

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – July 3, 2018

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, sections 11 and 12 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by the Town of Okotoks, respecting the decisions by the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Licence Nos. 00391311-00-00 and 00385019-00-00 to the Town of Okotoks, and issue *Water Act* Licence Nos. 00397640-00-00 and 00385021-00-00 to Her Majesty the Queen in Right of Alberta, represented by the Minister of Environment and Parks.

Cite as: *Town of Okotoks v. Director, South Saskatchewan Region, Alberta Environment and Parks* (03 July 2018), Appeal Nos. 17-062, 063, 065, and 066-R (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTIES:

Appellant: Town of Okotoks, represented by Ms. Kelley Fiske-Nielsen, Brownlee LLP.

Director: Mr. Dave Gower, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued two licences under the *Water Act* to the Town of Okotoks (Okotoks) for the diversion of water for municipal purposes. The licences were the result of the transfer of two pre-existing licences to Okotoks. AEP also issued two licences under the *Water Act* to Her Majesty the Queen in Right of Alberta, represented by the Minister of Environment and Parks (the Crown) for the implementation of a water conservation objective on the Sheep and Bow Rivers.

The licences issued to the Crown were the result of AEP holding back 10 percent of the volume of water sought to be transferred for the purpose of ensuring the volume and quality of water remain in the rivers to protect the aquatic environment.

Okotoks appealed the decisions to issue the licences to the Crown to the Environmental Appeals Board (the Board), arguing a transfer of the full water allotment to Okotoks would ensure protection of the aquatic environment, restore more water flow to the Sheep and Bow Rivers than the 10 percent holdback, and would better serve the public interest. Okotoks also appealed the decisions to hold back 10 percent of the volume of water as reflected in the licences issued to it.

AEP and Okotoks negotiated an agreement asking the Board to recommend the Minister amend one of the licences issued to Okotoks, increasing the volume of water allocated, and cancel one of the licences issued to the Crown.

The Board reviewed the agreement reached, the record provided by AEP, and the relevant legislation and recommended the Minister amend Licence No. 00391311-00-00 and reverse Licence No. 00397640-00-00.

The Board recommended Licence No. 00385019-00-00 issued to Okotoks and Licence No. 00385021-00-00 issued to the Crown be confirmed as issued.

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I. BACKGROUND

[1] On July 21, 2017, the Director, South Saskatchewan Region, Alberta Environment and Parks (the “Director”) issued Licence No. 00391311-00-00 (“Okotoks Licence 1”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of Okotoks (“Okotoks” or the “Appellant”) to operate a works and divert up to 88,810 cubic metres of water annually for municipal purposes (urban water supply). The Director also issued *Water Act* Licence No. 00397640-00-00 (“Crown Licence 1”) to Her Majesty the Queen in Right of Alberta as represented by the Minister of Environment and Parks for a volume of 9,868 cubic metres per year from the natural flow of the Sheep River for the implementation of a water conservation objective.

[2] On August 21, 2017, the Director issued *Water Act* Licence No. 00385019-00-00 (“Okotoks Licence 2”) to Okotoks to operate a works and divert up to 244,229 cubic metres of water annually for municipal purposes (urban water supply). The Director also issued Licence No. 00385021-00-00 (“Crown Licence 2”) to Her Majesty the Queen in Right of Alberta as represented by the Minister of Environment and Parks for a volume of 27,137 cubic metres per year from the natural flow of the Bow River for the implementation of a water conservation objective.

[3] On August 22, 2017, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Appellant appealing the volume allocated in Okotoks Licence 1 and appealing the issuance of Crown Licence 1.

[4] On August 24, 2017, the Board acknowledged the appeals of Okotoks Licence 1 and Crown Licence 1 (collectively, the “First Licences”) and notified the Director of the appeals. The Board requested the Director provide a copy of the documents upon which the Director based his decisions (“Record 1”). The Board received Record 1 on September 28, 2017.

[5] On September 12, 2017, the Board asked the Appellant and Director (collectively, the “Parties”) for their available dates for a mediation meeting in respect of the appeals of the First Licences.

[6] On September 19, 2017, the Board received a Notice of Appeal from the Appellant appealing Okotoks Licence 2 and Crown Licence 2 (collectively, the “Second Licences”).

