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# ALBERTA ENVIRONMENTAL APPEAL BOARD

## Decision

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Date of Decision – January 9, 2001

**IN THE MATTER OF** Sections 84, 85, 87 and 92.1 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3;

**-and-**

**IN THE MATTER OF** appeals filed by the Butte Action Committee and the Town of Eckville with respect to Approval 00077822-00-00 issued under the *Water Act* on May 4, 2000 to Crestar Energy by the Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment.

Cite as: *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment, re: Crestar Energy.*



**WRITTEN SUBMISSIONS  
PANEL:**

Dr. William A. Tilleman, Q.C.  
Dr. John P. Ogilvie  
Dr. Roy A. Crowther

**PARTIES:**

Appellants: The Butte Action Committee, represented by Ms. Jeannette Godkin, Vice Chair; and The Town of Eckville, represented by Her Worship Mayor Helen Posti

Department: Mr. Kenn Looten, Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment, represented by Mr. Randy Didrikson, Alberta Justice

Approval Holder: Crestar Energy, represented by Mr. Rob Lutzer

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## **I. BACKGROUND**

[1] On May 23, 2000 the Environmental Appeal Board (the “Board”) received a Notice of Appeal (EAB Appeal No. 00-029) from the Butte Action Committee for the Environment (the “BAC”), a society registered under the *Societies Act*. The Notice of Appeal was filed by Ms. Jeannette Godkin, Vice Chair of the BAC. The appeal concerns the decision by Mr. Kenn Looten, Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment, under the *Water Act*, S.A. 1996, c. W-3.5 to issue Approval No. 00077822-00-00 (the “Approval”) to Crestar Energy (the “Approval Holder”). Mr. Looten is designated a Director (the “Director”) under the *Water Act*.

[2] The Approval, dated May 4, 2000, authorizes the Approval Holder to explore for groundwater in relation to two pre-existing groundwater wells – Well 1966-06-27-01 and Well 1973-11-26-02 both located on LSD 12 in the North West ¼ of Section 28, Township 39, Range 3, West of the 5<sup>th</sup> Meridian, near Eckville, Alberta.

[3] On August 15, 2000 the Board received a further Notice of Appeal (EAB No.00-060), this time from the Town of Eckville (“Eckville”). This Notice of Appeal was filed outside of the statutory time limits by Her Worship Helen Posti, Mayor of the Town of Eckville. Eckville’s Notice of Appeal relates to the same decision made by the Director.

[4] In summary, the Notice of Appeal filed by the BAC advises that they:

1. object to the withdrawal of tremendous volumes of water, claiming a negative impact on the source aquifer and other aquifers in the area, BAC also objects to long term withdrawals of water;
2. are concerned with potable groundwater given that potable water is a finite and non-renewable resources;
3. are concerned with the use of potable water for oil field injection; and

4. requests that the Board stop the use of potable water for pressure maintenance (injection).

[5] In summary, the Notice of Appeal filed by Eckville advises that:

1. Eckville is concerned with the application made by the Approval Holder for the right to explore for groundwater because Eckville's main water source is only 2 miles away from the proposed exploration site;
2. Eckville is concerned that diverting vast volumes of potable water will eventually have a negative impact on Eckville's aquifer and other aquifers; and
3. Eckville wants to know why it is necessary to use potable water when other technologies are available for performing injection procedures.

#### **A. History of the Decision Appealed**

[6] The Approval that the BAC and Eckville object to was issued in response to an Application under the Water Act (the "Application") received by the Director from the Approval Holder on October 26, 1999<sup>1</sup>, wherein the Approval Holder requested an increase of the maximum annual diversion at two pre-existing groundwater wells from 92514 m<sup>3</sup> to 185028 m<sup>3</sup>. The two pre-existing groundwater wells, which were developed in 1966 and 1973, were originally licenced to the Hudson's Bay Oil and Gas Company Limited in 1985, transferred to Amoco Canada Petroleum Company Limited in 1990, and finally transferred to the Approval Holder in 1993.<sup>2</sup> It is the Board's understanding that the water from these wells is used for an industrial oil field process known as "water flood" whereby the pressure in the reservoir is maintained by injecting water into the oil bearing formation.

[7] Upon reviewing Crestar's Application, the Director determined that prior to considering increasing the maximum annual diversion the "... applicant needs to demonstrate that the proposed groundwater increase will not significantly deplete groundwater resources."<sup>3</sup> The Approval Holder was directed to publish a public notice indicating that it had filed an "... application under the provisions of the *Water Act* to explore for groundwater..." and "... an application for licence under the provisions of the *Water Act* to divert water up to a maximum of 370,056 cubic metres annually from wells on the NW 28-039-03-W5 for Industrial (Injection)

purposes.”<sup>4</sup> The public notice provided that Statements of Concern with respect to the exploration for groundwater should be received within 7 days. Further, the public notice provided that Statements of Concern with respect to the diversion of water should be received within 30 days. The public notice was published in the Western Star on March 6, 2000 and March 13, 2000.

