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ALBERTA  
ENVIRONMENTAL APPEALS BOARD

Decision

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Date of Decision – November 29, 2004

**IN THE MATTER OF** sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** a Notice of Appeal filed by F.W. (Fritz) Seidel with respect to *Water Act* Licence No. 00154141-00-00 issued to Richard and Connie Blair and Lazy H Trail Company Ltd., by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motion: *Seidel v. Director, Southern Region, Regional Services, Alberta Environment re: Richard and Connie Blair and Lazy H Trail Company Ltd.* (29 November 2004), Appeal No. 02-151-ID1 (A.E.A.B.).

**PRELIMINARY MEETING BEFORE:** Dr. Frederick C. Fisher, Chair, Q.C.

**APPEARANCES:**

**Appellant:** Mr. F. W. (Fritz) Seidel, represented by Ms. Judy Stewart.

**Licence Holder:** Mr. Richard Blair, Ms. Connie Blair, and Lazy H Trail Company Ltd., represented by Mr. Alan Harvie, Macleod Dixon LLP.

**Director:** Mr. Brock Rush, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

## **EXECUTIVE SUMMARY**

Alberta Environment issued a Licence to Mr. Richard and Ms. Connie Blair and Lazy H Trail Company Ltd., authorizing the diversion of 8,641 cubic metres of water annually for an industrial camp (British Army Training Unit Suffield) near Cochrane, Alberta.

The Board received a Notice of Appeal from Mr. and Ms. Blair appealing certain conditions in the Licence. The Board also received a Notice of Appeal from Mr. F.W. (Fritz) Seidel.

The Board scheduled a mediation meeting involving all the parties to be held in Cochrane, Alberta. However, prior to the mediation meeting, the Board received a letter from Mr. and Ms. Blair requesting the appeal of Mr. Seidel be dismissed.

The Board held a Preliminary Meeting on April 24, 2003, to deal with the objections of Mr. and Ms. Blair prior to proceeding to the mediation meeting. After hearing the arguments of the parties at the Preliminary Meeting, the Board denied Mr. and Ms. Blair's request to dismiss Mr. Seidel's Notice of Appeal.

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## **I. BACKGROUND**

[1] On January 15, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”) issued Licence No. 00154141-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Richard and Ms. Connie Blair and Lazy H Trail Company Ltd. (the “Licence Holder”), authorizing the diversion of 8,461 cubic metres of water annually from Production Wells No. CW1-91 and CW2-01, located in the NW 25-26-07-W5M for the purpose of an Industrial Camp (British Army Training Unit Suffield Water Supply).

[2] On February 13, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Richard and Ms. Connie Blair and Lazy H Trail Company Ltd. appealing certain conditions within the Licence.

[3] On February 18, 2003, the Board wrote to the Licence Holder and the Director acknowledging receipt of the Notice of Appeal, notifying the Director of the appeal, requesting the Director provide the Board with a copy of the records relating to the Licence (the “Record”), and requesting that the Licence Holder and the Director provide available dates for a mediation meeting or hearing.

[4] In the Board’s letter of February 18, 2003, the Board also requested the Licence Holder and the Director advise the Board if in their opinion there were other persons that may have an interest in this appeal. In this regard, on February 20, 2003, the Board wrote to Mr. Colone and Ms. Cheryle Trudgeon, Mr. Randall and Ms. Joan Coleman, and Mr. Bryne and Ms. Anne Weerstra (the “Interested Persons”), as they are named in the Licence, notifying them of the appeal and providing them with a copy of the Notice of Appeal and Licence, and requesting they advise the Board if they wished to participate in the appeal.

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[6] On February 28, 2003, the Board received the Record from the Director, and copies of the Record were forwarded to the Licence Holder and to the Interested Persons.

[7] On March 16 and 17, 2003, Board staff received an e-mail and telephone calls from the Interested Persons advising that they wished to participate in the appeal.

[8] On March 14, 2003, the Board received a Notice of Appeal from Mr. F.W. (Fritz) Seidel (the “Appellant”) requesting that he be permitted to participate in the appeal. Mr. Seidel advised that he had filed a Statement of Concern with the Director with respect to the Licence but later withdrew the Statement of Concern.

[9] On March 18, 2003, in consultation with the Licence Holder, the Director, and the Interested Persons, the Board scheduled a mediation meeting for April 30, 2003, in Cochrane, Alberta.

