

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – November 12, 2021

**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 Stoney Nakoda Nation, and Ken Hoover with respect to the decision of the Director, Operations Division, South Saskatchewan Region, Alberta Environment and Parks, to issue an Amendment to Licence No. 00037369-00-03 under the *Water Act* to Fortress Mountain Holdings Ltd.

Cite as: *Stoney Nakoda Nation and Hoover v. Director, Operations, South Saskatchewan Region, Alberta Environment and Parks, re: Fortress Mountain Holdings Ltd.* (12 November 2021), Appeal Nos. 19-050 and 086 (A.E.A.B.), 2021 ABEAB 31.

**BEFORE:**

Mr. Alex MacWilliam, Board Chair (ret.).

**SUBMISSIONS BY:**

**Appellants:** Stoney Nakoda Nation, represented by Mr. Malcolm Macpherson and Mr. Saul Joseph, Clark Wilson LLP; and Mr. Ken Hoover.

**Licence Holder:** Fortress Mountain Holdings Ltd., represented by Mr. Thomas Heath.

**Director:** Mr. Andun Jevne, Director, operations Division, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Lisa Semenchuk and Ms. Shannon Keehn, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Since 1982, Fortress Mountain Holdings Ltd. (the Licence Holder) has been the holder of a Water Licence issued by Alberta Environment and Parks (AEP) for the purposes of “Municipal (Urban Water Supply).” In 2019, the Licence Holder applied to AEP to change the purposes of the Water Licence to “Municipal (Urban Water Supply) and Commercial (Truck Fill Station).” AEP provided public notice of the application (Amendment Application). Stoney Nakoda Nation (SNN) and Mr. Ken Hoover (collectively, the Appellants), both filed Statements of Concern with AEP opposing the Amendment Application. AEP found the Appellants would not be adversely affected by the Amendment Application and decided the Statements of Concern were invalid.

AEP approved the Amendment Application and issued the amended Water Licence. As required by the *Water Act*, AEP provided public notice of the issuance of the amended Water Licence but did not provide individual notice to the Appellants. When the Appellants learned of the issuance of the amended Water Licence, they filed Notices of Appeal with the Environmental Appeals Board (the Board). The Notices of Appeal were filed after the 30-day time period provided in the *Water Act* for filing. The Board requested the Appellants, the Licence Holder, and AEP to provide comments on the matter of the Notices of Appeal being filed late and whether the Board should exercise its statutory authority to extend the period to file the Notices of Appeal.

After reviewing the submissions received from the parties, the Board determined the Appellants’ Notices of Appeal were filed late, and there were insufficient extenuating circumstances or reasons to justify an extension of the time to file.

The Board dismissed the Notices of Appeal filed by SNN and Mr. Hoover for lateness.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's (the "Board") decision regarding the appeals filed by the Stoney Nakoda Nation ("SNN") and Mr. Ken Hoover ("Mr. Hoover") (collectively, the "Appellants").

## **II. BACKGROUND**

[2] On November 23, 1982, Alberta Environment and Parks ("AEP") issued Water Licence No. 00037369-00-00 (the "Water Licence") under the *Water Act*, R.S.A. 2000, c. W-3, to Fortress Mountain Holdings Ltd. (the "Licence Holder") to divert water from an unnamed tributary of Galatea Creek, located at NE 32-021-09-W5M, southeast of the Town of Canmore, in the Municipal District of Bighorn No. 8, Alberta (the "Diversion Point"). The purpose of the Water Licence was listed as "Municipal (Urban Water Supply)."

[3] On July 5, 2019, the Director, Operations Division, South Saskatchewan Region, Alberta Environment and Parks (the "Director"), provided public notice that the Licence Holder had applied for an amendment to the Water Licence (the "Amendment Application"). The Amendment Application sought to change the purpose of the Water Licence to "Municipal (Urban Water Supply) and Commercial (Truck Fill Station)."

[4] On August 2, 2019, SNN filed a Statement of Concern with the Director, opposing the Amendment Application. On October 10, 2019, the Director provided SNN with a letter advising the Statement of Concern was invalid as SNN was not directly affected for the following reasons:

- (a) the Amendment Application would not result in a reasonable probability of adverse environmental impacts, change, or effect on the SNN, as the Barrier hydro-electric dam is located between SNN reserve land and the Diversion Point;
- (b) the Diversion Point location upstream from the Barrier Dam meant there would be no direct effect on licences, traditional agriculture users, and household users downstream of Barrier Dam, and the Diversion Point

already existed and there was no proposal to change the Diversion Point;  
and

- (c) the Water Licence authorized the diversion of 80.0 acre-feet of water from a non-fish bearing unnamed tributary of Galatea Creek, with no requirement to return water to the watershed.

