



Environmental Appeal Board

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April 10, 2015
(via email)

APPEAL FILE: 2013-WAT-029

Re: *Water Act Appeal – Horst v. October 4, 2013 decision of the Assistant Regional Water Manager to restore licensed point of diversion (PD73165) to the normal, natural channel to Maguire Creek*

The Board acknowledges receipt of a letter dated April 9, 2015 from Mr. and Mrs. Purcell in response to the April 9, 2015 letter from counsel for the Respondent attaching a Consent Order that is intended to bring an end to Mr. Horst's appeal. That Consent Order has been executed by Mr. Horst (a copy of which was received today), the Respondent (a copy of which was received today, and two of the Third Parties to the appeal (Mr. and Mrs. Melling and Mr. Proudfoot). Only the Purcells object to the terms of the Consent Order. In their April 9, 2015 letter, the Purcell's set out their reasons for not agreeing with the terms of the Consent Order, and their reasons in support of the appeal proceeding to a hearing. They also suggest amendments to the Consent Order that would resolve their concerns.

Following the Purcell's letter, the Board received a copy of previous email correspondence between counsel for the Respondent and the Purcells, some of which contains information regarding settlement negotiations that is neither necessary nor appropriate for the Board to consider.

Background

Mr. Horst appealed the October 4, 2013 Order issued by the Respondent on various grounds, and asked the Board to rescind the 2013 Order. The hearing of his appeal was set to proceed for three days next week, from April 14 -16, 2015 in Cranbrook, BC.

According to the terms of the Consent Order that he has now executed, Mr. Horst consents to the 2013 Order being "a lawful and binding order" upon him. He also consents to complying with the terms of the 2013 Order no later than 12:00 noon on July 15, 2015. Therefore, according to the terms of the Consent Order, the 2013 Order is, in essence, upheld, and Mr. Horst is subject to all of the terms of the 2013 Order. The only change to the 2013 Order is the date for compliance.

The Purcells object to the 2013 Order, and to the Consent Order because they do not want the terms of the original 2013 Order enforced, whether by consent, or otherwise. Their position (like Mr. Horst's original position in his Notice of Appeal), is that the 2013 Order was based on an incorrect understanding of the natural flows of the creek at issue in the 2013 Order. They submit that, if the appeal is not heard by the Board and Mr. Horst complies with the 2013 Order (in accordance with the terms of the Consent Order), they will be "greatly impacted". The Purcells state that they have evidence to present at the hearing in support of their position, and Mr. Horst's decision to settle his appeal is not "conclusive of whether there are outstanding issues to be addressed".

The Purcells also take issue with paragraph 4 of the Consent Order, stating that this paragraph is prejudicial to their interests.

Decision

The Board finds that the resolution of the issues in the appeal under the Consent Order, which has been executed by the Appellant, Mr. Horst, and the Respondent, brings an end to the triable issues in his appeal. The issues raised by Mr. Horst in his appeal have, in essence, been abandoned: Mr. Horst agrees to comply with the 2013 Order. In fact, the only change to the 2013 Order is the compliance date,

which is more in the nature of an administrative change than a substantive change. Two of the Third Parties have also executed the Consent Order.

Although the Purcells want the hearing to proceed, it is not their appeal and they cannot control the appeal. The Purcells were added as participants, and then as parties, because they could be impacted by the Board's decision on Mr. Horst's appeal. They did not appeal the 2013 Order themselves, although that may have been an option provided that their appeal was filed within the statutory appeal period. That appeal period has long since expired.

The Board further notes that, as the Consent Order does not make any substantive changes to the 2013 Order, Mr. Horst could have achieved the same result (brought an end to his appeal) by simply withdrawing his appeal and complying with the terms of the 2013 Order. For whatever reason, he chose to proceed with a Consent Order. It would be contrary to law, and would be completely unfair, for the Board to force Mr. Horst's appeal to a hearing, when he wants to comply with the very decision that he appealed, and has executed a Consent Order to that effect. Although the Purcells have serious concerns with the 2013 Order and the impact that it will have on them, this is not a matter that Mr. Horst must pursue as part of his appeal. Mr. Horst has chosen his path, and the Purcells must find another means of having their concerns addressed by the Ministry outside of Mr. Horst's appeal.

As a final matter, the Purcells disagree with paragraph 4 of the Consent Order, stating that this paragraph is prejudicial to their interests. As they have not consented to the terms of the Consent Order, its terms are not enforceable against them.

Considering all of the circumstances, the Board will exercise its discretion to accept the Consent Order, as filed. The Board will provide the parties with a final copy of the Consent Order endorsed by the Board in due course.

The hearing of Mr. Horst's appeal is hereby cancelled.

Yours truly,

"Alan Andison"

Alan Andison, Chair