

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – February 11, 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** appeals filed by the Mountain View Regional Water Services Commission, Gerald Oxtoby, the City of Red Deer, Terry Little, Kelly Smith, Butte Action Committee, and Mike Gallie with respect to *Water Act* Preliminary Certificate No. 00198509-00-00 issued to Capstone Energy Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (11 February 2004), Appeal Nos. 03-116 and 03-118-123-ID1 (A.E.A.B.).

**BEFORE:**

Dr. William A. Tilleman, Chair;  
Dr. Frederick C. Fisher, Vice Chair; and  
Mr. Al Schulz, Board Member.

**PARTIES:**

**Appellants:**

Mountain View Regional Water Services Commission, represented by Mr. Jim Romane; Mr. Gerald Oxtoby; the City of Red Deer, represented by Mr. Nick P. Riebeek, Chapman Riebeek; Mr. Terry Little, Mr. Kelly Smith, the Butte Action Committee, and Mr. Mike Gallie, represented by Mr. Don Bester.

**Certificate Holder:**

Capstone Energy Ltd., represented by Mr. Alan S. Hollingworth, Q.C., Gowling Lafleur Henderson LLP.

**Director:**

Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Denise Black, Board Secretary.

## EXECUTIVE SUMMARY

Alberta Environment issued a preliminary certificate and proposed licence\* to Capstone Energy Ltd. for the diversion of water from the Red Deer River for oilfield injection near Red Deer, Alberta. The Board received Notices of Appeal from the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, Mr. Kelly Smith, the Butte Action Committee, and Mr. Mike Gallie appealing the preliminary certificate and proposed licence.

The Board held a preliminary meeting to determine if the parties that filed the appeals were directly affected; to determine the issues to be considered at the hearing of these appeals; to consider an application for interim costs; and to determine whether the appeal filed regarding the Director's decision to reject a statement of concern was properly before the Board.

After reviewing the submissions and oral arguments provided by the parties, the Board found the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith directly affected. The Board dismissed Mr. Mike Gallie's appeal as he was found not directly affected, but as he could provide unique, relevant evidence, the Board made him as a party to the appeals. The Butte Action Committee withdrew its request to be included as a formal appellant, and instead decided to act as Mr. Gallie's agent.

Upon reviewing the submissions of the parties on the issues to be considered at the hearing of these appeals, the Board identified five main areas that the parties wished to address: purpose, protection, volume, immediate neighbours, and policy considerations.

With respect to the application for interim costs, based on the information that was before it, the Board decided not to grant interim costs, but invited any of the parties to reapply with additional information. (A subsequent application for interim costs was made and granted by the Board.)

The appeal of the Director's decision not to accept a statement of concern did not have to be considered. It was one of Mr. Gallie's appeals, which was dismissed as Mr. Gallie was determined not to be directly affected.

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\* A proposed licence is part of a preliminary certificate, and is appealable only as part of an appeal of the preliminary certificate.

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## I. BACKGROUND

[1] On July 23, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Preliminary Certificate No. 00198509-00-00 (the “Certificate”), including a Proposed Licence (the “Proposed Licence”), under the *Water Act*, R.S.A. 2000, c. W-3, to Capstone Energy Ltd. (the “Certificate Holder”).<sup>1</sup> The Proposed Licence allows for the diversion of 328,500 m<sup>3</sup> of water annually from the Red Deer River by way of an infiltration well in the fluvial gravel formation in SW 4-36-1-W5M near Red Deer, Alberta. The purpose for which the water will be used is oilfield injection.

[2] Between August 15 and September 8, 2003, the Environmental Appeal Board (the “Board”) received Notices of Appeal from the Mountain View Regional Water Services Commission (the “Water Commission”) (Appeal No. 03-116), Mr. Gerald Oxtoby (Appeal No. 03-118), the City of Red Deer (Appeal No. 03-119), Mr. Terry Little (Appeal No. 03-120), Mr. Kelly Smith (Appeal No. 03-121), the Butte Action Committee/Mr. Mike Gallie (Appeal No. 03-122, appealing the Director’s decision to refuse to accept a Statement of Concern), and the Butte Action Committee/Mr. Mike Gallie (Appeal No. 03-123, appealing the Certificate) (collectively the “Appellants”).<sup>2</sup> On September 19, 2003, the Board also received a Notice of Appeal from Ms. Dorene Rew.<sup>3</sup>

[3] The Board wrote to the Certificate Holder and the Director notifying them of the appeals and wrote to the Appellants acknowledging receipt of the Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals. The Board received the Record from the Director on August 22, 2003, and some

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<sup>1</sup> A preliminary certificate specifies certain terms and conditions, and promises that a licence (the proposed licence) will be issued upon meeting these terms and conditions. The proposed licence is attached to and forms part of the preliminary certificate. The terms and conditions of the proposed licence are appealable as part of an appeal of the preliminary certificate. See: section 66(4) of the *Water Act*.

Where a preliminary certificate and proposed licence have been issued, the only opportunity to appeal the terms and conditions of the proposed licence is as part of an appeal of the preliminary certificate. It is not possible to independently appeal the issuance of a licence that was a proposed licence and, therefore, part of a preliminary certificate. See: sections 115(1)(b) and (c) of the *Water Act*.