[5] In the October 10, 2019 letter, the Director stated the SNN "...can obtain information on the status of our review of this application at any time by contacting... [AEP staff]... and any licence amendment that may be issued is public information and will be made available at <https://avw.alberta.ca/ApprovalViewer.aspx>."

[6] On October 25, 2019, the Director issued Licence Amendment No. 00037369-00-03 (the "Licence Amendment"). As requested by the Licence Holder, the Licence Amendment changed the purpose of the Water Licence from "Municipal (Urban Water Supply)" to "Municipal (Urban Water Supply) and Commercial (Truck Fill Station)." The Director posted the Licence Amendment to the AEP website on October 30, 2019.

[7] On December 17, 2019, the Environmental Appeals Board (the "Board") received a Notice of Appeal from SNN appealing the issuance of the Licence Amendment. On December 19, 2019, the Board advised SNN the *Water Act* provides a 30-day time limit for filing an appeal of a Licence Amendment. As the Notice of Appeal was filed outside the 30-day appeal period, the Board asked SNN to explain why it was filed late and provide any reasons why the Board should grant an extension of time to file the Notice of Appeal.

[8] On January 2, 2020, the Board received SNN's submission. The Board requested response submissions from the Licence Holder and the Director, which were received on January 17, 2020.

[9] On January 20, 2020, the Board received a Notice of Appeal from Mr. Hoover regarding the Director's decision to issue the Licence Amendment. On January 23, 2020, the

Board wrote Mr. Hoover asking him to explain why the appeal was filed late and to provide any reasons why the Board should grant an extension of time to file the Notice of Appeal.

[10] On January 24, 2020, the Board received a rebuttal submission from SNN.

[11] On January 30, 2020, the Board received submissions from Mr. Hoover. The Board acknowledged his submissions on February 3, 2020. In this same letter, the Board stated that, if it determined there was sufficient information in Mr. Hoover's submissions to consider extending the appeal period, the Licence Holder and Director would be given an opportunity to provide comments, followed by the opportunity for Mr. Hoover to submit rebuttal comments before the decision was made.

[12] On February 21, 2020, following a review of the submissions from SNN and Mr. Hoover (collectively, the "Appellants"), the Licence Holder, and the Director, the Board advised these parties the appeals were dismissed. The Board's letter stated it would provide the reasons for the decision at a later date. This decision contains those reasons.

### **III. SUBMISSIONS**

#### **A. SNN Initial Submission**

[13] SNN said they filed a Statement of Concern with the Director expressing their concerns and interests regarding the Amendment Application. SNN stated they did not receive any meaningful communication from the Director or the Licence Holder regarding their concerns and received no notice the Licence Amendment was issued. SNN said they learned from a local newspaper on November 19, 2019, that the Director had issued the Licence Amendment.

[14] SNN stated once they learned the Licence Amendment had been issued, they prepared the Notice of Appeal and filed it with the Board within the 30-day notice period stipulated in the *Water Act*.

[15] Alternatively, SNN asked the Board to grant an extension of the time to file the Notice of Appeal because:

- (a) SNN is directly affected by the Licence Amendment;
- (b) the Licence Amendment will result in significant adverse impacts to SNN's rights and interests;
- (c) SNN's concerns with the Licence Amendment have not been addressed in any meaningful or timely way by either Alberta or the Licence Holder;
- (d) SNN was unsuccessful in their efforts to have a practical and meaningful working relationship with both AEP and the Licence Holder;
- (e) in the spirit of responsible decision-making and reconciliation, the Board should reverse the Director's decision and ensure AEP and the Licence Holder hear and understand SNN's concerns, and ensure reasonable accommodation measures be put in place before any subsequent decisions by AEP regarding the Water Licence; and
- (f) the Board's responsibility to uphold the public interest is not met by approving projects with adverse impacts to SNN and others without an appropriate review and mitigation process to hear and evaluate interests, concerns, and impacts.

