

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 18, 2005

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 an appeal filed by Ken Smulski, filed on behalf of Ken Smulski, J. Smulski Estate, S.V. Farms of Gibbons and 267554 Alberta Ltd., with respect to *Water Act* Approval No. 00212558-00-00 issued to Agrium Products Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Smulski v. Director, Northern Region, Regional Services, Alberta Environment re: Agrium Products Inc.* (18 March 2005), Appeal No. 04-073-D (A.E.A.B.).

PRELIMINARY MEETING BEFORE:

Dr. William A. Tilleman, Q.C., Chair;
Dr. M. Anne Naeth, Board Member; and
Dr. Steve E. Hrudehy, Board Member.

SUBMISSIONS:

Appellant:

Mr. Ken Smulski, J. Smulski Estate, S.V. Farms of Gibbons, and 267554 Alberta Ltd., represented by Mr. Gavin Fitch, Lawson Lundell.

Director:

Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. Darin Stepaniuk and Mr. Mark Greene, Alberta Justice.

Approval Holder:

Agrium Products Inc., represented by Mr. Bernard Roth, Fraser Milner Casgrain LLP.

EXECUTIVE SUMMARY

Alberta Environment, issued an Approval under the *Water Act* to Agrium Products Inc. (Agrium), authorizing the construction, operation, management, and maintenance of modifications to the surface drainage and the northern extension of the phosphogypsum storage area of Agrium's fertilizer manufacturing facility near Redwater, Alberta.

The Board received an appeal from Mr. Ken Smulski, on behalf of himself, the J. Smulski Estate, S.V. Farms of Gibbons, and 267554 Alberta Ltd.

Mr. Smulski filed his appeal after the 7 day time limit for filing appeals of approvals issued under the *Water Act*. He argued the *Water Act* approval is ancillary to the approval issued under the *Environmental Protection and Enhancement Act* to Agrium for the same project, and therefore, he should have the same 30 day period in which to file his appeal.

The Board disagreed with this analysis, and the appeal with respect to the *Water Act* approval was dismissed for being filed out of time, as no special circumstances existed to warrant an extension of the appeal deadline.

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I. BACKGROUND

[1] On November 19, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00212558-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Agrium Products Inc. (the “Approval Holder” or “Agrium”), authorizing the construction, operation, management, and maintenance of modifications to the surface drainage and the northern extension of the phosphogypsum storage area of the Approval Holder’s fertilizer manufacturing facility near Redwater, Alberta.

[2] On December 17, 2004, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Ken Smulski (the “Appellant”), filed on behalf of himself, the estate of J. Smulski, S.V. Farms of Gibbons, and 267554 Alberta Ltd., appealing the Approval. The Notice of Appeal appealed the Approval and an Amending Approval 210-01-11 (the “EPEA Approval”) issued by the Director under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).¹ The Board assigned separate appeal numbers to the appeal of the Approval (04-073) and the appeal of the EPEA Approval (04-074).

[3] On December 22, 2004, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the record (the “Record”) relating to this appeal and for the Parties to provide available dates for a mediation meeting or hearing.²

[4] In this letter, the Board stated:

“The normal time limit prescribed in the *Water Act* for filing an appeal of a *Water Act* [approval] is 7 days. As Approval No. 00212558-00-00 was issued on November 19, 2004, your Notice of Appeal appears to be outside the time limit prescribed in the *Water Act*, you are requested to advise the Board if you wish to request an extension of time to appeal? Please indicate to the Board the reasons for the extension of time to appeal and provide an explanation as to why the appeal was filed outside of the 7 day time limit. The granting of the extension of time is at the discretion of the Board and is not routinely granted. You are

¹ The appeal of the EPEA Approval was filed within the legislated time frame. The Board will be determining the validity of the appeal of the EPEA Approval (Appeal No. 04-074) at a later date, and therefore, it is not at issue in this decision.

² On January 7, 2005, the Board received a copy of the Record from the Director, and on January 13, 2005, copies were forwarded to the Appellant and the Approval Holder.

requested to provide this information in writing to the Environmental Appeal Board by January 10, 2005.” (Emphasis omitted.)

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The AEUB responded in the negative. On January 6, 2005, the Board received a letter from the NRCB stating it held a public hearing into the Approval Holder’s application regarding the phosphogypsum storage area. A copy of the decision (NR2004-01) was attached.

[6] On January 13, 2005, the Board wrote to the Parties advising that the matter of the late filed appeal would be dealt with in writing. The Board received submissions from the Parties between February 7 and 18, 2004.