[10] On March 20, 2003, the Board received a letter from Mr. Martin Buckley, C.A.O., Municipal District of Bighorn No. 8, providing the Board with copies of by-laws and Development Permits with respect to the Licence Holder. The Board wrote to the Municipal District of Bighorn No. 8 on March 24, 2003, requesting clarification of whether the letter was intended as a Notice of Appeal. The Board received a telephone call on April 9, 2003, from the Municipal District of Bighorn No. 8 advising that its letter was not intended as a Notice of Appeal but was provided as information to the Board only.

[11] On March 24, 2003, the Board acknowledged receipt of the Notice of Appeal from the Appellant, notified the Licence Holder and the Director of the appeal, and requested the Director provide any further records in relation to the Appellant’s appeal to the Board. The Board informed the Appellant of the mediation meeting scheduled for April 30, 2003, and provided him with a copy of the Record.

[12] On April 1, 2003, the Board received a letter from the Licence Holder objecting to the appeal of the Appellant. Their letter stated:

“It is the position of the Blairs/Lazy H that the EAB cannot accept Mr. Seidel’s letter as a Notice of Appeal because he did not file a complete statement of concern and instead withdrew an incomplete statement of concern.... It is also the position of the Blairs/Lazy H that the EAB cannot accept Mr. Seidel’s letter as a Notice of Appeal because he has not complied with the *Environmental Appeal Board Regulation*.... Mr. Seidel’s letter of March 14, 2003 to the EAB does not contain any of the required information, except signature and address.... It is the position of the Blairs/Lazy H that if the EAB intended to grant Mr. Seidel party

status, the EAB has not requested Mr. Seidel provide evidence that he is entitled to party status and Mr. Seidel has not provided that evidence....”

[13] In response to the Licence Holder’s April 1, 2003 letter, the Board wrote to the Licence Holder, the Appellant, and the Director (the “Parties”) on April 2, 2003, advising that a Preliminary Meeting would be scheduled to address the Licence Holder’s motion to dismiss the Appellant’s Notice of Appeal, and requesting the Parties advise if they were available for the Preliminary Meeting on either April 23 or 24, 2003, in Calgary, Alberta.

[14] In consultation with the Parties, the Board scheduled the Preliminary Meeting for April 24, 2003, in Calgary, Alberta.

[15] After reviewing the submissions and hearing the arguments of the Parties at the Preliminary Meeting, the Board wrote to the Parties on April 28, 2003, stating that it would accept Mr. Seidel’s Notice of Appeal. The following are the Board’s reasons.

## **II. SUBMISSIONS**

### **A. Appellant**

[16] The Appellant submitted that he had complied with all of the requests for information from the Director and the Board. The Appellant stated he provided the information to the Director, both orally and by delivering documents, in December 2001. The Appellant explained he provided additional information after he filed his Statement of Concern, including a site plan and three well reports concerning the location and use of his household water supply wells, to the Director as requested.

[17] The Appellant argued he provided additional information as requested by the Board, he was not notified that his Notice of Appeal was incomplete, and the Registrar accepted his letter as a Notice of Appeal.

[18] The Appellant stated he met with the Licence Holder in January 2002 to discuss the Licence application. According to the Appellant, the Licence Holder showed him the CW2-01 well and led him to believe that well had been in operation for 10 years and the amount of water applied for had been pumped from that well on a regular basis. According to the

Appellant, the Licence Holder had informed him the "...application for a licence was essentially a formality to licence the water diversion that had been pumped from CW2-01 for 10 years." The Appellant stated he had visually assessed the level in his well and noticed the water level was normal for that time of year. According to the Appellant, and based on his belief that water had been withdrawn from the CW2-01 well for the past 10 years, he considered there was little impact on his water supply, and therefore, he wrote to the Director to withdraw his Statement of Concern and offered to engage his own hydrologist to prepare a report regarding the Appellant's water supply source.

[19] The Appellant stated that on March 4, 2003, he was shown the Licence and a copy of a second water report prepared for the Licence Holder. The Appellant argued it was at this time he discovered the Licence Holder had misrepresented the facts concerning the CW2-01 well with respect to the length of time the well had been operational and the amount of water withdrawn during the past year. The Appellant stated the report did not reference his well or two wells of his immediate neighbours, and the wells that were referenced in the report were not accurately recorded, researched, or described. The Appellant further stated that on discovering the misrepresentation of facts, he notified the Director and the Board, stating his concerns and expressing his desire to participate in the appeal process, and explaining why he had previously withdrawn his Statement of Concern.