<sup>2</sup> At the outset of the Preliminary Meeting, the Board determined Mr. Bester was representing the Butte Action Committee, Mr. Mike Gallie, Mr. Smith, and Mr. Little.

<sup>3</sup> The Board dismissed the appeal of Ms. Dorene Rew as her Notice of Appeal was filed late. See: *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-138-D (A.E.A.B.).

additional documents were provided by the Director on September 2, 2003. A copy of the Record and additional documents was provided to each of the Appellants and the Certificate Holder.

[4] 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.

[5] Between August 26, 2003 and September 2, 2003, the Board received a number of Stay requests from the Appellants.<sup>4</sup> On September 18, 2003, after reviewing written submissions from the Appellants on the various Stay requests, the Board notified the Parties<sup>5</sup> that it would not grant a Stay as the requests were premature. The Board stated:

“The persons that filed appeals are concerned that if Capstone is allowed to take the water authorized by the Preliminary Certificate, then their water supply may be harmed in some way....

The Board notes that the Preliminary Certificate that is under appeal promises Capstone Energy Ltd. a Licence to divert water, *once it has met certain conditions*. As a result, Capstone *may not take any water until these conditions are met*. Once these conditions are met, Capstone must submit, and Alberta Environment must accept, a Certificate of Completion. It is only once this Certificate of Completion has been filed and accepted that Capstone may take water.

Therefore, until Capstone is allowed to take water, it is not possible for the ‘irreparable harm’ to occur. Without an immediate possibility of irreparable harm, the request for a Stay is premature.

However, the Board will direct that Capstone and Alberta Environment provide the Board with a copy of the Certificate of Completion when it is filed and confirmation that it has been accepted. Once the Certificate of Completion has been filed and accepted, the Board would be prepared to immediately consider the application for a Stay upon request by any of the valid Notice of Appeal filers.” (Emphasis in the original.)

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<sup>4</sup> On August 26, 2003, the Water Commission requested a Stay. The Board asked the Water Commission and the other parties to respond to a series of questions regarding the Stay request. The Water Commission responded on September 3, 2003. On August 28, 2003, the Board received a Stay request from Mr. Gerald Oxtoby. On the same dated, the Board wrote to Mr. Oxtoby and asked that he provide additional information regarding the Stay request. Mr. Oxtoby responded on September 5, 2003. On August 29, 2003, the Board received a Stay request from the City of Red Deer, and on September 2, 2003, the Board received a Stay request from the Butte Action Committee on behalf of itself and Mr. Mike Gallie, Mr. Kelly Smith, and Mr. Terry Little.

<sup>5</sup> For the purposes of this decision, the “Parties” are the Appellants, the Certificate Holder and the Director.

[6] The Board received a reconsideration request of its decision regarding the Stay from the Butte Action Committee on September 19, 2003. The Board asked the Parties to provide submissions regarding the reconsideration request. The Board did not have to consider the reconsideration request as the Certificate Holder agreed not to carry out any work until the appeal is concluded.<sup>6</sup>

[7] On October 6, 2003, the Board received a request for interim costs from Mr. Bester on behalf of the Butte Action Committee/Mr. Gallie, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith. This request is addressed below as one of issues in this decision.<sup>7</sup>

[8] On October 21, 2003, the Board notified the Parties that it would hold a Preliminary Meeting to hear oral arguments on the following issues:

- “1. whether the Appellants (the Mountain View Regional Water Services Commission, the City of Red Deer, the Butte Action Committee, Mr. Gallie, Mr. Oxtoby, Mr. Little and Mr. Smith) are directly affected by Alberta Environment’s decision to issue Preliminary Certificate No. 00198509-00-00 to Capstone Energy Ltd.;
2. what are the issues to be heard at a potential hearing;
3. Mr. Bester’s request for interim costs; and
4. whether the Notice of Appeal filed by Mr. Bester in appeal No. EAB 03-122 [naming the Butte Action Committee and Mr. Gallie] is complete or properly before the Board because it appears to only appeal the Director’s decision to reject Mr. Bester’s Statement of Concern [filed on behalf of the Butte Action Committee and Mr. Gallie].”

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<sup>6</sup> The Parties provided their responses between September 25 and October 1, 2003. Rebuttal submissions were received on October 7 and 8, 2003. On October 10, 2003, the Board wrote to the Parties and stated:

“The Board notes that Capstone has agreed not to undertake any work in relation to the Preliminary Certificate until the appeal has concluded. Therefore, it is the Board’s view that it is not necessary for it to consider the Stay re-consideration requests at this time. The Board, however, directs Capstone to advise the Board immediately if they undertake steps in accordance with the Preliminary Certificate. If this occurs, the Board will consider the Stay re-consideration request.”

