



ALBERTA
ENVIRONMENTAL APPEALS BOARD

2021 ABEAB 30

November 5, 2021

Via E-Mail

Ms. Ann McKendrick McNabb



(Appellant)

Mr. Travis Coates
BURNCO Rock Products Ltd.
155 Glendeer Circle SE
Box 1480, Station T
Calgary, AB T2H 2P9
(Approval Holder)

Ms. Nicole Hartman
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(representing Director, Alberta Environment
and Parks)

Dear Ladies and Mr. Coates:

Re: Decision* –BURNCO Rock Products Ltd./Water Act Approval No. 00430788-00-00 Our File No.: EAB 20-029

This is the Board's decision concerning the late-filed appeal of Ms. Ann McKendrick McNabb (the "Appellant"). Ms. Meg Barker, Acting Board Chair, made the decision.

Background

On December 30, 2018, BURNCO Rock Products Ltd. (the "Approval Holder") filed application number 001-00430788 under the *Water Act*, R.S.A. 2000, c. W-3 to extract aggregate material below the water table for the purpose of expanding its current sand and gravel operation at NW 13-26-05-W5M.

The Director, South Region, Regulatory Assurance Division, Alberta Environment and Parks (the "Director") waived notice of the application in accordance with section 108(6) of the *Water Act*.¹

* Cite as: *McNabb v. Director, South Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: *BURNCO Rock Products Ltd.* (05 November 2021), Appeal No. 20-029-D (A.E.A.B.), 2021 ABEAB 30.

¹ Section 108(6)(b) of the *Water Act* provides:

"(6) Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director's own initiative, the Director may waive the notice requirement under subsection (1) if the Director is of the opinion that

...

(b) the activity or diversion of water specified in the application for the approval or licence

On June 18, 2020, the Director issued *Water Act* Approval No. 00430788-00-00 (the "Approval") to the Approval Holder to alter the flow, direction of flow, or level of water, in order to extract aggregate material below the water table for the purpose of expanding current sand and gravel operations, located at NW13-26-05-W5M, in Cochrane, Alberta.²

The Notice of Decision was posted on the Alberta Environment and Parks' ("AEP") Public Notices Viewer³ from June 18 through June 24, 2020. The Approval Holder posted notice of the decision in the Cochrane Times on July 1, 2020. The Notice of Decision stated an appeal must be submitted to the Board within seven days of the provision of the notice.

The Appellant filed a Notice of Appeal of the Approval on October 29, 2020. The Board acknowledged receipt of the Notice of Appeal and advised the Approval Holder and Director of the appeal on October 29, 2020. The Board further advised that, as the Approval was issued June 8, 2020, and the Appellant stated she received the Approval September 28, 2020, it appeared the appeal was filed outside of the seven-day time limit prescribed by the *Water Act*⁴ for filing an appeal of an approval. The Board requested the Appellant provide further information to explain why the appeal was filed outside the seven-day time limit and reasons why an extension of the time limit should be given. The Appellant provided additional information to the Board in a letter dated November 23, 2020.

On November 26, 2020, the Board asked the Director to provide the documents related to how notice was provided (the "Record"). The Board set the process for the Approval Holder and Director to provide response comments regarding the late-filed appeal and for the Appellant to provide rebuttal comments. The Director provided the Record on December 8, 2020, and copies were provided to the Appellant, Approval Holder, and Director (collectively, the "Participants"). The Board received comments from the Participants between December 16, 2020, and January 11, 2021.

Summary of the Appellant's Comments

The Appellant recommended the Approval be revoked or amended, and that *Water Act* License No. 00396954-00-00⁵ also be revoked or amended so her concerns regarding water,

or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users...."

² See: *Water Act* Approval No. 00430788-00-00.

³ Alberta Environment and Park's Authorization Viewer is located on a website at: <https://avw.alberta.ca/ApprovalViewer.aspx>.

⁴ Section 116(1)(a)(ii) of the *Water Act* states:

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

(a) not later than 7 days after

(i) receipt of a copy of a water management order or enforcement order, or

(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,
or

(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."