[16] SNN submitted the Board must ensure administrative due process and give SNN the opportunity to have their interests and concerns regarding the Licence Amendment evaluated and mitigated.

[17] SNN questioned the Board's statement that constitutional matters are not within the Board's jurisdiction. SNN stated rights under Section 35 of *The Constitution Act*<sup>1</sup> are "inextricably woven" into much of the appeal. SNN submitted the Board could not deny them

<sup>1</sup> Section 35 of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, provides:

- "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."



due process of law based on the Board's stated inability to determine constitutional matters. SNN said the Notice of Appeal contains multiple procedural issues the Board can determine.

**B. Licence Holder**

[18] The Licence Holder submitted the appeal process, including the 30-day time limit to file an appeal, was clearly explained to SNN when the Director rejected their Statement of Concern on October 10, 2019. The Licence Holder noted SNN filed the Notice of Appeal on December 17, 2019, which was over one month late.

[19] The Licence Holder stated the appeal process needed to be accurate and specific to provide a level playing field for everyone involved. The Licence Holder said SNN's request for the Board to accept its late filed appeal did not respect the appeal process and was unfair to persons who follow the legislated procedure. The Licence Holder stated it went through a rigorous public process to receive the amendment, during which SNN had the opportunity to provide their input. The Licence Holder submitted reopening the application process after the appeal period expired would be unfair and biased against it.

[20] The Licence Holder said it responded to SNN's Statement of Concern on August 8, 2019, but did not receive a reply or request for further information. The Licence Holder stated it was not told to provide SNN with any notice of the Licence Amendment. The Licence Holder submitted the appeal is based on the Director's rejection of SNN's Statement of Concern.

[21] The Licence Holder objected to using November 19, 2019, the date SNN said they were made aware of the Licence Amendment, as the start for the time period to file a Notice of Appeal. The Licence Holder stated it was SNN's sole responsibility to file the Notice of Appeal on time, as the Director had provided SNN with the information needed to track the progress of the Licence Amendment application.

[22] The Licence Holder appreciated the concerns outlined by SNN in their Statement of Concern, and despite the lack of response from SNN to any of the Licence Holder's follow-up

communications, the Licence Holder would continue to look for ways to work with SNN and other community members.

[23] The Licence Holder noted the Amendment Application underwent a thorough review from both the Director and Licence Holder, and the public was provided ample opportunities during the 30-day consultation period to submit appeals within the defined deadlines.

**C. Director**

[24] The Director stated section 115(1)(c)(i) of the *Water Act*<sup>2</sup> provides that a person may file a Notice of Appeal when:

- (a) the director amends a licence;
- (b) notice of the amendments have been given;
- (c) the person previously submitted a Statement of Concern under section 109 of the *Water Act*; and
- (d) the person is directly affected by the director's decision.

[25] The Director noted those who are entitled to appeal must be provided with notice of the director's decision under section 111(2)(b) of the *Water Act*.<sup>3</sup>

<sup>2</sup> Section 115(1)(c)(i) states:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

- (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...."

<sup>3</sup> Section 111(2)(b) of the *Water Act* states:

"If subsection (1) applies, the Director must ...

- (b) if notice of the application or proposed changes was provided under section 108, give notice or require the approval holder, preliminary certificate holder or licensee to give notice of the decision, in accordance with the regulations, to every person who submitted a statement of concern under section 109."

[26] The Director explained he provided a letter dated October 10, 2019, to SNN advising their letter regarding the Amendment Application did not amount to a valid Statement of Concern. The Director's letter explained the presence of dams between the Diversion Point in the Water Licence and SNN reserve land made it improbable there would be any effect on SNN from the Amendment Application. The Director noted the letter provided SNN with information on where to obtain issued licence amendments or further information on the status of the Amendment Application.

[27] The Director submitted that his October 10, 2019 letter would have made SNN aware they would not receive direct notice regarding the outcome of the Amendment Application. The Director stated SNN did not seek further information regarding the Amendment Application.

[28] The Licence Amendment was issued on October 25, 2019, and posted on the AEP website on October 30, 2019. The Director noted his October 10, 2019 letter to SNN provided them with the website address to obtain information on the status of the Amendment Application. The Director stated the 30 days to file a Notice of Appeal began when notice of the Licence Amendment was posted on the AEP website. The Director said the time period started no later than October 31, 2019, and, therefore, SNN's Notice of Appeal filed on December 17, 2019, was outside that 30-day time period.