[7] On September 20, 2017, the Board acknowledged the appeals of the Second Licences and notified the Director of the appeals. The Board requested the Director provide a copy of the documents upon which the Director based his decisions (the “Record 2”). The Board received Record 2 on October 20, 2017.

[8] On October 27, 2017, the Board asked the Parties for their available dates for a mediation meeting in respect of the appeals of the Second Licences.

[9] On November 17, 2017, the Board notified the Parties the mediation meeting for the First Licences would be held on December 19, 2017.

[10] On December 14, 2017, the Board advised the Parties the mediation meeting for the Second Licences would be held on February 14, 2018.

[11] The mediation meeting for the First Licences was scheduled for December 19, 2017, but the meeting was cancelled due to unforeseen circumstances. The mediation meeting was re-scheduled to January 23, 2018. Although productive discussions ensued, no resolution was reached at that time. The Parties indicated they would continue their discussions.

[12] On February 6, 2018, the Appellant requested the mediation meeting of the Second Licences be adjourned to allow the Parties to continue discussions. The Board granted the request and adjourned the mediation meeting. The Parties provided regular updates to the Board while discussions continued.

[13] On June 25, 2018, the Parties notified the Board they had reached a resolution of the appeals relating to the First Licences and the Second Licences and requested the Board forward the recommendations in the joint resolution to the Minister for her approval.

II. DISCUSSION

[14] Okotoks Licence 1 and Okotoks Licence 2 were issued to the Appellant as a result of a transfer of water from Burnswest Corporation and the Bow River Irrigation District, respectively. Under section 83 of the *Water Act*, when a transfer of water occurs, the Director has the authority to holdback up to 10 percent of the water allocated.¹ The purpose of the holdback is to protect the volume and quality of water in the river and to protect the aquatic environment. Where the Director holds back any portion of the volume of water allocated under the licence being transferred, the water held back is incorporated into a “Crown Licence.”

[15] Since 2007, the South Saskatchewan River Basin has been closed to any new surface water licences.² If a person requires surface water from this basin, they must obtain a licence from an existing licence holder and, with approval from the Director, have the water allocated under that licence transferred. In this case, the Appellant sought to transfer water

¹ Section 83 of the *Water Act* provides:

- “(1) If the Director is of the opinion that withholding water is in the public interest to protect the aquatic environment or to implement a water conservation objective, and the ability to withhold water has been authorized in an applicable approved water management plan or order of the Lieutenant Governor in Council, the Director may withhold up to 10% of an allocation of water under a licence that is being transferred.
- (2) A withholding of an allocation of water under subsection (1) may be made only at the time a new licence is issued with respect to a transfer of an allocation of water.
- (3) If there has been a withholding of an allocation of water under subsection (1),
- (a) the water may remain in the natural water body, for the purposes of providing or maintaining a rate of flow of water or water level requirements, without issuing a licence for that water,
 - (b) the water may be reserved or added to an existing reservation under section 35, or
 - (c) the Director may not issue a licence with respect to the withheld water except to the Government under section 51(2) for an allocation of that water in accordance with the priority number and terms and conditions of the licence from which the water was withheld.
- (4) If a withholding of an allocation of water under subsection (1) has been made with respect to a transfer of an allocation of water under a licence that is to revert back to the original licence, the withheld allocation does not revert back to the original licence and remains with the Government.”

² See: *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta. Reg. 171/2007.

allocated under licences held by Burnswest Corporation, for water allocated from the Sheep River, and the Bow River Irrigation District, for water allocated from the Bow River.

[16] The Director approved the transfers of the allocations under these licences, but the resulting licences issued to the Appellant reflected holdbacks of 10 percent of the volumes allocated under the Burnswest Corporation and Bow River Irrigation District licences. The holdback volumes were allocated to the Crown in Crown Licences 1 and 2. The Appellant appealed the reduced allocation in Okotoks Licences 1 and 2 and the issuance of Crown Licences 1 and 2.

[17] The Appellant stated its water use plan negated the need for a 10 percent holdback, and a transfer of the full allotment, without the 10 percent holdback, would ensure protection of the aquatic environment, restore more water flow to the Sheep and Bow Rivers than a 10 percent holdback, and would better serve the public interest.