⁵ *Water Act* Licence No. 0036954-00-005 was issued on December 12, 2018 to the Approval Holder for the

mining the aquifer, and measuring her adjacent water wells could be addressed. The Appellant argued approving activities without proper diligence introduces unnecessary risks into her business.

The Appellant noted the *Water Act* states public consultation is a key component to the approval process and includes opportunities for local and regional involvement. The Appellant stated the Approval application process "...should proactively involve adjacent landowners to protect their interests."⁶ The Appellant stated the process should involve landowners who would be impacted and written notices should be circulated to landowners within a kilometre of the proposed project. She said adjacent landowners should be allowed to express legitimate concerns during the review process.

The Appellant stated the Notice of Decision was advertised in the Cochrane Times on July 1, 2020, but the Cochrane Times is distributed to Cochrane residents, not Rocky View County residents. The Approval Holder's gravel pit is located in Rocky View County. The Appellant explained the Cochrane Times would not reach adjacent landowners. The Appellant stated she owns property immediately north, west, and east of the Approval Holder's site. The Appellant stated the notices should have been mailed directly to adjacent landowners, and not simply published in a paper that does not cover their area or used by Rocky View County. The Appellant argued the Approval Holder should have directly notified adjacent landowners.

The Appellant noted there are records from 2009 to 2011 which document the Appellant's concerns with the Approval Holder's operations in the aquifer and the potential impact to her water wells. The Appellant stated water is critical to the residences and businesses of adjacent landowners. The Appellant stated Rocky View County only approved mining to a depth of one metre above the water table. The Appellant stated the Director was aware of her concerns and requests to be involved with any applications. The Appellant asked why the application was being allowed now, if the original application was denied.

The Appellant explained she had employed hydrogeologists in 2019 to select potential water locations on her property, and several dry wells were drilled adjacent to the gravel pit. She said she found it challenging to locate and maintain sufficient water, and she had been without water for a month. The Appellant became aware of the Approval to mine in the water table on September 28, 2020. The Appellant stated she did not think she could appeal the decision and was advised on October 7, 2020, by the Director that the Board decides whether it accepts a late-filed appeal.

The Appellant explained she delayed filing the appeal because she needed to research her options with technical and legal advisors. The Appellant was researching the application, the process, the *Water Act*, and obtaining technical advice for her submission. The Appellant argued in light of COVID-19 restrictions and rural mail distribution, the seven-day appeal period was inappropriate notice for an appeal process.

diversion of water for industrial purposes, specifically gravel washing. This Licence expires December 11, 2028. The Board notes this Licence is not a matter in this appeal.

⁶ Appellant's Rebuttal, January 11, 2021, at page 1.

The Appellant stated other aggregate companies in Rocky View County have committed to monitoring water wells on site, adjacent lands, and water wells within 500 metres of their gravel pit boundaries. Those companies also agreed to not mine in the water table.

The Appellant stated she has raised concerns since the gravel pit was first proposed, and expressed her concerns to Rocky View County in 2009. In 2011, Rocky View County approved operations on NW-13-26-5-W5M. The Appellant was advised at the time she would be notified, as an adjacent landowner that would be impacted, of any changes that were proposed or occurred. The Approval Holder was not the operator at the time but, she argued, it assumed the Approval and its conditions. She stated that in 2019, she drilled three dry water wells on NW-24-26-5-W5M, which is immediately north of the gravel pit. In 2018 and 2020, the Appellant identified concerns about the mining activity and impacts to her property and water table. The Appellant asked for monitoring of her wells and springs, and for that data to be shared.

The Appellant stated that, in 2019, she provided information to the Approval Holder regarding her water well and spring. The Appellant said she expressed concerns about potential dewatering of her wells and asked for the opportunity to work with the Approval Holder and provide feedback and input on its application to AEP. The Appellant expressed disappointment at not being informed about the application and that water monitoring was not addressed.