[29] The Director noted section 115(1)(c)(i) of the *Water Act* says that only persons who previously filed a Statement of Concern and are directly affected by the Director's decision may appeal an amendment. The Director submitted that, even if SNN had filed the Notice of Appeal on time, they would not be entitled to an appeal as the Statement of Concern was not accepted by the Director and SNN was not directly affected by the Licence Amendment.

**D. SNN Rebuttal Submission**

[30] SNN stated the Director, in his submissions, confirmed he did not provide SNN with notice of the Licence Amendment and, therefore, the 30-day time period to file a Notice of Appeal started on November 19, 2019, when SNN became aware of the Licence Amendment.

[31] SNN submitted it was premature for the Director to determine that SNN was not directly impacted and not entitled to consultation. SNN said the Director's submissions and the October 10, 2019 letter show the Amendment Application had some potential to impact SNN, and the Director had a duty to consult with SNN as required under "The Government of Alberta's policy on consultation with First Nations on land and natural resource management, 2013."<sup>4</sup> SNN said the Director's predetermination that SNN was not directly impacted and did not need to be consulted was a breach of natural justice and procedural fairness.

[32] SNN stated they provided the Licence Holder and AEP with evidence the Licence Amendment could cause significant adverse impacts, but SNN's concerns were never addressed.

[33] SNN said the Director did not inform them that they would not receive notice of the issuance of the Licence Amendment, and they did not receive the October 10, 2019 letter until October 28, 2019, after the Director had issued the Licence Amendment. SNN stated the Director and Licence Holder did not inform SNN of the Licence Amendment, and they had minimal time to review and consider options before becoming aware of the Licence Amendment.

[34] SNN submitted AEP was attempting to conceal its illegal and poor conduct by preventing SNN from protecting their legal rights and accessing procedural fairness. SNN said the Director's contention that SNN had the onus to be aware of any decision made was unreasonable and not supported by law. SNN stated the Board should consider the Director's failure to provide SNN with the most basic form of procedural fairness.

<sup>4</sup> See: "The Government of Alberta's policy on consultation with First Nations on land and natural resource management, 2013" at <https://open.alberta.ca/publications/6713979>.

[35] SNN asserted they consulted with Board staff and were informed the notice period started when SNN became aware of the Licence Amendment. SNN said they provided the Board with their Notice of Appeal within 30 days of learning of the Licence Amendment.

[36] SNN said they had standing to appeal as they previously filed a Statement of Concern. In response to the Director assertion that section 109 of the *Water Act*<sup>5</sup> should have “validity” read into the legislation, SNN argued “validity” of a Statement of Concern is not part of the *Water Act*.

[37] SNN submitted the following decisions and opinions of the Director were incorrect and must be reviewed:

- (a) SNN is not directly affected by the Amendment;
- (b) the duty to consult was not triggered;
- (c) SNN’s Statement of Concern was not valid; and
- (d) SNN is not entitled to review the Licence Amendment.

[38] SNN stated the Board’s actions must be consistent with protecting the public interest, and the threshold for reviewing decisions is low and must be broadly applied. SNN submitted:

“Alberta’s conduct does not meet the standards set out in case law with respect to administrative law, the duty to consult, or the Honour of the Crown.

<sup>5</sup> Section 109 of the *Water Act* provides:

- “(1) If notice is provided
  - (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
  - (b) under section 108(2), the approval holder, preliminary certificate holder or licensee, may submit to the Director a written statement of concern setting out that person’s concerns with respect to the application or proposed amendment.
- (2) A statement of concern must be submitted
  - (a) in the case of an approval, within 7 days after the last providing of the notice, and
  - (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice.”

Alberta continues its deceptive conduct, including in its representations to the Board contained within the Alberta Letter. Alberta makes interpretations of the *Water Act* that are not supportable and should not be entertained by the Board at all. Alberta directly seeks to mislead the Board in an effort to prevent SNN from exercising its legal rights. This conduct is shameful and must be brought to light and addressed and corrected by the Board using the full scope of the legal remedies available to correct Alberta's poor conduct.”<sup>6</sup>

[39] SNN stated if the Board did not proceed with the appeal, the administration of justice would be brought into disrepute, and SNN would have to pursue other legal options. SNN noted other legal options would result in unnecessary delay and cost.