[8] The Director received a Statement of Concern from the Butte Action Committee on March 14, 2000. The Director received an additional 14 Statements of Concern on March 17, 2000 and a further 19 Statements of Concern between April 13, 2000 and April 18, 2000.

[9] On May 4, 2000 the Director issued to Crestar an approval to explore for groundwater. The Approval, while indicating the quantity of water applied for, does not authorize the diversion of water.

[10] By letter dated May 4, 2000 the Director notified the Statement of Concern filers that the Approval had been issued. It was in response to this letter that the BAC filed its Notice of Appeal.

[11] The Director has not yet made a decision whether to issue or refuse to issue the licence to divert water that was requested by the Approval Holder.<sup>5</sup>

## **B. Procedural History Before the Board**

[12] On May 12, 2000 the Board received a letter from Ms. Jeanette Godkin on behalf of the BAC, advising that the BAC “... on behalf of it’s members, is appealing file no. 12081 Re: Crestar Energy’s application for an increase of water on NW 28 39 3W4.” The stated grounds for the appeal included “concern for potable groundwater now and in the future” and

further stated that the “withdraw [sic] of tremendous volumes will have a negative impact on source aquifer and other aquifers in the area.”

[13] The Board replied on May 15, 2000 and advised the BAC that “... the Board requires some additional information to proceed further with your request for an appeal.”

[14] On May 23, 2000 the Board received the Notice of Appeal from the BAC.<sup>6</sup>

[15] By letter of June 16, 2000, the Director provided the Director’s Records. The Director also advised that he wishes:

“... to raise a preliminary jurisdictional question regarding the standing of the Butte Action Committee to bring this appeal. There is nothing in its letter of objection ... or its Notice of Appeal ... to show that any of its members would be directly affected by this approval to explore.... As well, from a practical perspective this Notice of Appeal may be somewhat premature in that it addresses the issue of uses of groundwater for the oilfield injection whereas the ... [Director] has not issued a licence to divert further groundwater at this time.”

[16] In response to this preliminary motion by the Director, the Board in its letter of July 5, 2000, asked the parties to provide written submissions on the following issues:

1. Is the Butte Action Committee “directly affected”?
2. Are there any other persons who should be properly included as part of this appeal?
3. Is the appeal frivolous and vexatious or without merit?
4. Is the appeal “premature”?

[17] The Board received the Initial Submissions from the Director on July 14, 2000 and from the Approval Holder on July 20, 2000.<sup>7</sup> Furthermore, the BAC reiterated the concerns

contained within their Notice of Appeal by stating in a letter dated July 21, 2000 that “our concerns are not for the immediate water supplies but the long term needs of potable water.”

[18] On August 15, 2000, while the Board was awaiting the Rebuttal Submissions from the Director and the Approval Holder, the Board received a Notice of Appeal from Eckville. The Board understands that this Notice of Appeal was provided in response to discussions between the BAC and Eckville.

[19] On August 23, 2000, the Board acknowledged receipt of the Notice of Appeal from Eckville and expressed concern about the timeliness of the appeal.<sup>8</sup>

[20] On September 29, 2000, after reviewing all of the various submissions for the parties, the Board wrote to the parties and decided to hold an oral preliminary meeting to determine the standing of the parties. The Board proposed to hold the oral preliminary meeting on October 12, 2000.

[21] On October 6, 2000, the Board received requests from both the BAC and Eckville to cancel and reschedule the oral preliminary meeting sometime in November. On October 6, 2000, the Board granted the Appellants request and cancelled the oral preliminary meeting.<sup>9</sup>

[22] On November 30, 2000, the Approval Holder wrote to the Board and advised that it had met with the BAC and Eckville on November 28, 2000. With this letter the Approval Holder provided a copy of a report entitled: “Hydrogeological Exploration Study 12-28-39-03-W5 Water Source Wells” dated November 30, 2000.<sup>10</sup>

[23] On December 16, 2000, the BAC wrote to the Board and “... respectfully requests an oral hearing to determine the status of the Butte Action Committee’s jurisdictional validity.”<sup>11</sup>

[24] In a letter dated January 2, 2001, the Approval Holder advised the Board: "...conditions as outlined in the Approval No. 00077822-00-00/Water Act have been met. The conditions are addressed in the hydrogeological report provided by Terracon Geotechnique Limited."