The Appellant explained she hired Water Line Resources in 2019 to identify potential water well locations and review water potential on her property. The Appellant stated Water Line Resources indicated the hydrology in the area was very complex with many fractures in the soil profile. The Appellant was only able to drill one successful well out of six attempts. She said Water Line Resources advised the only way to document and provide transparent data was for her water wells and springs to be measured regularly. The Appellant noted the Approval Holder only measures the wells on its property.

The Appellant stated the availability of water is vital to the 150 cattle grazing on her land adjacent to the gravel pit and for the sustainability of her operations. If the water source becomes impacted or reduced due to resource extraction activities, her animals, livelihood, business operations, and property would be in jeopardy.

Approval Holder's Comments

The Approval Holder noted the Appellant acknowledged she had knowledge of the Approval by September 28, 2020. The Approval Holder argued the late filed appeal should not be accepted. The Approval Holder stated "[w]e rely on the timelines outlined in the *Water Act* to provide certainty around the approvals issued at our sites. Allowing late appeals of issued approvals introduces unnecessary risk to the planning of our business."⁷

Director's Comments

The Director argued the appeal should be dismissed since public notice of the

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Approval Holder's Response, January 4, 2021, page 1.

decision was reasonable, and the Appellant filed her Notice of Appeal nearly four months after the notice period ended. In the alternative, the Director said the Appellant had actual knowledge of the Approval on September 28, 2020, but did not file an appeal of the Approval until over a month later, on October 29, 2020. The Director argued the Appellant had the opportunity to appeal the Director's decision but filed her appeal out of time, and there were no extenuating circumstances that warranted extending the appeal period.

The Director noted the statutory appeal period for an approval under section 116 of the *Water Act* is seven days. Section 116(1)(a)(ii) provides that notice of an appeal must be submitted to the Board not later than seven days after receipt of the notice of decision that is appealed from or the last provision of notice of decision that is appealed from. The Director explained the latter applies when notice of the application had not been given, and the Director did not know the identity of directly affected persons and instructed the applicant to provide notice of the decision to the public generally.

The Director stated the Notice of Decision was posted on AEP's Public Notices Viewer from June 18 through June 24, 2020. Notice of the decision was also published in the *Cochrane Times* on July 1, 2020. The Director submitted the seven-day appeal period began to run on July 1, 2020, and the Appellant filed her Notice of Appeal more than four months later on October 29, 2020.

The Director referred to the Board's previous decision, *Terry's Lease Maintenance*,⁸ wherein the Board noted the importance of appeal period deadlines. The Director argued the Appellant filed her appeal well past the statutory time limit, and there is a need for certainty in the appeal process, which adherence to the statutory time limits provides. Alternatively, the Director argued the Appellant had actual knowledge of the Approval on September 28, 2020, but did not submit a notice of appeal for over a month. The Director noted the Board's decision in *Black Diamond Land & Cattle Company Ltd. v. Director*⁹ and argued the Board had looked to the date an appellant actually learned of a decision when determining whether an appeal was filed out of time.

The Director explained that, where the notice of the application is waived and the approval is issued, the Director must ensure notice of the decision is provided in accordance with the regulations. The Director noted he has broad discretion under section 13 of the *Water (Ministerial) Regulation*¹⁰ as to how notice is provided. The Director stated notice was provided

⁸ *Terry's Lease Maintenance Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, (03 February 2017), Appeal No. 16-007-D (A.E.A.B.) ("*Terry's Lease Maintenance Ltd.*").

⁹ *Black Diamond Land & Cattle Company Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Beglinger* (18 August 2014), Appeal No. 14-002-D (A.E.A.B.).

¹⁰ Section 13(1) of the *Water (Ministerial) Regulation*, Alta. Reg. 205/98, provides in part:

"13(1) For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

- (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the

in two ways: (1) notice was provided on AEP's Public Notices Viewer; and (2) the Approval Holder was required to publish the Notice of Decision in the Cochrane Times. The Director had been advised the Cochrane Times had a more focused distribution than the Rocky View Weekly and had a similar number of distributions to its competitors. The Director understood the Appellant was in the distribution area for the Cochrane Times. The Director submitted the legislative requirements for notice were met, and the *Water Act* does not require direct notice for individuals who may be directly affected. The Director argued the Appellant was not prejudiced as she had the opportunity to appeal the decision but was out of time.