[20] The Appellant argued the legislation is silent as to the consequences of withdrawing a Statement of Concern, and if the intent was to lose the right to file an appeal, the legislation should clearly state that result. The Appellant stated he "...may have chosen to not withdraw his statement of concern in order to preserve his right to appeal in the future. It is submitted that Alberta Environment never explained to Mr. Seidel such a consequence of withdrawing his statement of concern...."<sup>1</sup>

[21] The Appellant stated his household wells could be affected by the diversion of the large quantity of water allowed under the Licence. He further stated the second report provided by the Licence Holder "...indicates that the water supply may dry up in times of drought, and

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<sup>1</sup> Appellant's submission, dated April 21, 2003, at paragraph 22.

may become contaminated as a result of surface runoff.”<sup>2</sup> Therefore, according to the Appellant, he would be directly affected by the Director’s decision to grant the Licence and “...under the circumstances, it would be inequitable to deny him a right to appeal the Licence, or at least participate as a party in Blair’s appeal.”<sup>3</sup> The Appellant also questioned the amount of water that is actually required by the Licence Holder, and according to calculations completed by the Appellant, questioned why the Licence allocated almost double the amount of water actually required.

[22] The Appellant stated he has “...relevant, unique information...” regarding whether the water withdrawal allowed under the Licence will affect adjacent water supplies, and reference was made to what the Appellant perceived as misinformation in the second report prepared for the Licence Holder.

[23] The Appellant argued the substantive requirements for submitting a Notice of Appeal had been met, “...albeit in an informal manner...”<sup>4</sup> including the file number and Licence number of the Licence being appealed, a site well map, his signature and address for service, and the reasons for his appeal. He submitted the information that was not provided, including the section of the *Water Act* under which the Notice of Appeal was submitted, the name and title of the person whose decision is being appealed, and a description of the relief sought, is basically required to identify the decision being appealed. He stated he had originally submitted the Notice of Appeal to the Director, who later suggested the Appellant send his appeal to the Board. According to the Appellant, the Director did not provide any information regarding the requirements of a Notice of Appeal as stipulated in the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”). The Appellant stated the Board processed his letter as a Notice of Appeal from a directly affected person who had previously submitted a Statement of Concern to the Director, even though he had informed the Board he had withdrawn his Statement of Concern and the reasons why, and the Board did not ask for additional information to “formalize” the Notice of Appeal at that time.<sup>5</sup>

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<sup>2</sup> Appellant’s submission, dated April 21, 2003, at paragraph 26.

<sup>3</sup> Appellant’s submission, dated April 21, 2003, at paragraph 27.

<sup>4</sup> Appellant’s submission, dated April 21, 2003, at paragraph 30.

<sup>5</sup> See: Appellant’s submission, dated April 21, 2003, at paragraph 31.

[24] The Appellant argued the Notice of Appeal was filed within 30 days of receiving notice, as he did not become aware of the Licence being issued until March 4, 2003.

[25] The Appellant argued in the alternative that if his Notice of Appeal was not accepted, he should be entitled to receive party status. He submitted that all of the substantive information required under the Regulation has been provided. The Appellant argued that his participation in the appeal process would materially assist the Board in its decision. In addition, he argued he has a unique interest as his is the closest neighbouring well to the licenced wells.

**B. Licence Holder**

[26] The Licence Holder argued the Appellant did not file a complete Statement of Concern and withdrew an incomplete Statement of Concern. The Licence Holder recognized the Board's ability to allow an appeal to be heard when a Statement of Concern was not filed, but only in exceptional circumstances. The Licence Holder argued the circumstances in this situation are not extremely unusual, as the Appellant simply withdrew his Statement of Concern.

[27] The Licence Holder submitted that by withdrawing the Statement of Concern, "...the Director is precluded from considering the filer's concerns when making a final decision..." and his right to file an appeal was no longer preserved.<sup>6</sup> They further submitted the Appellant had failed to provide the additional information requested, and therefore, the Director could not determine whether the Appellant was directly affected.