**E. Ken Hoover**

[40] Mr. Hoover submitted the Board should accept his Notice of Appeal and extend the time for him to file. He said he worked diligently for four or five months on the Amendment Application but did not have the information that would have made it possible for him to file a Notice of Appeal within the 30-day time limit.

[41] Mr. Hoover noted he was the only person who filed a Statement of Concern who lives and works in the park, so his residency makes him directly affected by the decision to issue the Licence Amendment. In his view, the Licence Holder and the Director have “little to no comprehension of the dynamics of being a full-time resident to which this application does directly affect.”<sup>7</sup>

[42] Mr. Hoover said he had involved himself in the complexities of the approval process, and in doing so, he had made phone calls, sent emails, and tried his best to understand the process surrounding the Amendment Application.

[43] Mr. Hoover explained he was asked on October 8, 2019, to provide a Statement of Concern by October 18, 2019. Mr. Hoover said he received a letter from the Director dated

<sup>6</sup> SNN's Rebuttal Submissions, January 24, 2020, at page 5 to 6.

<sup>7</sup> Submission of Mr. Ken Hoover, January 30, 2020.

October 22, 2019, which stated: “While your submission will not be considered a valid statement of concern, the issues you raised in your submission will be considered in our review of this application.” Mr. Hoover stated he was not informed he could appeal the Director’s decision to reject his Statement of Concern.

[44] Mr. Hoover stated the Board must be the “scales of justice” so he can express his concerns and represent tens of thousands of people concerned with the speed the Licence Amendment was approved.

[45] It was alarming to Mr. Hoover that, out of 200 filers of Statements of Concern, not one was provided with the opportunity to speak to the issues with the Amendment Application. Mr. Hoover said he is on the “front lines” in Spray Valley Provincial Park, Peter Lougheed Park, and the SNN reserve lands, which gives him first-hand knowledge of the direct impact the Licence Amendment would have on the ecosystems in the area. Mr. Hoover suggested that when fires and ecological disasters occur in and around Fortress Mountain, the Board may regret it did not allow one Statement of Concern filer to speak.

[46] Mr. Hoover stated Canmore, Banff, Lake Louise, and Jasper are under great strain, and the Licence Amendment will put similar strains on the area around Fortress Mountain.<sup>8</sup>

[47] Mr. Hoover submitted there is no financial gain for him or his family in his efforts on the appeal, and he has spent hundreds of hours standing up for himself and his community because they are directly affected by the Licence Amendment.<sup>9</sup>

#### **IV. ANALYSIS**

##### **A. Legislation**

[48] Section 116(1) of the *Water Act* sets the time limits for filing a Notice of Appeal

<sup>8</sup> Submission of Ken Hoover, January 30, 2020.

<sup>9</sup> Submission of Ken Hoover, January 30, 2020.

as follows:

“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,

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.”

[49] In these appeals, section 116(1)(b) is applicable to the Licence Amendment and provides for an appeal period of 30 days. The appeal period starts when a person is in receipt of the notice of the decision or the last provision of notice of the decision.

[50] Section 116(2) of the *Water Act*, gives the Board the authority to extend the time to file a Notice of Appeal if there are sufficient grounds.<sup>10</sup>

## **B. Discussion**

[51] After reviewing the Appellants’ submissions, the Board has determined the appeals must be dismissed based on two grounds:

- (a) the Appellants did not meet the legislated time limits for filing their Notices of Appeal; and
- (b) the Appellants failed to provide sufficient reasons for the Board to grant an extension of time.

<sup>10</sup> Section 116(2) of the *Water Act* states:

“The Environmental Appeal 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.”



1. SNN's Notice of Appeal

[52] Having deadlines in legislation provides an element of certainty to the regulatory process for all involved. The *Water Act* requires an applicant for a licence amendment to go through an application process which involves a technical and scientific review of the application by AEP. An application may include a public notice process that allows anyone who may be directly affected by the proposed amendment to file a Statement of Concern with AEP. The Director reviews each Statement of Concern to determine if it is valid. If the Director finds a Statement of Concern is not valid, the Director must inform the party that filed it. The Director then proceeds to review the application, the legislation, valid Statements of Concern, and other relevant factors, and makes a decision to either approve or deny the application. Even though a Statement of Concern may be found invalid, it does not prevent the Director from reviewing the issues raised therein and considering them when making the decision on the application. However, the Director is not required to notify a party who filed an invalid Statement of Concern of the Director's decision regarding the application.