[18] The Parties attempted to resolve the appeals at a mediation meeting and continued discussions after the mediation meeting ended. As a result of the discussions, the Parties provided a joint agreement to the Board recommending the volume of water allocated under Okotoks Licence 1 be increased to the total volume of water transferred from Burnswest Corporation and Crown Licence 1 be cancelled.

[19] The Board has reviewed the agreement and the relevant legislation and considers the agreement to be reasonable. The Board recommends the Minister vary Okotoks Licence 1 and reverse Crown Licence 1 according to the agreement reached between the Parties.

[20] As the Parties made no recommendations regarding Okotoks Licence 2 and Crown Licence 2, the Board recommends these licences be confirmed as issued.

III. RECOMMENDATIONS

[21] In accordance with section 12 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993,³ and based on the agreement reached between the Parties, the Board recommends the Minister of Environment order the following:

1. Licence No. 00391311-00-00 be varied as follows:
 - a. Delete “88,810” and replace with “98,678” on the cover page;
 - b. Delete “0.009” and replace with “0.01” on the cover page;
 - c. Delete “88,810” in Table 3-1 and replace with “98,678”;
 - d. Delete “88,810” in clause 3.8 and replace with “98,678”; and
 - e. Delete “0.009” in clause 3.9 and replace with “0.01”.
2. Licence No. 00397640-00-00 be reversed.
3. Licence No. 00385019-00 be confirmed as issued.
4. Licence No. 00385021-00-00 be confirmed as issued.

[22] Pursuant to section 100(2) of EPEA,⁴ a copy of this report and recommendation and of any decision of the Minister are to be provided to:

1. Ms. Kelley Fiske-Nielsen, Brownlee LLP, on behalf of the Town of Okotoks; and
2. Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General, on behalf of the Director, South Saskatchewan Region, Alberta Environment and Parks.

³ Section 12(1) of the *Environmental Appeal Board Regulation* provides:

“Where the parties agree to a resolution of a notice of appeal filed pursuant to section 91(1)(a) to (j) of the Act or section 115(1)(a) to (i), (k), (m) to (p) or (r) of the *Water Act*, the Board shall within 15 days

- (a) prepare a report and recommendations that are signed by the parties and reflect the agreed upon resolution,
- (b) submit the report and recommendations to the Minister to be dealt with under section 100 of the Act, and
- (c) send a copy of the report and recommendations to each party.”

⁴ Section 100(2) of EPEA states:

“The Minister shall immediately give notice of any decision made under this section to the Board and the Board shall, immediately on receipt of notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.”

Dated on July 3, 2018, at Edmonton, Alberta.

“original signed by”
Alex MacWilliam
Board Chair



ALBERTA

ENVIRONMENT AND PARKS

Office of the Minister

Minister Responsible for the Climate Change Office

MLA, Lethbridge-West

Ministerial Order

31/2018

Environmental Protection and Enhancement Act

R.S.A. 2000 c. E-12

Water Act

R.S.A. 2000 c. W-3

Order Respecting Environmental Appeals Board Appeal Nos. 17-062, 17-063, 17-065, and 17-066

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 17-062, 17-063, 17-065, and 17-066.

Dated at the City of Lethbridge, in the Province of Alberta, this 28 day of July, 2018.

-original signed by-
Shannon Phillips
Minister

Appendix

Order Respecting Environmental Appeals Board Appeal Nos. 17-062, 17-063, 17-065, and 17-066

With respect to the July 21, 2017 and August 21, 2017 decisions of the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Licence Nos. 00391311-00-00, 00397640-00-00, 00385019-00-00, and 00385021-00-00, I, Shannon Phillips, Minister of Environment and Parks, order:

1. Licence No. 00391311-00-00 be varied as follows:
 - f. Delete “88,810” and replace with “98,678” on the cover page;
 - g. Delete “0.009” and replace with “0.01” on the cover page;
 - h. Delete “88,810” in Table 3-1 and replace with “98,678”;
 - i. Delete “88,810” in clause 3.8 and replace with “98,678”; and
 - j. Delete “0.009” in clause 3.9 and replace with “0.01”.
2. Licence No. 00397640-00-00 be reversed.
3. Licence No. 00385019-00-00 be confirmed as issued.
4. Licence No. 00385021-00-00 be confirmed as issued.