[28] The Licence Holder referenced a letter forwarded to the Director by the Appellant that stated:

"Mr. Blair has subsequently explained to me that the 8461 m<sup>3</sup> of water mentioned in the 'PUBLIC NOTICE' has been withdrawn annually for the past 10 years to serve the BATUS Camp, and that the current public process is simply meant to formalize this use."<sup>7</sup>

[29] The Licence Holder stated the Appellant toured the Licence Holder's property, and the Appellant was shown the site of the CW2-01 well. According to the Licence Holder, it was obvious the site was under construction as "...there had been three test pits dug with a

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<sup>6</sup> See: Licence Holder's submission, dated April 21, 2003, at paragraph 13.

<sup>7</sup> Licence Holder's submission, dated April 21, 2003, at paragraph 6.

tracked backhoe in addition to the well CW2-01; large dirt piles were surrounding the well; the area was not landscaped; and the culvert was sticking out of the ground.”<sup>8</sup>

[30] The Licence Holder denied making any representations to the Appellant that the CW2-01 well had been in operation for 10 years. He stated the Appellant has water supply wells of his own and should be able to distinguish between a newly constructed well and one that has been in operation for 10 years. In addition, the Licence Holder stated the public notice included the application to explore for groundwater, supporting the position that the Appellant would know the CW2-01 well had not been in use previously.

[31] The Licence Holder referred to cases that have been decided in the courts. The first, *Winnipeg (City) Assessor v. Winnipeg (City) Board of Revision*,<sup>9</sup> involved taxpayers withdrawing their applications asking for a review of their property assessments from the Board of Revision. The court determined the withdrawal left the Board of Revision with no application to review and the relevant statute did not contain any provision allowing the Board of Revision to control the withdrawal of applications. The Licence Holder argued that no provisions exist in the *Water Act* that allow the Director or the Board to control the withdrawal of statement of concerns, and if the legislature had intended the control to exist until a decision had been made by either the Director or the Board, provisions would have been included in the legislation.

[32] The second case provided by the Licence Holder, *Forbes Chevrolet Oldsmobile v. Dartmouth (City)*,<sup>10</sup> involved the appellants withdrawing their appeals regarding the commercial assessment of their property. The Licence Holder summarized the decision of the court, stating that “...once an appeal is withdrawn upon proper notice, the notice of appeal has no further legal effect and it becomes a nullity as of the date of the withdrawal.”<sup>11</sup>

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<sup>8</sup> Licence Holder’s submission, dated April 21, 2003, at paragraph 7.

<sup>9</sup> *Winnipeg (City) Assessor v. Winnipeg (City) Board of Revision*, [1993] M.J. No. 632 (Man. C.A.).

<sup>10</sup> *Forbes Chevrolet Oldsmobile v. Dartmouth (City)*, [1996] N.S.J. No. 58 (N.S. C.A.).

<sup>11</sup> Licence Holder’s submission, dated April 21, 2003, at paragraph 19.

[33] Based on these decisions and previous Board decisions, the Licence Holder submitted that, after the Appellant withdrew his Statement of Concern, he "...cannot revive his statement of concern at a later date once the statutory time period for filing has passed despite any alleged misunderstanding on his part."<sup>12</sup>

[34] The Licence Holder argued the Notice of Appeal filed by the Appellant was incomplete, as it did not contain the information required under the Regulation. According to the Licence Holder the majority of the information was not provided until the Appellant submitted it as background to his appeal on April 14, 2003, well beyond the 30-day limitation period.

[35] The Licence Holder submitted the proper procedure the Appellant should have followed was to apply for party status pursuant to the Regulation and the Board's Rules of Practice. They stated the information necessary to determine if the Appellant's water supply well would be uniquely impacted by the water diversion was never supplied. This included information such as "...water supply sources, well depth, dugout size, flow rate from springs and water requirements."<sup>13</sup> The Licence Holder stated it is impossible to determine if the report held by the Appellant would assist the Director, as the information has not been released to the other Parties. The Licence Holder concluded by stating that the tests within Rule 14 of the Board's Rules of Practice had not been met, and therefore, they objected to granting the Appellant party status.<sup>14</sup>

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<sup>12</sup> Licence Holder's submission, dated April 21, 2003, at paragraph 20.

<sup>13</sup> Licence Holder's submission, dated April 21, 2003, at paragraph 27.

<sup>14</sup> Rule 14 of the Board's Rules of Practice provides:

"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 a proposed 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 earlier file for such status."