The Director argued the Appellant had not met the onus of showing there were extenuating circumstances that warranted extending the appeal period as described in *Terry's Lease Maintenance Service Ltd.* The Director noted the Appellant stated that, when she learned of the decision on September 28, 2020, she did not think she could appeal the decision, and rather than confirming with AEP or the Board, the Appellant only spoke with her consultant. The Director further noted the Appellant stated she was advised on October 7, 2020, that the Board decides whether it will accept a late filed appeal, but did not file her appeal until nearly three weeks later. The Director argued the Appellant's submissions did not constitute extenuating circumstances.

Analysis

Under section 116(1)(a)(ii) of the *Water Act*, the time period for filing an appeal of an approval is not later than seven days after notice of the decision is received or last provision of notice of the decision. The Board may, on application under subsection (2), extend the time period for filing a notice of appeal, if the Board is of the opinion there are sufficient grounds to do so:

Section 116 of the *Water Act* provides, in part:

- "116(1) A notice of appeal must be submitted to the Environmental Appeals Board
- (a) not later than 7 days after
 - (i) receipt of a copy of a water management order or enforcement order, or
 - (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,
 - or
 - (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.
- (2) 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."

It is a basic principle of administrative law and natural justice that the appeal process must be fair to all parties. As a general rule, approval holders should be able to have certainty in an issued approval and rely on the statutory time limits contained within the *Water Act*. Consequently, an individual asking for an extension of the appeal period under section 116(2) of

Government for that purpose;

- (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;..."

the *Water Act* must show special or extenuating circumstances for the Board to exercise discretion to grant an extension.¹¹ Unless an appellant can demonstrate to the Board there were exceptional circumstances that resulted in the notice of appeal being filed late, the Board will, as a general rule, deny the request to extend the time period for filing the notice of appeal, and the Board will dismiss the appeal.¹²

As noted above, the *Water Act* requires a Notice of Appeal to be filed with the Board no later than seven days after receipt of the notice of decision or last provision of the notice of decision. The notice of decision was posted on AEP's Public Notices Viewer from June 18 through June 24, 2020, and in the Cochrane Times on July 1, 2020. Based on these dates, the appeal period ended on July 8, 2020. The Appellant filed her appeal on October 29, 2020, almost four months after the expiry of the appeal period.

The issue before the Board is whether there are extenuating or special circumstances that warrant the Board exercising its discretion under section 116(2) of the *Water Act* to extend the appeal period and accept the Appellant's appeal.

The Approval Holder stated it relies on the time limits specified in the *Water Act* to provide certainty around the approvals issued for its sites. The Approval Holder argued allowing late filed appeals of issued approvals introduces unnecessary risk to the planning of its business operations. Notice of the decision was published on July 1, 2020. The Appellant acknowledged first becoming aware of the decision to issue the Approval on September 28, 2020. The Director noted the Appellant was advised on October 7, 2020, that she could still file an appeal, and the Board would decide whether it would accept the late-filed appeal. The Appellant still did not file her appeal until October 29, 2020. Even though the Appellant did not think she could still file an appeal, she had the responsibility to make further inquiries with the Board to determine if there was a possibility her appeal could be accepted. Instead, she contacted her technical and legal advisors. The Board appreciates the efforts the Appellant made to collect the information she felt was necessary to file the Notice of Appeal, but adhering to time limits in the legislation is still a requirement.

The Appellant argued there were deficiencies in the application process, namely the lack of opportunity for those directly affected to provide input, and there were deficiencies in the Notice of Decision, since it was improperly published in the Cochrane Times while the project is located in Rocky View County. The Appellant stated the Approval Holder should have been obligated to directly notify adjacent landowners. Although the Board understands the concerns raised by the Appellant regarding notice of the decision, it does not constitute the special circumstances that would warrant extending the appeal period.