[53] Once the Director has made the decision, notice must be provided to those who filed valid Statements of Concern and to the public. A party who has had their Statement of Concern declared invalid may still learn of the Director's decision by public notice, often in local newspapers, on the AEP website, at local AEP offices, or posted at the local municipal office.

[54] The *Water Act* provides that anyone who is directly affected and filed a Statement of Concern may file a Notice of Appeal with the Board within a prescribed time period. A party that filed an invalid Statement of Concern may file a Notice of Appeal and make submissions on why the Board should accept their appeal even though the director did not accept their Statement of Concern. The time limit to file an appeal is specified in the legislation so that all parties will know when the process is complete. Once the appeal process concludes, the director's decision can be implemented as issued, changed, or refused, depending on the Minister's decision, and all parties can move forward.

[55] In this appeal, the Director issued the Licence Amendment on October 25, 2019, and made his decision available to the public by posting it on the AEP website on October 30, 2019. Section 116(1)(b) of the *Water Act* states a Notice of Appeal must be filed with the Board no later than 30 days after “the last provision of notice of the decision that is appealed from.” Therefore, the period to file a Notice of Appeal started October 31, 2019, and ended November 30, 2019.

[56] SNN stated they only learned in the local media on November 19, 2019, that the Director had issued the Licence Amendment. SNN submitted the Board should find the Notice of Appeal was filed on time as they filed their Notice of Appeal on December 17, 2019, which was within 30 days of SNN learning the Licence Amendment had been issued.

[57] The Director had not accepted SNN’s Statement of Concern as valid and informed SNN of this decision in his October 10, 2019 letter. The Director did not have a legal duty to specifically inform SNN when the Licence Amendment was issued. The Director was clear in his October 10, 2019 letter that any decision on the Amendment Application would be made available on the public AEP website. The Director’s letter provided the website address to SNN and provided them with the name of a person to contact at AEP and their telephone number.

[58] Had SNN checked the AEP website as suggested by the Director or contacted the person at AEP, they would have been aware from October 31, 2019, onward of the Director’s decision to issue the Licence Amendment. SNN was aware the application for the Licence Amendment had been filed. SNN should have taken steps to be updated on the progress of the application even though the Director did not accept their Statement of Concern. It appears they did not do so, as they say they only learned from the local media the Licence Amendment had been issued. SNN filed their Notice of Appeal on December 17, 2019. While this was within 30 days of them learning from the media of the issuance of the Licence Amendment, the legislation requires a Notice of Appeal be filed within 30 days of the Director providing public notice of the decision.

[59] The appeal period starts at the time notice of the decision is provided by the Director. If no time limits were placed on the appeal period, the applicant for an approval or licence would never know when it could proceed with its project. If the time period started at the time a potential appellant actually learned of the director's decision, it could lead to absurd results, such as when a decision is not discovered until months or years after it is made and public notice provided. The Board recognizes this is not the case with the SNN appeal as it was filed 18 days late. However, there needs to be consistency when applying the legislation, including the calculation of the 30-day appeal period. Consistency in applying the time limit in which an appeal must be filed will allow all parties – the applicant, appellants, and the regulator – to know when the process is complete.

[60] The Board finds SNN filed their Notice of Appeal after the legislated time period.

[61] SNN submitted that, if the Board finds the Notice of Appeal is late, then the Board should grant SNN an extension of time to file.

[62] The legislation dictates the appeal period, but it also provides the Board with the discretion to extend the appeal period in certain circumstances. The Board uses this authority in only limited situations.<sup>11</sup> If an appellant who filed a late appeal provides the Board with suitable

<sup>11</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.).

grounds, the Board has the jurisdiction under the legislation to extend the time limit to file a Notice of Appeal. The onus is on the Appellants to demonstrate to the Board that the time limit should be extended to allow their appeals to proceed. Due to the importance of certainty in the regulatory process, the Board generally does not extend the appeal period unless it is clear an extension is necessary to support the principles of natural justice and fairness, including the rights of all parties. For the Board to grant an extension of time to file a Notice of Appeal, an appellant must show that extenuating or special circumstances prevented them from filing within the legislated time frame so as to justify altering the right of the applicant to certainty.

