



# ENVIRONMENTAL APPEALS BOARD

## RULES OF PRACTICE

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# INTRODUCTION

These are the Rules of Practice of the Alberta Environmental Appeals Board which are contemplated by section 95 of the *Environmental Protection and Enhancement Act*.

The *Environmental Protection and Enhancement Act* and the corresponding Environmental Appeal Board Regulation set out the formal requirements of an appeal and what the Board must do when it receives an appeal. In addition, the *Environmental Protection and Enhancement Act* confers on the Board all the powers of a commission of inquiry under the *Public Inquiries Act*. The purpose of these Rules of Practice is to indicate how the Board will exercise its powers to deal with appeals.

The Board wishes to stress that its procedures will have to be flexible. Where any matter arises during the course of any proceeding that is not envisioned by these Rules, the Board will do whatever is necessary to enable it to adjudicate effectively and completely on the appeal. Additionally, the Board will dispense with compliance of any part or all of a particular rule if, in its opinion, the circumstances so require, and it will issue specific directions to govern such cases. In all cases, the *Environmental Protection and Enhancement Act*, the *Water Act*, the Environmental Appeal Board Regulation and other statutory provisions must be complied with and will override these Rules in case of conflict.

The Board intends to use these Rules of Practice to fulfill the spirit of the Acts and Regulation. Every effort will be made to process appeals in a timely fashion in accordance with the principles of natural justice, including issuing decisions expeditiously. The Board expects all Parties to co-operate in the discharge of its mandate.

## GENERAL

### 1. Definitions

In these Rules,

“Act” means the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

“Appellant” means the person who files a Notice of Appeal that results in an appeal;

“Board” means the Environmental Appeals Board established under section 90 of the Act;

“Chair” means the Chair of the Board and includes any member of the Board acting as chair from time to time;

“Minister” means the Minister of Environment;

“Notice of Appeal” means a notice of appeal filed pursuant to section 91 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, section 115 of the *Water Act*, R.S.A. 2000, c. W-3, and Schedule 5 of the *Government Organization Act*, R.S.A. 2000, c. G-10;

“Panel” means a panel of the Board;

“Party” means

- (a) the Appellant;
- (b) the person whose decision is the subject of the Notice of Appeal;
- (c) any person who the Board decides under section 9(2) of the Regulation should be allowed to make representations in respect of the subject matter of the Notice of Appeal; and
- (d) for the purposes of these Rules of Practice, any person who the Board determines to be a Party;

“Presiding Board Member” means members of the Board presiding at any proceeding;

“Regulation” means the Environmental Appeal Board Regulation, A.R.114/93.

## **2. Conduct**

The Board has all the powers necessary to conduct a fair, expeditious and impartial hearing of an appeal, including the following:

- to issue subpoenas authorized by law;
- to administer oaths and affirmations;
- to rule on the admissibility and relevancy of evidence;
- to seek full disclosure of evidence when the ends of justice would be served;
- to regulate the course of the hearing and the conduct of persons at the hearing;
- where appropriate, to inform the Parties as to the availability of one or more alternative means of dispute resolution, and encourage the use of such methods;
- to hold conferences for the settlement or simplification of the issues including, where appropriate, the use of preliminary meetings and alternative means of dispute resolution;
- to require the attendance at any meeting of at least one representative of each Party who has authority to make commitments in regard to procedural matters and to negotiate concerning resolution of the issues in controversy;

- to dispose of procedural motions;
- to make or recommend decisions in conjunction with the Panel;
- to call and question witnesses;
- where sanctioned by law, to impose appropriate sanctions against any Party or person failing to obey a Board order, refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith; and
- to take any other action authorized by or exercise the powers of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39.

### **3. Precedent**

In light of the discretionary nature of the Board's powers, it must decide each case individually based on the material before it in that particular case. Over time, the Board's prior decisions may provide a useful benchmark to indicate how the Board will view particular types of cases. However, while the Board will generally try to decide similar cases similarly, as a matter of law it must decide each case on its own merits.

### **4. Miscellaneous**

The Board shall consider all Notices of Appeal properly filed with it, and shall do so as expeditiously as possible.

All documents filed by a Party to an appeal are available for inspection at the Board office by Parties to the appeal and by the public.

Any Party may appear on its own behalf or be represented by counsel or by an authorized representative.