¹¹ See for an example special circumstances: *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection* re: *Town of Olds* (12 March 1999), Appeal No. 98-250-D (A.E.A.B.) at paragraph 14.

¹² See: *Biggart v. Director, Central Region, Regional Services, Alberta Environment* re: *Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.). See also: *Rely-On Ltd. v. Director, Lower Athabasca Region, Alberta Environment and Parks* (21 June 2016), Appeal No. 15-039-D (A.E.A.B.). See also *Olinek v. Alberta (Environmental Appeals Board)*, 2017 ABQB 311.

In the current appeal, the Director proceeded to a Notice of Decision and did not require the Approval Holder to provide public notice of the application, which would have triggered the statement of concern process. In the statement of concern process, individuals who are directly affected by the application can submit their concerns with the application to the Director, and those who are accepted as directly affected by the Director would receive direct notice of the decision. In this case, there was no opportunity for persons to submit their concerns and be considered to be directly affected and, therefore, there was no corresponding obligation on the part of the Approval Holder to directly notify those individuals.¹³ Outside the statement of concern process, there is no obligation to notify adjacent landowners or other persons who may be interested in the application. The Board realizes that, in most cases, direct notice of an application or decision is not practical. While the Board can appreciate the Appellant's concerns as an adjacent landowner, direct notice of the application and subsequent decision was not required in the current circumstances or under the legislation. This applies even when the Appellant had conversations with the Approval Holder and understood she would be notified of any proposed changes to the operations.

There is no evidence before the Board as to the circulation area of the Cochrane Times and whether or not the Appellant's address is included in the distribution area. The Director's and Appellant's submissions appear to disagree with the Appellant on this point. Notwithstanding the Participants' conflicting statements, the Board notes that, in order for public notice of the decision to be valid under the legislation, only one form of public notice must be provided.¹⁴ The Approval Holder published public notice of the decision in the Cochrane Times on July 1, 2020. In addition, the Director posted public notice of the decision on AEP's Public Notices Viewer from June 18 through June 24, 2020. The Board finds that, regardless of the distribution area of the Cochrane Times, public notice of the decision on AEP's Public Notices Viewer was sufficient for the purposes of section 13(1)(a) of the *Water Ministerial Regulation*.

The Appellant stated she had concerns with the application for the Approval and raised them with the Approval Holder. It did not appear that either the Approval Holder or the Appellant raised the concerns with the Director. The Appellant could have raised her concerns with the Director, but she decided not to after reaching out to the Approval Holder. If the Appellant raised her concerns with the Director directly instead of the Approval Holder, the Director could have considered the information provided, and the Director would have been better positioned to make an assessment regarding who may be affected by the application for the Approval.

It is unfortunate the Approval Holder did not contact the Appellant when it filed its application for the Approval given the Appellant had contacted the Approval Holder previously to discuss concerns she had regarding impacts the operations might have on groundwater sources.

¹³ See section 108 and 109 of the *Water Act*.

¹⁴ Section 13(1)(a) of the *Water (Ministerial) Regulation*, Alta. Reg. 205/98 (*Water (Ministerial) Regulation*, provides:

“13(1) For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

(a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out....”

Although the Appellant was unaware until after the time limit to file an appeal of the Approval was passed, the Board finds there are no extenuating circumstances that warrant extending the appeal period. The Board finds the Appellant's appeal was filed out of time.

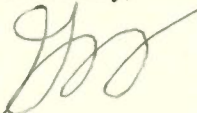
The Board received additional information from Ms. McNabb on October 18, 2021 stating it was additional information to her rebuttal submission. The Board did not consider the new information as it was not relevant to the issue at hand.

Decision

Upon review of the legislation and the submissions from the Participants, the Board finds there are insufficient grounds to warrant an extension of the statutory appeal period. The Board denies the request for an extension of time to appeal and dismisses the appeal.

Please do not hesitate to contact the Board if you have any questions. I can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 or by email at gilbert.vannes@gov.ab.ca.

Yours truly,



Gilbert Van Nes
General Counsel
and Settlement Officer

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.