**C. Director**

[36] The Director argued the Appellant had not submitted a Statement of Concern in accordance with the *Water Act* based on two grounds. First, he did not provide the additional information requested and, therefore, no determination was made as to whether he was directly affected, and the Appellant withdrew his Statement of Concern. The Director argued that by withdrawing his Statement of Concern, the Appellant did not meet the provisions required under the *Water Act*.

[37] The Director stated the Appellant submitted a Statement of Concern to the Director on November 30, 2001, indicating:

“Please be advised [that] we are concerned about the large water diversion proposed in the application before you. We may be directly affected due to the proximity of our properties to this project....”<sup>15</sup>

[38] According to the Director, he responded to the Appellant’s Statement of Concern, requesting further information. The Director stated the Appellant provided only some of the requested additional information. Then, on January 9, 2002, the Appellant wrote to the Director advising that:

“On January 8, 2002, I toured Mr. Blair’s property and the location of his springs. The distance between our two water sources is estimated to be about 2,500 feet. My concern is greatly diminished and I hereby withdraw my ‘letter of concern’....”<sup>16</sup>

[39] The Director stated the withdrawal of the Statement of Concern was accepted, and as a result, the Appellant did not receive notice when the decision was made.

[40] The Director did not provide any submissions on whether or not special circumstances existed to warrant the Board allowing the appeal even though the requirements of the *Water Act* had not been fulfilled. The Director submitted that as he was not a party to the conversations and meetings held between the Appellant and Licence Holder, he “...is not in a position to comment if those exchanges lead to a fundamental misunderstanding or not on the part of Mr. Seidel and if he withdrew his ‘letter of concern’ based upon such a fundamental

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<sup>15</sup> Director’s submission, dated April 22, 2003. See also: Director’s Record at Tab 73.

<sup>16</sup> Director’s submission, dated April 22, 2003. See also: Director’s Record at Tab 64.

misunderstanding.”<sup>17</sup> Thus, according to Director, he “...has no ‘first hand’ information as to what special or unusual circumstances may exist which would convince the Board to apply ...”<sup>18</sup> the exception provisions outlined in the *O’Neill*<sup>19</sup> case.

### III. ANALYSIS

#### A. Statement of Concern

[41] The relevant sections of the legislation regarding the submission of Statements of Concern and Notices of Appeal are as follows.

[42] Section 95(6) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, (“EPEA” or the “Act”) provides:

“Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

This section of EPEA provides the Board with broad powers to determine who shall be heard in an appeal, but it also must remain within the constraints determined by the rules of natural justice.

[43] Section 115 of the *Water Act* stipulates who may file a Notice of Appeal:

“115(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances ...

- (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
  - (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108....”

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<sup>17</sup> Director’s submission, dated April 22, 2003.

<sup>18</sup> Director’s submission, dated April 22, 2003.

<sup>19</sup> *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-250-D (A.E.A.B.).

Under section 115(1)(c)(i), a Notice of Appeal can only be accepted if the person previously filed a Statement of Concern and is directly affected. The directly affected status of the Appellant was not an issue in this decision.

[44] Section 116 of the *Water Act* states:

- “(1) A notice of appeal must be submitted to the Environmental Appeals Board... not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.
- (3) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.
- (4) A notice of appeal must contain the information and be made in the manner provided for in the *Environmental Protection and Enhancement Act* and the regulation under that Act.”

[45] The Parties referred to the previous Board decision of *O’Neill* in which the Board determined that it requires exceptional circumstances before it will consider a Notice of Appeal without a Statement of Concern being previously filed. The Board continued, stating:

“Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O’Neill, refuses to answer Board questions and provide at least some evidence of the requisite statement of concern and its proper filing.”<sup>20</sup>

[46] None of the Parties argued that the Appellant failed to provide a least some semblance of a Statement of Concern to the Director within the legislated filing period. The Appellant filed a letter expressing his concerns “...about the large water diversion proposed in the application before you. We may be directly affected due to the proximity of our properties to this project.”<sup>21</sup> In this letter the Appellant stated the file number and location of the Licence Holder’s property, and he included his contact information and the legal land description of his own properties.

[47] The Director, in responding to the Appellant’s Statement of Concern, requested additional information concerning:

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<sup>20</sup> *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-250-D at paragraph 14 (“*O’Neill*”).

<sup>21</sup> Director’s Record at Tab 73.