[63] With this in mind, the Board reviewed the written submissions it received to determine whether the Appellants provided sufficient grounds to allow the Board to grant an extension of time to file an appeal. SNN submitted the Board should grant an extension to file the Notice of Appeal for the following reasons:

- (a) SNN is directly affected by the Licence Amendment;
- (b) the Licence Amendment will have an adverse impact on their rights and interests;
- (c) AEP and the Licence Holder have not addressed SNN's concerns in any meaningful way; and
- (d) the Board has a responsibility to the public interest to hear and evaluate SNN's concerns and interests regarding the Licence Amendment.

[64] The reasons SNN gave for why the Board should grant an extension are not relevant factors for the Board to consider when determining whether to extend the time to file the Notice of Appeal. SNN did not explain what prevented them from filing the Notice of Appeal within the legislated time limit. The only reason indicated for failing to meet the deadline was they were unaware until November 19, 2019, that the Licence Amendment was issued. This is not considered an extenuating circumstance that would justify the Board using its authority to extend the time period to file an appeal.

[65] None of the reasons SNN cited in their submissions, prevented SNN from filing on time. If the Notice of Appeal had been filed on time, SNN could have raised these issues in their appeal as part of the substantive hearing, but without a valid Notice of Appeal filed within the legislated time limits, the Board cannot consider such arguments.

[66] To be clear, as the Notice of Appeal is not properly before the Board, it is not making any finding on whether SNN is directly affected, on any constitutional matters, or on any of SNN's concerns with the Director's decision to issue the Licence Amendment.

[67] Upon review of the legislation and the written submissions, the Board is of the opinion SNN has not provided sufficient grounds to warrant an extension of the statutory appeal period. Accordingly, SNN's Notice of Appeal is not valid and the appeal is dismissed.

## 2. Ken Hoover's Notice of Appeal

[68] Mr. Hoover stated he missed the deadline to file his Notice of Appeal because the Director did not inform him he could appeal the Director's decision.

[69] Mr. Hoover filed his Notice of Appeal with the Board on January 20, 2020, 51 days after the 30-day deadline expired. In the Board's letter dated January 23, 2020, the Board asked Mr. Hoover to provide reasons why it should extend the time for him to appeal. It also asked him to explain why he filed the appeal outside of the 30-day time limit.

[70] Mr. Hoover said he worked diligently for four or five months on the Amendment Application but did not have the information that would have made it possible for him to file a Notice of Appeal within the 30-day time limit. Mr. Hoover was aware of the application and knew the Director would be making a decision. He filed a Statement of Concern in response to the Licence Amendment application. He did not provide the Board with any evidence as to why he could not have contacted the Director or checked the AEP website periodically to find out if the Licence Amendment had been issued.

[71] The Board appreciates Mr. Hoover's passion for the environment and his efforts to have his voice heard. However, there is a responsibility for each person wanting to participate in the appeal process to become aware of the procedural rules set out in the *Water Act* and *EPEA*, and to follow them, including being aware of the time limits for filing a Notice of Appeal. Mr. Hoover said he made phone calls, sent emails, and tried his best to understand the process surrounding the Amendment Application, which should have included the appeal process and associated time limits.

[72] Mr. Hoover failed to provide sufficient grounds for the Board to consider extending the legislated time limit for filing a Notice of Appeal. Therefore, the Board dismisses the appeal of Mr. Hoover for filing the Notice of Appeal after the expiry of the time limit.

## **V. DECISION**

[73] The Board finds SNN did not file its Notice of Appeal within the legislated time limits. SNN did not provide evidence of extenuating or special circumstances that prevented SNN from filing on time and, accordingly, did not provide the Board with sufficient grounds to extend the time limit. Therefore, the Board dismisses Stoney Nakota Nation's Notice of Appeal for lateness.

[74] The Board finds Mr. Hoover did not file his Notice of Appeal within the legislated time limit, and he did not provide evidence of extenuating or special circumstances that prevented him from filing on time and, accordingly, did not provide the Board with sufficient grounds to extend the time limit. Therefore, the Board dismisses Mr. Hoover's Notice of Appeal for lateness.

Dated on November 12, 2021, at Edmonton, Alberta.

A handwritten signature in black ink, appearing to read 'Alex MacWilliam', is written over a horizontal line.

Alex MacWilliam  
Board Chair (ret.)