II. SUBMISSIONS

A. Appellant

[7] The Appellant stated two approvals were issued for the same project, with the EPEA Approval being the primary approval and the *Water Act* Approval the ancillary approval. The Appellant stated his Notice of Appeal was filed within the 30 day time limit for the EPEA Approval but outside the 7 day time limit for the *Water Act* Approval. The Appellant submitted that, “...since both approvals pertain to the same project, and the EPEA approval is clearly the primary or senior approval, extending the time limit for filing the *Water Act* appeal should be viewed as a mere formality.”³

[8] The Appellant argued the Director made one decision, to approve the extension of the phosphogypsum storage area. He argued that, since two separate approvals were required to implement the decision, there is an “...anomalous situation of two different appeal periods applying to the same decision.”⁴ The Appellant submitted the Board should accept his appeal, as he did file his Notice of Appeal within the 30 days prescribed in EPEA.

[9] The Appellant stated both approvals are required for the extension of the phosphogypsum storage area to proceed, and this “...has given rise to the confusing situation

³ Appellant’s submission, dated January 26, 2005.

⁴ Appellant’s submission, dated January 26, 2005.

that two different appeal periods apply in respect of commencing an appeal from the approval of a single project.”⁵ The Appellant argued the Approval is ancillary to the EPEA Approval since condition 3.1.17 of the EPEA Approval authorizes the construction of a perimeter drainage system, and to modify surface drainage, an approval under the *Water Act* is required.

[10] The Appellant stated the Approval and the EPEA Approval are integrally interrelated. He stated the Approval is required for the Approval Holder to carry out one particular part of its overall project authorized by the EPEA Approval. The Appellant submitted the Approval “...is of the type contemplated in subsection 16(2) of the *Water Act*, namely, its issuance is necessary to enable Agrium to comply with Part 2 Division 1 of *EPEA* (i.e., to comply with the Environmental Assessment process set out in *EPEA*, failing which it could not have received the *EPEA* approval).”⁶

[11] The Appellant further argued, “...it makes no sense whatsoever to try in this case to artificially or arbitrarily separate the *EPEA* approval from the *Water Act* approval and treat them as separate, stand-alone approvals, each with its own (different) appeal periods.”⁷ The Appellant stated he filed a single Notice of Appeal appealing the decision by the Director to approve the extension of the phosphogypsum storage area, and this one decision requires two different approvals.

[12] The Appellant submitted his appeal should be accepted in its entirety, and to “...do anything else would be illogical and would represent a triumph of legal technicality over common sense and sound environmental decision-making.”⁸

B. Approval Holder

[13] The Approval Holder submitted the Appellant did not provide adequate reasons

⁵ Appellant’s submission, dated January 26, 2005.

⁶ Appellant’s submission, dated January 26, 2005. Section 16 of the *Water Act* states:
“(1) Unless the regulations provide otherwise, the Director may not issue or amend an approval, preliminary certificate or licence or approve a transfer of an allocation of water under a licence if the Director is of the opinion that Part 2, Division 1 of the *Environmental Protection and Enhancement Act*, if applicable, has not been complied with.
(2) Notwithstanding subsection (1), the Director may issue an approval, preliminary certificate or licence to enable a proponent to comply with Part 2, Division 1 of the *Environmental Protection and Enhancement Act*.”

⁷ Appellant’s submission, dated January 26, 2005.

for the Board to grant an extension of time for filing the appeal. The Approval Holder argued the Appellant's reliance on section 16(2) of the *Water Act* was misplaced. He stated that the Approval was clearly not issued under section 16(2). The Approval Holder explained section 16(2) "...allows for activities such as the drilling of monitoring wells that are necessary to collect data for an environmental impact assessment."⁹ The Approval Holder stated the Approval allows for the construction of the project, as the construction of the gypsum stack extension will have impacts on water flows and therefore requires an approval under the *Water Act*. The Approval Holder requested the Board dismiss the application for the extension of time.

C. Director

[14] The Director agreed with the arguments provided by the Approval Holder. The Director explained larger projects that are considered at a public interest proceeding before the AEUB or NRCB typically require more than one approval, and often include an approval from the AEUB or NRCB, an approval under EPEA, and may require one or more approvals or licences under the *Water Act*. The Director argued the requirement of more than one approval does not create a single appeal right. He stated the legislation provides appeal rights for each approval with timelines associated with the exercise of those rights.

