

Appeal Mechanisms in Alberta's Environmental Legislation

Environmental Law: Key Strategies for Everyday Practice

LESA LIBRARY

Prepared by:

Gilbert Van Nes

Alberta Environmental Appeals Board

Edmonton, Alberta

For presentation in:

Edmonton, Alberta – October 17, 2018



Legal Education
Society of Alberta

APPEAL MECHANISMS IN ALBERTA'S ENVIRONMENTAL LEGISLATION

Introduction 2

Parties in the Appeal Process 2

 The Proponent – Appellant or Respondent..... 2

 The Neighbour - Appellant..... 3

Starting the Regulatory Process – Public Notice 3

Statements of Concern 5

Notice of Appeal 6

Neighbours – Directly Affected or Directly and Adversely Affected 6

Mediation..... 8

Hearings 8

Costs..... 9

Judicial Review 10

Appendix A

Appendix B

Appendix C

INTRODUCTION

One of the themes in modern environmental legislation is public participation. The importance of public participation was recognized in Alberta in 1993, with the passage of the **Environmental Protection and Enhancement Act**, RSA 2000, c E-12 (“EPEA”). Section 2 of EPEA provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

Similar wording was repeated in 1999, with the passage of the **Water Act**, RSA 2000, c W-3 (“WA”), where section 2 of the legislation provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making....”

This paper will examine public participation, specifically the appeal mechanisms, in EPEA, the WA, and the **Public Lands Act**, RSA 2000, c P-40 (“PLA”). Similar appeal mechanisms are also found in the **Climate Changes and Emissions Management Act**, R.S.A. 2000, c. C-16.7 (“CCEMA”), Schedule 5 of the **Government Organization Act**, RSA 2000, c G-10 (“GOA”), and the **Canadian Environmental Protection Act, 1999**, SC 1999, c 33 (“CEPA”).

PARTIES IN THE APPEAL PROCESS

There are two different situations where legal counsel may become involved in these appeal mechanisms. The first is acting for the project proponent (the “Proponent”) and the second is acting for the next-door neighbour (the “Neighbour”).

The Proponent is the person with respect to whom a decision is made by Alberta Environment and Parks (“AEP”). The Neighbour is a person who may be affected by the decision made by AEP.

The Proponent – Appellant or Respondent

Under EPEA, the Proponent is typically the person to whom AEP issues an Approval, permitting a regulated activity. Under the WA, the Proponent is typically the person to whom AEP grants water rights (a Licence) or the person AEP allows to undertake work in a watercourse. (an Approval). Under

the PLA, the Proponent is usually the person to whom AEP issues a Disposition. (A Disposition is an interest in public lands, such as a grazing lease.) However, the Proponent can also be the person against whom AEP takes enforcement action for violating the legislation.

A Proponent can play two different roles in an appeal. First, a Proponent can file an appeal and be the appellant in the appeal. This happens when the Proponent does not agree with the decision made by AEP. For example, the Proponent may not agree with the terms and conditions included in an Approval or the Proponent may oppose an enforcement action taken against them. In these cases, there are two parties to the appeal: the Proponent and AEP.*

Second, the Proponent may be involved in an appeal as the respondent, when a Neighbour files an appeal. As discussed below, a Neighbour can file an appeal opposing the authorization (usually an Approval, a Licence, or a Disposition) granted to the Proponent. In these cases, there are three parties to the appeals: the Proponent, AEP, and the Neighbour.* In such cases, the Proponent and AEP are on the same side and are opposing the appeal filed by the Neighbour.

The Neighbour - Appellant

A Neighbour can also file an appeal. A Neighbour is a person who is affected by AEP's decision in some way. A Neighbour must be "directly affected" under EPEA and the WA or "directly and adversely affected" under the PLA to file an appeal. "Directly affected" and "directly and adversely affected" are specific legal tests that must be met for a Neighbour to file a valid appeal.

Further, there may be other procedural prerequisites that must be met for a Neighbour to file a valid appeal. These tests and prerequisites are discussed below. It is important to note, if these tests and prerequisites are not met, the Neighbour will not be able to file a valid appeal, and their appeal can be dismissed. (There is no general "public interest" ability to appeal.)

STARTING THE REGULATORY PROCESS – PUBLIC NOTICE

With respect to public participation and the appeal mechanisms, the regulatory process starts with giving public notice.

* As stated, where a Proponent files an appeal, there are usually only two parties to the appeal: the Proponent and AEP. If the matter proceeds to a hearing on the merits, it is possible for interested persons to apply to intervene in the hearing. These "intervenor" may be allowed to participate in the hearing at the discretion of the Board. This participation may range from merely filing a written statement to having the same rights as a party.

Further, as stated, where a Neighbour files an appeal, there are usually only three parties to the appeal: the Proponent, AEP, and the Neighbour. Again, if the matter proceeds to a hearing on the merits, it is possible for the Board grant interested persons intervenor status. Further, it is also possible for two or more Neighbours to file appeals. In such cases, all the appeals are dealt with together. In one case, before the Environmental Appeals Board, 225 Neighbours filed appeals opposing the expansion of a seed cleaning plant.

When a Proponent applies for an authorization (i.e. an Approval or a Licence) with AEP under EPEA or the WA, the application is reviewed and is deemed complete. Once the application is deemed complete, AEP is required to publish a Notice of Application or require the Proponent to publish a Notice of the Application.

Section 72(1) of EPEA provides:

“Where the Director [(the AEP statutory decision-maker)] receives

- (a) an **application for an approval** under section 66,
- (a.1) an application for registration under section 66 or a notice under section 87 or 88 and the Director has given notice under section 66.1 that the application or notice is deemed to be an application for an approval,
- (b) an application under section 67(2) in respect of a change to an activity, or
- (c) an application under section 70(1)(a) to amend a term or condition of, add a term or condition to, or delete a term or condition from an approval,

the Director shall, in accordance with the regulations, provide or require the applicant to provide notice of the application.”

Section 108(1) of the WA provides:

“An **applicant**

- (a) for an **approval**,
- (b) for a **licence**,
- (c) for a renewal of a licence if the Director has decided to conduct a public review of the licence renewal,
- (d) for an amendment of
 - (i) an approval,
 - (ii) a preliminary certificate, or
 - (iii) a licence,

or

- (e) for a transfer of an allocation of water under a licence,

shall provide notice of the application in accordance with the regulations.

Historically, the Proponent has been required to provide the Notice of Application by publishing a notice in the local newspaper. In January 2018, AEP established a website where the Notices of Application are published. Unfortunately, this website has not been widely advertised and is difficult to use. (For example, searching the website by Proponent name requires the exact name to be entered.)

This website is found at <https://avw.alberta.ca/PublicNoticesViewer.aspx>

There is no requirement to publish a Notice of Application under the PLA.

The Notice of Application invites Neighbours who are directly affected by an application to submit a Statement of Concern to AEP.