Unless otherwise ordered by the Board, the hearing of an appeal is open to the public.

The Board may amend its rules, including such time limits as may be required, to give proper effect to the hearing of an appeal.

Any Party may apply, at any time, for advice and direction as to how to proceed.

### **5. Notice of Appeal**

A Notice of Appeal must contain the following information:

- the provision of the *Environmental Protection and Enhancement Act* or *Water Act* or *Government Organization Act* under which the Notice of Appeal is submitted;

- the name and title of the person whose decision is the subject of the Notice of Appeal and the details of the decision objected to;
- the grounds of appeal including the reasons why the Appellant objects to the decision appealed;
- a description of the relief requested by the person objecting;
- the signature of the person objecting, or the person's agent; and
- an address in Alberta for service for the person objecting.

## **6. Review by the Board**

The Board shall consider the Notice of Appeal in relation to the question of its jurisdiction and the dismissal obligations set out in section 95(5).

An appeal must be dismissed, if in the Board's opinion:

- the person submitting the Notice of Appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, under the *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, or any Act administered by the Energy Resources Conservation Board (Energy and Utilities Board) at which all of the matters included in the Notice of Appeal were adequately dealt with; or
- the Government of Alberta has participated in a public review under the *Canadian Environmental Assessment Act (Canada)*, R.S. 1992, c. 37, in respect of all of the matters included in the Notice of Appeal.

However, Parties submitting a Notice of Appeal from issues that arose at these earlier hearings or reviews will have an opportunity to explain to the Board why the appeal submission is materially different from these other hearings.

The Board also has the power to dismiss the Notice of Appeal if:

- it is determined that the Appellant does not have standing or the Board does not have jurisdiction;
- it considers the Notice of Appeal to be frivolous, vexatious or without merit;
- the person who submitted the Notice of Appeal has failed to comply with a written notice under section 92; or

- the person who submitted the Notice of Appeal fails to provide security in accordance with an order under section 97(3)(b).

## **7. Stay**

A Party may apply for a Stay of the decision that is the subject of the Notice of Appeal, and the Board may grant such a Stay at its discretion. An application for a Stay shall be in writing, signed by the applicant or their agent, filed with the Board, and served on all Parties to the original proceedings.

Upon receipt of an application for a Stay, the Board may:

- make an order staying the order, decision or original proceedings;
- dismiss the application for a Stay; or
- issue directions on procedure inviting submissions from interested persons on whether or not a Stay should be granted. Directions on procedure may provide that:
  - the applicant for a Stay shall serve a copy of the directions on procedure on all Parties to the original proceedings;
  - an interested person filing a submission with the Board shall serve a copy of the submission on the applicant for a Stay and all Parties to the original proceedings;
  - the applicant for a Stay shall be given an opportunity to reply to any submissions; and
  - the applicant for a Stay shall file a copy of any reply with the Board and serve it on all Parties to the original proceedings.

If the application for the Stay relates to the issuing of an enforcement order or an environmental protection order and is made by the person who has been issued the order, the Board may:

- require Alberta Environment to take any action Alberta Environment considers necessary to carry out the terms and condition of the order, and determine the costs of doing so, and
- require the recipient of the order to provide security to cover such costs,

if the Board is of the opinion that immediate and significant adverse effects may result if the terms and conditions of the order are not carried out.

## **8. Request for Information**

The Board may give written notice to the person who submitted the Notice of Appeal that it requires additional information. This information is to be submitted as set out in the written notice and within the time specified in the written notice (section 92).

The Board may provide to a person who submitted the Notice of Appeal, and any person who the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of an appeal (section 95(3)). These representations may be made orally or in writing, at the Board's direction.

## **9. Determination of Issues**

The Board shall determine which matters included in the Notice of Appeal will be included in the hearing of the appeal. The Board may consider certain matters before it makes its determination (section 95(2)). Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter (section 95(4)).

## **10. Motions**

All motions shall state the specific relief requested and the basis for the motion. Except as provided below, they shall be made in writing.

Unless otherwise ordered by the Board, a motion may be made orally following reasonable notice to the other Parties during a preliminary meeting, a mediation or an appeal hearing. After an opportunity for response, the Board may rule on the motion immediately or may direct that the motion and response be submitted in writing.