- “1. Do you have water supply sources (wells, dugouts, springs, etc.) on your lands in SE 26, SW 26 & NW 26-26-7W5? A sketch plan showing these water supply sources would prove helpful.
2. What is the depth of your well(s), the size of your dugout(s), the flow rate from your spring(s), if you have them? May we have a copy of your Water Well Drilling Report(s), if available?
3. What are your water requirements (i.e. number of people living in the house; number of livestock; etc.)?

If you still wish to submit a formal statement of concern, please provide these details (in writing).... By copy of this letter, we are forwarding a copy of your statement of concern to Richard and Connie Blair.”<sup>22</sup>

[48] The statements made in the Director’s letter appear contradictory in that one sentence infers his letter is not a Statement of Concern, but the final sentence refers to the letter as the Appellant’s Statement of Concern. In response to the Appellant’s letter withdrawing the Statement of Concern, the Director again referenced it as a Statement of Concern and made no representation that it was flawed in any way. Regardless of the interpretation of the Director’s comments, the Appellant did provide additional information to the Director within the specified time period. Enclosed with his December 12, 2001 letter to the Director, the Appellant provided a sketch of the location of his wells and springs along with a brief description of the distances between his water sources and those of the Licence Holder, as requested by the Director. Plus, the Appellant provided the Director with copies of three water well drilling reports, also as requested by the Director. The only question the Appellant did not answer specifically was with respect to his water requirements. He did, however, agree to get additional information about the wells if it was needed.

[49] As the Board has identified in previous decisions, the purpose of the Statement is twofold.<sup>23</sup> First, it notifies the Director of the filer’s concerns, and ultimately the individual who is making the application is also notified of the concerns. Even if the Statement of Concern is withdrawn, the Director has a duty to review the concerns, albeit he may not have to afford a great deal of weight to the issues. What is important is that the Licence Holder has adequately addressed the concerns of the Appellant.

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<sup>22</sup> Director’s Record at Tab 73.

<sup>23</sup> See: *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115 (A.E.A.B.).

[50] Second, it preserves the filer's right to appeal the decision.

[51] A concern that faces the Board is the situation where an individual withdraws a statement of concern based on an agreement with the licence holder, but when the licence is issued, the Director has decided differently. Although the appellant's concerns may have been addressed in the agreement with the licence or approval holder, the Director may not be privy to this agreement. Even if the Director was aware of the terms of the agreement, he is not bound to the conditions set in the agreement. An agreement between two private individuals cannot and should not influence the Director's decision in a matter.

[52] Based on the arguments presented by the Licence Holder and the Director, the statement of concern filer would be unable to file an appeal, even though it is evident they are now potentially adversely affected by the Director's decision. This obviously is not consistent with the ideals of procedural fairness that have been incorporated into the legislation and into administrative processes.

[53] During the Preliminary Meeting, the Director stated an individual should not have to be involved in the process if their concerns have been satisfied. Although this does appear logical, in this case the Director was aware the Appellant withdrew his Statement of Concern based on the presumption the licensed amount of water had been withdrawn from the wells during the past 10 years.<sup>24</sup> The Appellant clearly stated he had been told the amount of water mentioned in the public notice had been withdrawn annually for the past 10 years and the current process was simply meant to formalize that use. This should have indicated to the Director that the Appellant was operating under a misunderstanding of the facts. In this situation, the Director was in a position to seek clarification from the Appellant that the Statement of Concern was being withdrawn based on the actual facts concerning the Licence.

[54] During the Preliminary Meeting, the Director was asked what the effect would be if the Statement of Concern was withdrawn based on a misapprehension of the facts. The Director responded:

“Your withdrawing it [the Statement of Concern] based on a misapprehension of facts, then I think you're withdrawing it, you're not withdrawing it being fully

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<sup>24</sup> See: Director's Record at Tab 64, Appellant's letter to Director, dated December 12, 2001.

informed. And then there is a question if that's a valid withdrawal because you don't have the true facts in front of you or as you understand them."<sup>25</sup>

[55] During the Preliminary Meeting, the Licence Holder argued the withdrawal of a statement of concern and a notice of appeal are the same in law as both processes are outlined in the legislation and both are contemplated in the legislation. The Board does not agree. In the legislation, it is clearly stated the Board must dismiss a Notice of Appeal if the appellant withdraws it. However, the legislation is silent on the issue of an individual withdrawing a statement of concern. This in itself denotes a major difference in how the issue should be dealt with.

