of the emails from the Licence Holder and Pirmez. The Board set a process and schedule for receiving submissions on the Director's and the Licence Holder's preliminary motions between July 7, 2020 and August 4, 2020. The issues were:

- 1) Was Mr. Orr's Notice of Appeal filed outside of the timeline prescribed in the legislation (section 116 of the *Water Act*)<sup>6</sup>?
- 2) Is Mr. Orr directly affected by the transfer of Licence No. 00400952-00-00?
- 3) Is the appeal filed by Mr. Orr frivolous and vexatious?

The Appellant's initial written submission was due July 7, 2020. The other parties' response submissions were due by July 21, 2020. The Appellant's rebuttal submission was due by August 4, 2020. The Board's letter reminded the parties of the Board having strict timelines and included the following notice: "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 the *Environmental Protection and Enhancement Act*."

On July 14, 2020, the Board wrote to the parties and advised that the Board had not received a response from the Appellant to the questions asked in the June 23, 2020, letter from the Board. The Board restated the questions from the June 23, 2020, letter and revised the submission schedule to allow submissions to occur from July 27, 2020 to August 24, 2020. The Board's letter again reminded the parties of the need to respond to the Board in a timely manner and contained the following notice: "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 the *Environmental Protection and Enhancement Act*."

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<sup>3</sup> The history of the Appellant's communications with Alberta Environment and Parks regarding the Licence and the Director's response to the Appellant's letters can be found in the Notice of Decision. The Board does not have copies of the Appellant's letters mentioned in the Notice of Decision.

<sup>4</sup> Licence Holder's email dated June 17, 2020.

<sup>5</sup> Pirmez' email dated June 18, 2020.

<sup>6</sup> *Water Act*, R.S.A. 2000, c. W-3. Section 116 states in part:

"116(1) A notice of appeal must be submitted to the Environmental Appeals Board

...

(b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from."

The Board received a letter via fax from the Appellant on July 15, 2020. The Appellant identified the correspondence as confidential and private and did not respond to the Board's questions. As the letter was marked confidential and did not respond to the Board's questions, the letter was not provided to the other parties.

On August 22, 2020, the Board received a letter from the Appellant dated August 21, 2020, 24 days after the deadline. On August 25, 2020, the Board received documents from the Appellant dated August 20, 2020, intended to accompany the letter received on August 22, 2020. The Appellant's letter and documents did not answer the questions in the Board's correspondence of July 14, 2020.

### Legislation

Section 95(5)(a)(iv) of EPEA<sup>7</sup> provides: "(5) The Board 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 provides: "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."

### Analysis

Under section 95(5)(a)(iv) of EPEA, the Board has the authority to dismiss an appeal if an appellant fails to provide the information requested by the Board. In this case, the Board requested that the Appellant provide information in response to the preliminary motions of the Director and Licence Holder to dismiss the Appellant's appeal. The Board set a submission process twice and provided the Appellant two opportunities to respond to the questions asked by the Board. However, the Appellant repeatedly missed the deadlines.

### Conclusion

The Appellant has not met deadlines set by the Board or provided the information requested by the Board in response to the preliminary motions of the Director and the Licence Holder. Pursuant to section 95(5) of EPEA, the Board dismisses the appeal due to the Appellant's repeated missing of deadlines set by the Board and failure to respond to the Board's requests for further information.

Please do not hesitate to contact the Board if you have any questions. I can be reached toll-free by first dialling 310-0000, followed by 780-427-6207. I can also be contacted via email at gilbert.vannes@gov.ab.ca.

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<sup>7</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").

Yours truly,

Gilbert Van Nes  
General Counsel  
and Settlement Officer

Att.