[15] The Director submitted the Approval Holder's arguments would result in the time for appealing an approval set out in section 116 of the *Water Act* "...should be ignored in every case where an EPEA approval is also issued. This is not logical and it is not common sense. It is contrary to law."¹⁰

[16] The Director stated the relevant documentation clearly directed the Appellant to take the responsibility to discover the appropriate appeal deadlines. He stated the notice of decision letter sent to the Appellant stated "...there are strict timelines for filing an appeal dependent upon the type of appeal."¹¹ The Director submitted the Appellant's Notice of Appeal clearly indicates the Appellant was aware he was dealing with two separate approvals as he referred to them separately and referred to both legislation sections authorizing appeals of the

⁸ Appellant's submission, dated January 26, 2005.

⁹ Approval Holder's submission, dated January 28, 2005.

¹⁰ Director's submission, dated February 8, 2005.

¹¹ Director's submission, dated February 8, 2005.

Approval and the EPEA Approval. The Director submitted there is an absence of sufficient grounds to extend the appeal period.

D. Appellant's Rebuttal Submission

[17] In response to the Approval Holder's submission, the Appellant stated the EPEA Approval deals with groundwater in considerable detail, and the *Water Act* Approval deals principally with modifications to surface drainage. He explained the primary issue raised in his Notice of Appeal is groundwater. The Appellant noted the Approval Holder's objections to his argument that section 16(2) of the *Water Act* supports his position, but he maintained his contention that this section was applicable in this case.

[18] In response to the Director's submission, the Appellant stated he did not claim there is a single appeal right or that section 116 of the *Water Act* should be ignored in every case where an EPEA approval is also issued. He argued the circumstances of this case involve two approvals being issued and two approvals being appealed, and one of the appeals was commenced within the time limit. The Appellant stated the issues raised in his Notice of Appeal relate to water, and as both approvals relate to water, the water issues cannot "...be neatly compartmentalized and assigned to one of the approvals and excluded from the other."¹² According to the Appellant, the appeal is directed at the Approval and the EPEA Approval.

[19] The Appellant stated, "...even if the *Water Act* appeal was dismissed, in our view the Notice of Appeal would be unaffected as the concerns therein with respect to groundwater relate more to the *EPEA* approval than the *Water Act* approval."¹³ He submitted the sensible approach would be to grant the extension and allow both appeals to proceed.

[20] The Appellant argued granting an extension for filing the appeal would not result in any prejudice to the Approval Holder or the Director, as there is substantial overlap between the two approvals issued to the same project.

¹² Appellant's submission, dated February 16, 2005.

¹³ Appellant's submission, dated February 16, 2005.

III. ANALYSIS

A. Legislation

[21] Section 116(1) of the *Water Act* provides: “A Notice of Appeal must be submitted to the Environmental Appeals Board 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....” Therefore, in the case of an amending approval issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is seven days.

[22] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states: “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.”

[23] The timeframe for filing an appeal of an EPEA approval is stated in section 91(4)(c) of EPEA: “A notice of appeal must be submitted to the Board ... (c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case.”

B. Discussion

[24] After reviewing the Appellant’s submission, the Board has determined the appeal respecting the *Water Act* Approval must be dismissed based on two grounds; for failing to meet the evidentiary onus in applying for an extension and the need for certainty in the appeal process.

[25] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.¹⁴

¹⁴ See: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (5 January 2005), Appeal Nos. 03-040-058 and 03-060-081-D (A.E.A.B.); *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-138-D (A.E.A.B.); *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*

1. Extension of Time

[26] The first consideration the Board examined was whether the Appellant had provided sufficient reasons to grant an extension of time to file an appeal. The applicable timeframe with respect to the *Water Act* Approval is seven days. To allow an extension of time, the Appellant must be able to show that extenuating or special circumstances existed that prevented him from filing within the legislated timeframe. The Appellant was asked to provide reasons why an extension of time should be allowed for him to file a Notice of Appeal.

[27] In response, the Appellant presented novel arguments to support his position. He stated this is a unique situation in which approvals were required under both EPEA and the *Water Act*. The Board disagrees with the novelty of the situation. There are numerous projects that require more than one approval or licence, and if the proponent does not acquire all of the appropriate approvals and licences, it will not be in compliance with the applicable legislation and the project could not proceed.

[28] The Board does not determine the timeframes in which to file an appeal. The legislators determined the appeal periods at the time the legislation was drafted. They chose to have different time limits for the approvals issued under the *Water Act* and EPEA, and they did not indicate these time limits should change in any way when appeals are filed under both Acts. The Board will not extend these time limits unless there are special circumstances that warrant introducing an element of uncertainty into the appeal process.