[56] At no point did the Director inform the Appellant his right of appeal could be affected by his withdrawal of his Statement of Concern.

[57] As admitted by the Appellant during the Preliminary Meeting, an individual is deemed to know the law. Therefore, an individual filing an appeal should know what information is required to provide a complete Statement of Concern and Notice of Appeal. However, the legislation also allows for the Board to ask for additional information from a person who files a notice of appeal, if required, and, as explained by the Director, he, too, can ask for additional information from a statement of concern filer.

[58] During the Preliminary Meeting, the Licence Holder questioned whether the Board accepted the Notice of Appeal as valid. It must also be understood that all notices of appeal received by the Board are treated in the same manner. In the initial stages of the process and to expedite the appeal procedures, Board staff treat the notices of appeal as though all are valid appeals. Board members then make the determination as to whether it is a valid appeal, and in this case, the determination was made after the Preliminary Meeting was held.

[59] Based on the above, the Board finds the Statement of Concern was properly filed with the Director and the Board can consider his Notice of Appeal.

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<sup>25</sup> Preliminary Meeting Transcript, April 24, 2003.

**B. Notice of Appeal**

[60] The Licence Holder argued the Appellant had not submitted a complete Notice of Appeal to the Board.

[61] Section 5 of the Regulation states that a Notice of Appeal must contain the following information:

- “(1) A notice of appeal submitted pursuant to section 91 of the Act shall contain the following:
  - (a) the provision of the Act under which the notice of appeal is submitted;
  - (b) the name and title of the person whose decision is the subject of the notice of appeal and the details of the decision being appealed;
  - (c) a description of the relief requested by the person appealing;
  - (d) the signature of the person appealing, or the person’s lawyer or other agent;
  - (e) an address for service for the person appealing.
- (2) A notice of appeal submitted pursuant to any enactment other than section 91 of the Act shall contain the following:
  - (a) the section number and the name of the other enactment pursuant to which the notice of appeal is submitted, and
  - (b) the information referred in subsection (1)(b), (c), (d) and (e).”

[62] The Board will request further information from individuals who file a notice of appeal to either clarify some aspect of the appeal or to assist in determining whether or not the Board has jurisdiction to hear the appeal.

[63] Section 92 of EPEA provides the Board with the ability to request further information. It states:

“Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice.”

[64] Under section 92 of EPEA, the Board has the jurisdiction to ask additional questions of appellants, and the Board will use this ability to ensure it clearly understands which decision is being appealed and the issues of the appellants. Although the Board requires as much information as possible to assess if it has jurisdiction to hear the appeal, the Board also recognizes that, in some cases, the appellants have yet to see the information provided in the application or the terms and conditions of an approval or licence.

[65] In his Notice of Appeal, the Appellant clearly identified the Licence being appealed, his location relevant to the project, his name and address, and the issue he was concerned about was the volume of water that could be withdrawn under the Licence. This provided sufficient information to the Board to accept jurisdiction to consider the Notice of Appeal. If the Board was to reject all notices of appeal that did not have every element included, the appeal process would not fulfill its purpose – to hear appeals from those individuals directly affected by decisions of the directors. The Board does not expect citizens to retain legal counsel to submit a notice of appeal, and even with legal counsel, the Board has received notices of appeal that may be considered incomplete. The legislators anticipated there would be circumstances when the information is incomplete and included section 92 to allow the Board to ask appellants for additional information.

[66] The Board is satisfied the information provided by the Appellant is sufficient to deem the Notice of Appeal valid. Therefore, the Board accepts the Appellant as a party to these appeals.

[67] Even if the Board had not accepted the Notice of Appeal as being valid, the Appellant has presented enough information to show he could be potentially affected by the Director's decision regarding the Licence. Under these circumstances, the Board would have granted the Appellant party status pursuant to section 95(6) of EPEA.

#### **IV. CONCLUSION**

[68] Based on the foregoing, and pursuant to section 95 of the *Environmental Protection and Enhancement Act*, the Board accepts the Notice of Appeal as filed by the Appellant as valid. Therefore, Mr. F.W. (Fritz) Seidel is a proper party to this appeal.

Dated on November 29, 2004, at Edmonton, Alberta.

*“original signed by”*

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Dr. Frederick C. Fisher, Q.C.  
Chair