[25] In response to this letter, on January 3, 2001 the Board wrote to the parties and advised that there were a number of issues and questions raised by the parties – particularly mootness -- that the Board would like to address.<sup>12</sup>

[26] With respect to the issue of mootness, the Board received several submissions.<sup>13</sup>

## **II. Issue**

[27] The issue before the Board is whether to continue with the appeals filed by the BAC and Eckville (collectively the "Appellants") in light of the recent statements by the Approval Holder and the Director that these particular appeals are now moot.

## **III. Analysis**

[28] For reasons that follow, the Board agrees that the appeals are moot; the preliminary meeting schedule for January 10, 2001 is accordingly cancelled and the Board's file will, subject to the condition that follows, be closed. By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical.

[29] There are two reasons that lead us to this conclusion. First, Crestar, the Approval Holder, has stated that “The conditions in [the Approval] have been met...” The Approval Holder goes on to say “Since all the work under the Approval has been completed [the Board’s jurisdiction is lost].”<sup>14</sup> Second, the Director advises that “The approval activity has been undertaken and completed.”<sup>15</sup> The Board wishes to stress that we do not lose jurisdiction simply because someone tells us we have; the facts must fully support their claim.

[30] In Crestar’s case, there is (a) no more testing to be done, and (b) even following a hearing, there is no way the Board could recommend that Crestar reverse the now-finished exploration procedure. More important, any consequences of their preliminary tests will be the subject of future licensing and diversion application procedures to the Director, followed by specific notice and comment provisions and appeals against the whole of it, if desired. Therefore, proceeding with Crestar’s disputed Approval, which goes only to the now finished groundwater exploration, would not have any practical effect in resolving the issues before us.<sup>16</sup> It would only spend time and money precious to all parties, particularly in light of Crestar’s probable future application and the appellants’ probable future appeals.

[31] Regarding the future diversion of the water, this question is not even ripe for administrative appellate review; the Director, for example, goes on to say in his letter of January 4, 2001:

“... there has been no decision on whether to issue or refuse to issue a licence to divert further volumes of groundwater. Once the Director makes such a decision he must comply with the notice provisions in section 111(1) or (2) of the *Water Act*. Statements of concern filers and others who are directly affected, if they wish, can appeal such a decision pursuant to section 115(c) of the *Water Act*.”

[32] The Board notes from the Appellants’ correspondence that their main concern is the issue of diversion. Again, if this new licence is issued, future Notices of Appeal to the Board can be launched. What cannot be attacked though is the status of the current water licence because it was issued decades ago.<sup>17</sup>

[33] Accordingly, the Board dismisses the appeals and is closing its files but with one important condition. Since the Board accepts and has relied upon the representation of the Approval Holder and the Director that all work under Approval 00077822-00-00 is spent, the Board attaches the condition to its decision that *if* further work under this Approval is done by the Approval Holder, then the Board will immediately accept the re-instatement of these appeals with the same status that they held prior to today's decision.<sup>18</sup>

#### **IV. Decision of the Board**

[34] For the reasons detailed above, the Board dismisses the appeals, subject to the condition prescribed in paragraph 33 above.

Dated on January 9, 2001, at Edmonton, Alberta.

□original signed by□

Dr. William A. Tilleman, Q.C.

"original signed by"

Dr. John P. Ogilvie

"original signed by"

Dr. Roy A. Crowther

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<sup>1</sup> Director's Record – Tab 14.

<sup>2</sup> Director's Record – Tabs 17, 18, 22, 25, 26, 27, 28, 29, 30, and 31.

<sup>3</sup> Director's Record – Tab 11.

<sup>4</sup> Director's Record – Tabs 5 and 10.

<sup>5</sup> Letter from the Director to the Board dated January 4, 2001.

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<sup>6</sup> On May 31, 2000 the Board acknowledged receipt of the Notice of Appeal from the BAC and requested a copy of all correspondence, documents, and materials (the “Director’s Records”) in relation to the appeal from the Director. On May 31, 2000 the Board also notified the Approval Holder of the appeal.

<sup>7</sup> The Board also received a submission from the BAC on July 21, 2000. After reviewing the BAC’s letter of July 21, 2000, the Board was uncertain whether the BAC had had the opportunity to review the Initial Submissions of the Director and the Approval Holder prior to providing their submission. Also, it appeared to the Board that the BAC had not addressed some of the questions posed by the Board. As a result, in a letter dated July 31, 2000 the Board asked the BAC to provide a further submission respecting the questions posed by the Board. On August 14, 2000 the Board received a further submission from the BAC. The submissions of July 21, 2000 and July 31, 2000 constitute the Response Submission from the BAC.