## **11. Mediation<sup>1</sup>**

Prior to determining the issues on appeal and whether to proceed, the Board may schedule a mediation meeting at which all Parties may make representations. The Board will set the terms of reference for the mediation meeting in advance and will notify all Parties of the terms of reference in writing.

## **12. Site Visit**

Prior to proceeding to a hearing, or during a hearing, the Board may, at the request of a Party or on its own motion, schedule a site visit. The Board will set the terms of

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<sup>1</sup> Mediation is a term used in this document to describe the process of dispute resolution used by the Environmental Appeals Board in mediating disputes to assist parties with settlements of appeals.



reference for the site visit in advance and will notify all Parties in writing of the site visit and terms of reference for it.

### **13. Notice of Hearing**

After the Board has considered the issues in section 95(2) and (5), it will determine whether to proceed with the appeal. At such time as the Board decides to proceed with an appeal, it shall fix a date for the hearing of the appeal.

The Board shall give written notice of the date of the hearing to the Appellant, to Alberta Environment, and to the other Parties to the appeal. The Board shall publish notice in any manner which it considers appropriate at least 21 days before the hearing under the *Environmental Protection and Enhancement Act* and 7 days before the hearing under the *Water Act*.

The notice of hearing shall contain the following information:

- the date, time and place of the hearing;
- a summary of the subject matter of the Notice of Appeal;
- a statement that persons wishing to make representations on the matter before the Board must submit a request in writing to the Board;
- the deadline for submitting such a request in writing;
- the mailing address and fax number of the Board;
- the location and time that any material filed with the Board will be available for examination by interested persons; and
- any other matter the Board deems relevant.

### **14. Third Party Intervention**

The rights of any Party to the appeal process are determined by statute, these Rules, and other applicable laws. Normally, special rights given to intervenors will be established only following their request to participate in the appeal in response to the Board's publication of a notice of hearing.

A request in writing shall contain the following:

- the name, address, telephone and fax numbers of the person submitting the request;

- an indication whether the person submitting the request intends to be represented by a lawyer or agent, and, if so, the name, address, telephone and fax number(s) of the lawyer or agent;
- a summary of the nature of the person's interest in the subject matter of the Notice of Appeal; and
- the signature of the person submitting the request.

Where the Board receives a request in writing, it shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the Notice of Appeal.

As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as either likely to assist the appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties; and
- if the intervention request is late, there are documented and sound reasons why the intervenor did not file earlier for such status.

When the Board makes the determination as to whether or not the person submitting the request should be allowed to become a Party, it shall give the person written notice of that decision. In the discretion of the Board, a person may be denied intervention in a matter in which they could have participated as a Party, but failed in a timely fashion to avail themselves of the opportunity to do so. Those wishing to become involved in the appeal process must therefore make their intentions known to the Board as soon as possible.

## **15. Communication with Witnesses**

Except during examination or cross-examination, there shall be no communication between any counsel and a witness under examination or cross-examination from the time that the witness has been sworn or affirmed until that witness has been excused, unless it is necessary to comply with under-takings, deal with procedural matters, prepare for cross-examination of Parties adverse in interest, prepare the witness for appearance on

a subsequent panel, or for other reasons with leave of the Board or with consent of Board counsel and all Parties present at the hearing.

## MEDIATION

### **16. General**

The Board may, on its own initiative or at the request of any of the Parties to the appeal, schedule one or more mediation meetings prior to the hearing of the appeal. The purpose of a mediation meeting is to facilitate the resolution of the appeal or to determine any of the procedural matters set out in the Regulation. Parties shall come to the mediation meeting fully prepared for a useful discussion of all issues involved in the appeal, both procedural and substantive, and authorized to negotiate and make decisions.

### **17. Facilitation**

Reasonable notice of the time, place and purpose of the mediation meeting shall be given in writing to the Parties and other persons, if any, who are participating or seek to participate in the appeal. A mediation meeting shall be held in person unless the Presiding Board Member concludes that personal attendance is unwarranted or impractical. In this instance, the mediation meeting may be held by telephone or other appropriate means.

Section 11 of the Regulation contemplates that one purpose of a mediation meeting is to facilitate the resolution of the appeal. The Board members have mediation training and, where possible, will attempt to facilitate a resolution of the appeal at a mediation meeting. Alternatively, if it appears it would be productive, the Board may adjourn its hearing for a reasonable time to allow for third-party mediation.