[29] The issuance of the *Water Act* Approval is a separate and distinct decision from the decision to issue the EPEA Approval. There were two separate decisions made by the Director, one under the *Water Act* and the second under EPEA. When one is issued it does not override the other approval or override legislated terms. Each approval operates under the applicable legislation, including the appeal periods.

[30] The Board agrees the Approval and the EPEA Approval are integrally

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.).

interrelated, but that this does not mean appeal periods are interrelated. Each of the approvals regulates specific aspects of the proposed project, as each is issued under the legislation that has jurisdiction over the specific element of the project.

[31] The Board does not agree with the Appellant's argument that section 16(2) of the *Water Act* is applicable in this case. The Approval Holder was correct in its assessment of section 16(2). The sole purpose of this section is to allow work to be undertaken within the context of preparing an environmental impact assessment. It in no way creates the linkages the Appellant is suggesting.¹⁵

[32] As to the single Notice of Appeal filed by the Appellant, the Board will consider his concerns regarding the EPEA Approval at the time it assesses the validity of that appeal. When the Board received the Notice of Appeal from the Appellant, it noted he had appealed both the *Water Act* Approval and the EPEA Approval. The Board identified it as two separate appeals, designated distinct appeal numbers for each, and the Appellant was notified of the elapse of the time limit to appeal in the letter acknowledging his appeals. At no time did the Board consider the appeals as only one appeal of one decision.

[33] Before the Board will consider extending the time frame to file an appeal, the appellant must provide sufficient evidence to demonstrate that extenuating circumstances existed at the time that made it virtually impossible to meet the filing deadline. Without such evidence, the Board cannot consider a request for an extension of a filing period. Although the Appellant presented a novel legal argument in this case, it was not sufficient evidence of extenuating circumstances that would support an extension of time.

[34] Thus, based on the above observations, the Appellant has not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal related to the *Water Act* Approval is dismissed.

2. Certainty

[35] One of the purposes of having deadlines incorporated into legislation is to bring

¹⁵ Similar provisions are included in section 62 of EPEA. This section states: "Nothing in section 60 or 61 prohibits the doing of any work that is specified in the regulations as being work that is permitted to enable a proponent to comply with Division 1."

some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for an approval to go through an application process. This process provides for a technical and scientific review of the application and a public notice process, which seeks out concerns (statements of concern) of anyone who may be directly affected by the proposed approval. Once a decision is made to issue, or for that matter not to issue, the approval, then there is an appeal period in which the applicant for the approval or anyone who is directly affected (and who filed a statement of concern) can file an appeal. The time limit in which an appeal must be filed is stipulated so that all parties, the applicant, the people who are directly affected, and the regulator, know when the process is complete.

[36] Once this process is complete, the approval can be acted upon and all of the parties can move forward on that basis. The approval holder can carry on with their business affairs, making decisions based on the known terms and conditions of the approval. If no time limits were placed on the appeal period, the applicant for an approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the approval.

[37] The time lines included in the legislation, and the certainty that they create, balance the interests of all the parties.

[38] The Appellant did not provide any substantial reason to justify extending the appeal period. He only argued an extension should be given because there were two separate deadlines with respect to two different approvals. This was not a special circumstance, as this often occurs with larger projects. The Appellant simply missed the deadline for filing an appeal of the Approval and tried to link it to the EPEA Approval in an attempt to rationalize his oversight. In his rebuttal submission, he stated his major concerns are with groundwater, and the EPEA Approval relates more to his concerns than the Approval under the *Water Act*.

[39] Therefore, the Appellant has not presented sufficient reasons to justify allowing the appeal to be accepted past the legislated time limit, and taking into consideration the importance of providing a reasonable level of certainty in any decision made by the Director, the appeal must be dismissed.

IV. CONCLUSION

[40] The Board finds the statutory prerequisites for filing a Notice of Appeal have not been met, as the appeal was filed out of time and no evidence of special circumstances was presented to extend the appeal deadline. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal with respect to the Approval issued under the *Water Act* (Appeal No. 04-073).

Dated on March 18, 2005, at Edmonton, Alberta.

- original signed by -

William A. Tilleman, Q.C.
Chair

- original signed by -

Dr. M. Anne Naeth
Board Member

- original signed by -

Dr. Steve E. Hrudehy
Board Member