

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE PUBLIC HEALTH ACT,
CHAPTER P-37, R.S.A. 2000
AND ITS REGULATIONS

IN THE MATTER OF AN APPEAL TO
THE PUBLIC HEALTH APPEAL BOARD
BY 728106 ALBERTA LTD. AND WOLFGANG WENDRICH
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 1 SOUTH
DATED JUNE 30, 2016
HEARING HELD AUGUST 22, 2016

Appearances

Wolfgang Wendrich, Owner/Appellant
Georg Wendrich, Owner/Appellant

Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent
Wade Goin, Executive Officer, Alberta Health Services/Respondent

Board's Decision

The Board confirmed the Order of an Executive Officer issued June 30, 2016 (the "Order") and notified the parties of this decision on August 24, 2016.

Introduction

The Order was issued pursuant to the *Public Health Act*, the *Nuisance and General Sanitation Regulation* and the *Recreation Area Regulation*. The Order set out the contraventions of the *Act* and *Regulations* as they pertained to the water supply for the property known as Crowsnest Mountain Resort at 100 Wolfstone Drive in Coleman Alberta (the "Property"). The Property has both campsites and cabins.

The Order required the Owners to cease and desist the distribution of non-potable water to the recreational area immediately, including water for showers and toilets, obtain approval from Alberta Health Services before implementing a new water distribution system and to provide privies in the interim.

The Appellant received verbal confirmation of the Order on June 30, 2016 and the Notice of Appeal was received by the Board on July 10, 2016.

The stay hearing was held on July 25, 2016 by way of a telephone conference. The Chair of the Board granted a stay of the Order on August 2, 2016 and provided reasons for the decision to grant a stay to the parties on August 12, 2016.

The appeal hearing date was set for August 22 and 23, 2016. The Appellant applied for an adjournment of the appeal hearing on August 18, 2016 which the Board did not grant.

The appeal hearing was August 22, 2016 and the Board notified the parties of its decision to confirm the Order on August 24, 2016 indicating written reason would be provided in due course.

The Board received a petition from several of the occupants of the Property and two of the Petitioners attended the stay hearing. The two Petitioners were notified of the appeal hearing date, time and location but did not attend the hearing.

Issue

Whether the Executive Officer's Order dated June 30, 2016 ought to be varied or reversed to allow the Appellant to provide well water to the occupants of the Property until an approved water treatment system is constructed and implemented.

Appellants' Submissions

The Appellants asked the Board to vary or reverse the Order, allowing them to provide the well water to the occupants of the Property until they implement an approved water treatment facility. They estimated it would be less than 8 weeks.

Alberta Environment Protection also issued an order directing the Appellants to stop providing the well water to the occupants of the Property and that order was not stayed.

The Appellants submitted the well water is safe. There were some previous tests that showed contamination but the problem that caused the contamination was addressed. The Appellants and their families have been using the water for many years and they have never been sick from the water.

The Appellants submitted the Order was disproportionate, given the water problem was not significant and the time frame required to implement a water treatment facility was short.

A major issue raised by the Appellants was regarding the notice received before being required to cease providing well water to the occupants. They submitted they

received no notice and were blind sided at the start of their busy season. In addition, they submitted that transitional rules would have allowed for a solution within a reasonable time frame but this was not considered by Alberta Health Services as the Order required them to immediately cease providing the well water to the occupants of the Property. The Appellants contend that was abusive and demonstrated a lack of fairness or intention of working together to make things possible.

The Appellants stated they had been working towards implementing a water treatment facility but the process was complicated. It took 2 years to obtain approval for the water treatment facility and they were now attempting to obtain financing. The Order had affected their revenue and as a result they were close to being insolvent.

It was the Appellants' position that the Order did not consider the matter of fire protection for the property as the water would not be available to help extinguish fires.

It was their position that the sign/notice posted to guests stating there was a licensing dispute regarding the water, was not intended to undermine the meaning or importance of the 2012 Order regarding the boil water advisory. The sign, as written, was a misunderstanding on the part of a family member.

They submitted there are other boil water advisory Orders that have been in existence for long periods of time on the Public Health website.

Finally, the Appellants provided the Board with an article wherein the Chief Justice of the Supreme Court of Canada discussed access to the justice system. It was their position the legal requirements and processes were complicated and legal counsel was not affordable.

Alberta Health Services' Submissions

Alberta Health Services asked the Board to confirm the Order issued June 30, 2016. Alberta Health Services submitted the well water is non-potable and that was determined prior to 2012 when a prior Order was issued. Public Health officials determined the water was non-potable from laboratory test results showing Coliforms and a "Groundwater Under the Direct Influence of Surface Water" (GWUDI) assessment.