The Presiding Board Member at the mediation meeting will not be a member of the Panel that hears the appeal.

When the Parties agree to a resolution of the Notice of Appeal at the mediation meeting, the Board shall, within 15 days after the mediation meeting, prepare a Report and Recommendations that contains the resolution signed by the Parties if the decision being appealed is amended. The Report and Recommendations shall be submitted to the Minister of Environment to be dealt with according to the Act. A copy of the Report and Recommendations will be sent to each Party along with the Minister's Order.

### **18. Procedural Matters**

Where the Parties do not agree to a resolution of the Notice of Appeal at the mediation meeting, the Board, in consultation with the Parties, may:

- determine a date for a future meeting;
- admit any facts agreed to by the Parties;
- admit any evidence agreed to by the Parties;
- determine the matters to be included in the hearing of the appeal pursuant to section 95(2) and (3) of the Act;
- determine any matter of procedure;
- have the Parties exchange documents and written submissions; and
- where an oral hearing is to be held, determine
  - the order of witnesses;
  - the day-to-day conduct of the hearing; and
  - any other matter necessary for the hearing.

## THE HEARING

### **19. Written Submissions**

Every Party to an appeal must file a written submission with the Board and provide a copy to every other Party at least 7 days before the date of the hearing or as set out by the Board.

Written submissions shall be given to all other Parties.

A written submission shall contain:

- a summary of the facts and evidence to be relied on by the Party;
- a list of witnesses to be called on by the Party and a summary of each witness' evidence; and
- the name, address, telephone and fax numbers of the lawyer or other agent acting on behalf of the party.

## **20. Venue**

Normally, a hearing will be held in a community most convenient to the Parties and close to the location of the issue in question.

## **21. Swearing of Evidence**

All Parties submitting evidence shall do so under oath or affirmation, to be administered by a staff member authorized to swear oaths.

## **22. Opening Statement**

Unless the Presiding Board Member directs otherwise, at the beginning of every hearing each Party shall give a brief opening statement that describes the issues the Party will address at the hearing. The statement should include an outline of the evidence the Party intends to introduce, a list of witnesses, the topics to be covered, and the amount of time required.

Unless the Presiding Board Member directs, the opening statements will be made in the following order: the Appellant, Alberta Environment, and other Parties.

## **23. Order of Presentation**

Unless the Presiding Board Members directs otherwise, the evidence at a hearing shall be presented by the Parties in the following order:

1. the Appellant;
2. other Parties whose interest or position is, in the Board's opinion, similar to that of the Appellant;
3. Alberta Environment;
4. other Parties whose interest or position is, in the Board's opinion, similar to that of Alberta Environment;
5. the Board's witnesses, if any; and
6. the Appellant, in rebuttal.

## **24. Expert Witnesses**

A witness having technical or special knowledge, who is retained by the Board to give evidence, shall provide a written curriculum vitae of his/her qualifications and experience.

In hearings, the Board will not normally qualify a witness as an expert, but any witness with a degree of specialized knowledge should reference that knowledge on the curriculum vitae, and may seek to establish that specialized knowledge as helpful to a particular appeal. Any Party may challenge the qualifications of any witness having technical or special knowledge, before or during the course of his/her testimony.

Curriculum vitae will be filed with the Board prior to the hearing.

The Board, in its discretion, will determine the weight to be given to each witness' testimony, and the witness' qualifications and experience will be a factor in determining the weight to be given to such testimony. The fact that evidence is deemed admissible does not mean that it will be determinative of the issue.

## **25. Evidence: Admissibility**

The Presiding Board Member shall admit any relevant oral or documentary evidence (such as hearing statement) that is not privileged. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the appeal more probable or less probable than it would be without the evidence. The Presiding Board Member may, however, exclude evidence if its probative value (the matter that it is providing proof of) is substantially outweighed by: the danger of unfair prejudice; confusion of the issues; or considerations of undue delay, waste of time, or needless presentation of repetitious evidence.

The fact that evidence is deemed admissible does not mean that it will be determinative of the issue.