<sup>8</sup> The Board requested comments from all parties on the issues of whether Eckville:

1. Filed their Notice of Appeal within the time limits specified in the legislation and if not, whether the Board should exercise its discretion to extend the timelines per s.116(2)(I) and;
2. Is Eckville directly affected by the Approval?

On August 22, 2000, the Board received Rebuttal Submissions from the Director and the Approval Holder. On August 23, 2000, the Board received submissions from the BAC in relation to questions posed by the Board in relation to Eckville on August 23, 2000. On August 30, 2000, the Board received submissions from the Director and from Eckville in response to the questions posed by the Board on August 23, 2000. On September 13, 2000, the Board received submissions from the Approval Holder in response to the questions posed by the Board on August 23, 2000.

<sup>9</sup> On October 27, 2000, the Board received a letter from the BAC, which enclosed letters “... from residents who are “directly affected” allowing their interests to be represented by...” the BAC. On November 7, 2000, the Board wrote to the parties and suggested mediation. The parties responded with a series of letters and advised the Board that a meeting between the parties had been arranged, without the need for a Board appointed mediator. The Board confirmed this arrangement in a letter dated November 21, 2000 and asked the parties to provide a status report.

<sup>10</sup> In a letter received November 30, 2000 the BAC confirmed that it had met with the Approval Holder and advised that further work was required with respect to their discussions. Eckville also confirmed the meeting with the Approval Holder in a letter of November 30, 2000 and also advised that further review of the matter was required. In a letter dated December 4, 2000 the Board requested a status report by December 13, 2000. This date was subsequently extended to December 22, 2000 in a letter by the Board dated December 11, 2000.

<sup>11</sup> On December 22, 2000, the Board wrote to the parties and advised that it would hold an oral preliminary hearing on Wednesday, January 10, 2001 and detailed the procedure that the Board proposed to use with respect to this oral preliminary hearing. In letters received by the Board on January 2, 2001 from the BAC and January 3, 2001, from Eckville, further clarification regarding the proposed procedure was requested.

<sup>12</sup> Specifically, the Board said:

“The first and most significant issue is raised in the letter from Crestar Energy Ltd. dated January 2, 2001. Crestar advises that ‘... the conditions as outlined in the Approval No. 00077822-00-00/Water Act have been met. The conditions are addressed in the hydrogeological report provided by Terracon Geotechnique Limited.’

**The Board is concerned that if the conditions of the Approval have been met, then the appeal before the Board may be moot?** In the Approval is moot then the hearing scheduled for January 10, 2001 may not proceed. Specifically, the Board is concerned that if all of the work authorized in

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the Approval has been completed, then there may be nothing for the Board to address in relation to this Approval. The Board is only empowered to recommend that the Approval be confirmed, reversed or varied. If all of the work under the Approval has been completed there is nothing remaining to be confirmed, reversed or varied. It may be that some or all of the issues raised by the parties are more properly dealt with in an appeal of any licence that is issued to Crestar Energy as a result of this Approval.

The Board would like to address this issue prior to going to the preliminary meeting that is currently scheduled for January 10, 2001. To this end, **the Board requests the parties provide their comments respecting the concern that this appeal may be moot by close of business on Friday, January 5, 2001.** The parties should note that pursuant to section 87(5)(a)(i.2), the Board "... may dismiss a notice of appeal if for any other reason the Board considers that the notice of appeal is not properly before it...". Once the Board receives these comments it will proceed to make its decision respecting the mootness issue." (Emphasis in the original.)

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1. two letters from the Director dated January 4, 2001;
  2. a letter from the Approval Holder dated January 5, 2001;
  3. a letter from the BAC dated January 5, 2001; and
  4. a letter from Eckville dated January 6, 2001, which was filed late.

The Board also received two letters from the BAC dated January 8, 2001. The first advises that the BAC would like to appeal any diversion of water that is granted in relation to the Application filed by the Approval Holder. The second requests a stay of any diversion of water that is granted in relation to the Application filed by the Approval Holder.

<sup>14</sup> Letter from the Approval Holder, dated Jan 5, 2001.

<sup>15</sup> Letter from the Director, dated January 4, 2001.

<sup>16</sup> See Sopinka J. in *Borowski v. Canada (A.G.)* [1989] 1 S.C.R. 342, 353.

<sup>17</sup> The current water licence was issued in final form in 1985, but the water source holds priorities from 1966 and 1973.

<sup>18</sup> The Board's power to hear such a matter is found in section 92.1 of the Act which provides that: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."