The laboratory test results confirmed Coliforms on the following dates:

2011: May 10, May 18, June 7, June 14, June 29, August 4, August 9 and December 15;

2012: January 10, May 1, (e.coli also present), April 5, June 27, July 5, November 8, November 14 and December 12; and also on March 26, 2014 and March 18, 2015.

The Executive Officer explained the lack of Coliforms is not necessarily indicative of safe water but the presence of Coliforms usually indicates contamination from sewage and that the water source has underlying problems.

In addition to the laboratory test results, the GWUDI assessment assists in determining if there is risk of contamination from surface water, such as rivers and creeks. Surface water is not safe and can contaminate well water. An initial well water GWUDI assessment indicated 3 of the 4 risk factors were present. Those were:

- proximity to surface water (well is 25 meters within a creek);
- water quality (tests show contamination); and
- well construction (well is only 8 meters deep).

The Executive Officer issued 2 orders in 2012 as a result of laboratory test results. The second Order was issued on December 14, 2012 and stated:

That the owner immediately undertake and diligently pursue the completion of the following work in and about the above noted premises, namely:

Take immediate and reasonable action to notify all users of this water system that the water is not safe for human consumption and that the water must be boiled for at least 1 minute rolling boil prior to consumption, or to find an alternate safe water supply for drinking. You will ensure that these measures remain in place until such time that an Executive Officer of Alberta Health Services notifies you that the water is safe for consumption.

Take immediate action to make the water safe for human consumption including but not limited to installing and continuing adequate treatment, installing backflow prevention devices as needed, initiating and continuing adequate system monitoring programs.

Alberta Health Services submitted the December 2012 Order was intended to allow the well water to be used temporarily with the boil water advisory in place while a water treatment facility was built. However, the water treatment system was not built and no changes were made to the water being supplied to the occupants. Studies show boil water orders are not effective over time, compliance wanes and complacency increases. The Appellants had just less than 4 years, a significant period of time, to construct and implement an approved water treatment facility.

In addition, one of the signs found on the Property stated there was a technical licensing issue rather than clearly stating the water was not safe. It stated:

Water is currently classified as Non Potable due to some confusion about licensing agreements. Please come to the office to get a water jug while we are waiting to sort this out. Sorry for the inconvenience.

Alberta Health Services submitted that options were presented to the Appellants and set out in a letter dated June 16, 2016. Those options included haul water from a safe source (their water truck was approved for hauling water), treatment of the water (chlorine is not effective for germs in wells – ultraviolet is required) or having a “dry” campsite (provide no non-potable water to occupants).

Alberta Health Services submitted that the ability to fight a fire was not affected by the Order as the non-potable water could still be used to fight a fire. There had been record rainfall and the risk of fire was minimal.

Finally, there were no transitional rules regarding a change in the requirements for providing the occupants with potable water as suggested by the Appellants.

Reasons

The *Recreation Area Regulation*, Alberta Regulation 198/2004, states as follows:

In this Regulation

- (e) “potable water” means water that is safe for human consumption;
- f) “recreation area” means a campground or a recreation camp;

And:

3(1) The owner of a recreation area must ensure that sections 4 to 11, as those provisions relate to recreation areas, are complied with.

And:

(3) The owner of a remote recreation area must ensure that sections 4, 7 and 8 are complied with.

(4) Where the owner of a recreation area or remote recreation area does not operate the recreation area or remote recreation area, a reference in this Regulation to the owner of the recreation area or remote recreation area includes a reference to the person who operates the recreation area or remote recreation area.

4 Recreation areas and remote recreation areas must be located, operated and maintained so as to ensure that

- a) water sources will not become polluted, and
- b) nuisances will not be created,

by the operation or use of the recreation area or remote recreation area.

And:

7(1) If a recreation area supplies water

- a) for human consumption,
- b) to a sink or shower facility, or
- c) through hook up to a recreational vehicle,

the water must be potable, and the requirements set out in subsection (2) must be met in respect of the potable water.

- (2) Where a recreation area supplies potable water,
- a) the potable water supply must be sampled immediately before the commencement of each operating season for the recreation area and as may be required by an executive officer throughout the operating season,
 - b) the potable water supply must be kept in a clean and sanitary state, and
 - c) the equipment used for transmission, treatment and storage of the potable water supply must be maintained in a condition that is, and operated under conditions that are, clean and sanitary.
- 8 If a recreation area supplies non-potable water, the fact that the water supply is non-potable must be advertised at each public access point where the water is dispensed or supplied with a conspicuously and permanently posted sign that
- a) states "Not Safe for Drinking" or a similar statement, and
 - b) has a pictorial symbol indicating the water is not safe for drinking.