## **26. Evidence: Confidential and Sensitive Information**

Where there is full compliance with the *Alberta Evidence Act*, R.S.A. 2000, c. A-18, *Canada Evidence Act*, R.S. 1985, c. C-5, any legislation dealing with privilege, and the *Canadian Charter of Right and Freedoms*, the Presiding Board Member may limit introduction of evidence or issue such protective or other orders that in their judgment are required to prevent undue disclosure of classified, confidential or sensitive matters which include, but are not limited to, matters of a national security, business, personal or proprietary nature. Where the Presiding Board Member determines that information in documents containing classified, confidential or sensitive matters should be made available to another Party, the Presiding Board Member may direct the Party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

If the Presiding Board Member determines the procedure described above is inadequate and classified or otherwise sensitive matters must form part of the record in order to avoid prejudice to a Party, the Presiding Board Member may advise the Parties and provide opportunity for arrangements to permit a Party or representative to have access to such matters.

## **27. Evidence: Written Testimony**

The Presiding Board Member may accept and enter into the record direct testimony of a witness made by a sworn written statement rather than by oral presentation at the hearing. A witness whose testimony is presented by a sworn written statement shall be available for cross-examination.

## **28. Evidence: Cross-examination**

Cross-examination shall be limited to the scope of the direct evidence and, subject to the discretion of the Presiding Board Member, shall always be limited to witnesses whose testimony is adverse to the Party desiring to cross-examine. Cross-examination will be permitted to the extent necessary for full and true disclosure of the facts. The Presiding Board Member may, in the exercise of their discretion, permit inquiry into additional matters as if on direct evidence.

## **29. Burden of Proof**

Any Party offering evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.

## **30. Closing Arguments and Briefs**

At the close of the hearing and upon such terms as the Board may find reasonable, any Party to the proceedings shall be entitled to file a written brief, propose findings of fact and conclusions of law, or do both. At the close of the hearing, the Presiding Board Member will provide each Party with an opportunity to make closing remarks. Any brief, proposed findings of fact and conclusions of law, and closing remarks shall be included as part of the record.

## **31. Closing of the Record**

At the conclusion of the hearing, the record shall be closed unless the Presiding Board Member directs otherwise. Once the record is closed, no additional evidence shall be accepted unless the Board decides the evidence is material and that there was good cause for failure to produce it in a timely fashion. The Presiding Board Member shall reflect in the record, however, any correction to the transcript approved by the Panel.

## **32. Failure to Attend Proceedings**

Where publication or notice of a preliminary meeting, a mediation meeting or a public hearing has been given by the Board in accordance with these rules and statutory requirements, and a Party does not attend the preliminary meeting, mediation meeting or

hearing, the Board may proceed in that Party's absence and that Party is not entitled to any further notice of that portion of the appeal unless the Board directs otherwise.

Unless excused by the Board for good cause, failure of a Party to attend a proceeding, after being served with reasonable notice of the time and place thereof, shall constitute a waiver of all objections to the agreements reached in the proceeding and to any order or ruling with respect thereto.

### **33. Costs**

Any Party to a proceeding before the Board may make an application in writing to the Board for an award of costs on an interim or final basis. A Party may make an application for all costs that are reasonable and are directly and primarily related to the preparation and presentation of the Party's submission in relation to the matters contained in the Notice of Appeal.

An application for an award of interim costs can be made by a Party at any time prior to the close of a hearing of the appeal but after the Board has determined all Parties to the appeal.

An application for interim costs shall contain sufficient information to demonstrate to the Board that interim costs are necessary in order to assist the Party in effectively preparing its submission with respect to a proceeding.

An award of interim costs is subject to a redetermination in an award of final costs.

When an application for an award of final costs is made by a Party, it shall be made at the conclusion of the hearing, at a time, if any, determined by the Board.

The Board may make an award of final costs subject to the terms and conditions it considers appropriate.

Any decision to award costs to a Party is at the discretion of the Board.

### **34. The Board's Report**

Where the Board makes a decision (section 98) or proposes recommendations to the Minister (section 99), it shall prepare a decision or recommendation document containing:

- a statement of the issues to be decided;
- a summary of the evidence, including findings and conclusions and the reasons or basis for these findings and conclusions, on all material issues of fact, law or discussion presented on the record; and



- the recommendations or the decision, including any dissent.

The decision or recommendation of the Board shall be based upon a consideration of the whole record of the material properly before the Board.