In addition, the *Nuisance and General Sanitation Regulation*, Alberta Regulation 243/2003 states:

- 11 Where a person provides a source of water that the person intends to be used or realizes or ought to realize will be used by the public for human consumption, the person shall ensure that the water is potable.
- 12 Where under any law a potable water supply is required to be provided in or at any public place, the owner of the public place shall ensure that the equipment used for the transmission, treatment and storage of the water is maintained in adequate operating condition and in a clean and sanitary condition.

Both the *Nuisance and Sanitation Regulation* and the *Recreation Area Regulation* require the Appellants to provide potable water to the occupants of the Property. This includes not only drinking water but also potable water for recreational vehicles, showers and sinks.

The Board finds the water being provided to the recreation area was non-potable, as was determined by Alberta Health Services in 2012. This finding was based on the evidence provided by Alberta Health Services: the test results from 2011 to 2016 showing the presence of chloroform and the initial GWUI assessment indicating 3 of the 4 risks for ground surface water contamination existed for the water well.

The Appellants did not provide any scientific evidence to support their position that the water was safe. Their evidence was that their family had never been sick from drinking the water for many years. This is anecdotal evidence, not based in science or research. When considering matters regarding risks to public health, anecdotal

evidence cannot be accepted by the Board. The evidence provided by Alberta Health Services was based on science and it was accepted by the Board.

The well water being provided to the occupants of the Property contravened both the *Nuisance and General Sanitation Regulation* and the *Recreation Area Regulation*.

The second Alberta Health Services Order of 2012 required the Appellants to set up boil water signs as the water was non-potable and to immediately take action to make the water safe for human consumption including but not limited to installing and continuing adequate treatment, installing backflow prevention devices as needed and initiating and continuing adequate system monitoring programs. This was never completed by the Appellants in the nearly 4 years after the order was issued. They continued to provide the non-potable well water to the occupants of the Property.

The Appellants had reasons for not implementing an approved water treatment facility, approvals were required by other government departments and the lack of funds. However, the evidence of Alberta Health Services was that a boil water advisory is meant to be temporary as studies shows that compliance wanes over time and complacency increases. The Board accepts this evidence and also finds that the Appellants were undermining the boil water advisory by posting a sign that stated:

Water is currently classified as Non Potable due to some confusion about licensing agreements. Please come to the office to get a water jug while we are waiting to sort this out. Sorry for the inconvenience.

A reasonable person would believe the water was safe after reading this sign and that is also what the Appellants believed: that the water is safe. By posting this sign the Appellants were increasing the risk of illness for the occupants of the Property.

There was no evidence provided by the Appellants that there would be an increase in fire risks by not providing the non-potable water to the occupants of the Property.

Finally, regarding the Appellants position that they were blind sided by the Order requiring them to cease providing the non-potable water as set out in the Order on June 30, 2016, this was not supported by the evidence. The following is evidence to the contrary:

- December, 2012 Order of an Executive Officer directing the Appellants to provide potable water to the occupants of the property; and
- A letter dated June 16, 2016 from Alberta Health Services to the Appellants setting out the history of the non-potable water issues and setting out options available to the Appellants which included, construction of Alberta Environmental Protection (AEP) approved water treatment facility, ensure all water system users continue to be aware that the water is not safe for human consumption and of personal treatment options, and

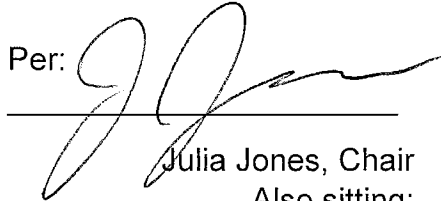
provide potable water using another method acceptable to both AEP and AHS which may include:

- cistern filled with potable water
- an adequate ground water source (with AEP approval).
- connection to an AEP regulated system.

The Order was issued in accordance with the requirements of the *Public Health Act*, the *Nuisance and General Sanitation Regulation* and the *Recreation Area Regulation*. The Order and the terms of the Order were a proper exercise of the Executive Officer's professional discretion given the scientific evidence he relied upon and the potential risk to the public's health.

For the above reasons, the Public Health Appeal Board has confirmed the Order dated June 30, 2016.

Per:

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

Julia Jones, Chair
Also sitting:
Sandra Sheppard, Vice-Chair
Linda Klein, Member

Date: September 19, 2016