<sup>7</sup> The interim costs application filed on October 6, 2003 by Mr. Bester on behalf of the Butte Action Committee/Mr. Gallie, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith was denied by the Board in its decision letter of December 1, 2003 and as further explained in this decision. However, in its decision letter of December 1, 2003, any of the Parties were invited to resubmit an interim costs application with additional information. On December 3, 2002, the Board received a revised interim costs request from Mr. Bester on behalf of Mr. Gallie, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith. The Board requested and reviewed written submission from the Parties in response to this revised interim costs request and on December 18, 2003, awarded a portion of the costs requested. The Board reasons for the granting a portion of these costs are detailed in another decision.

[9] The Board provided a schedule to receive written arguments on these issues and a Preliminary Meeting was held on November 14, 2003, to hear oral arguments. In a letter December 1, 2003, the Board advised the Parties of its decision respecting these issues and indicate that its reasons would follow.<sup>8</sup> These are the Board's reasons.

## II. PRELIMINARY MOTION

### A. Submissions

[10] A preliminary motion to put the appeals into abeyance was raised by the Water Commission and was generally supported by the other Appellants.

[11] The Water Commission asked the appeals be put into abeyance pending the completion of the "oilfield injection review."<sup>9</sup> The Water Commission stated that making a decision without the relevant policy is not a "good idea," and the decision-makers needs to know where Alberta Environment intends to proceed with the issue. The Water Commission argued it

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<sup>8</sup> In its letter of December 1, 2003, the Board stated:

"The Board is of the view that the Mountain View Regional Water Services Commission, the City of Red Deer, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith are directly affected and the Board will hear their appeals.

With respect to appeals filed by the Butte Action Committee on behalf of Mr. Gallie, the Board is of the view that Mr. Gallie did not meet the onus to demonstrate that he is directly affected. Therefore, the Board dismisses his notices of appeal. However, the Board is of the view that Mr. Gallie has personal knowledge about the Red Deer River that may be of assistance to the Board in its consideration of the other appeals, and therefore, the Board has decided to make Mr. Gallie a full party to these appeals in any event.

The Board will provide the issues to be considered at the hearing of these appeals in its written reasons.

With respect to the application for interim costs, the Board is not prepared to grant the application for interim costs based on the information that was presented. Any of the parties are free to provide a more detailed application for interim costs for the Board further consideration. ...

Finally, with respect to the appeal filed regarding the Director's decision to reject a statement of concern, as this appeal was filed by the Butte Action Committee on behalf of Mr. Gallie, the Board need not consider this issue as the notice of appeal has been dismissed."

The Board issued a further letter on January 7, 2004, specifying the issues to be considered at the hearing of these appeals.

<sup>9</sup> According to the Alberta Environment/Water for Life website (<http://www.waterforlife.gov.ab.ca> October 31, 2003): "The Government of Alberta is already undertaking a number of actions as part of the Water for Life strategy, including a review of water treatment facilities and a review of uses that remove water from the water cycle [(referred to some as the oilfield injection review)]." At the Preliminary Meeting the Director advised that the "oilfield injection review" appears to be a broader review of uses that remove water from the hydrological cycle.

would benefit the Certificate Holder as its licence can be changed depending on the results of the oilfield injection review.

[12] The City of Red Deer supported the position of the Water Commission. It submitted that the motion to put the appeals into abeyance paralleled cases in the courts, i.e. where, when a matter is being considered by a higher court, the lower court will hear the case but defer its decision until after the higher court makes its ruling. (It was clarified that the cases that the City of Red Deer was referring to were Charter cases.) The City of Red Deer recommended proceeding with the hearing, but asked that the Board not make its final determination until Alberta Environment completes its oilfield injection review.

[13] Mr. Bester submitted that it is the Minister that is initiating the public consultation process regarding oilfield injection, and that it has been identified as an important issue that needs to be reviewed because oilfield injection removes water from the hydrologic cycle. Mr. Bester indicated that he understood a resolution would be reached by the committee reviewing the issue within six months, but he also noted there has been recent changes to the committee's constitution. Mr. Bester argued that it is important to see the policy before any approvals or licences are issued that allow oilfield flooding. He argued that all authorizations should be suspended until the committee's recommendations have been received and implemented. When asked if it would be fair to the Certificate Holder to hold the appeals in abeyance until the oilfield injection review was completed, Mr. Bester stated that the Certificate Holder has been producing from that particular field for 23 years, and there is no reason why it cannot wait another six to twelve months. Mr. Bester stated that time must be given to allow the Alberta Environment to develop a proper policy.

[14] Mr. Oxtoby recognized the importance of the committee's review and stated it would be common sense to wait until the oilfield injection review was completed.

[15] The Director explained the review process being undertaken is part of the Water for Life Strategy, and oilfield injection is just one of the issues being dealt with. According to the Director, the terms of reference for the committee<sup>10</sup> looking into the strategy are just being set. The Director stated there are no guarantees the deadlines set will be met, although he is

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<sup>10</sup> The "Advisory Committee on Water Use Practice and Policy." See: Alberta Environment/Water for Life Website at <http://www.waterforlife.gov.ab.ca/html/removed.html> updated to November 27, 2003.

hopeful that the deadlines will be met as there are a number of licences allowing oilfield injection that are set to expire in December 2004. The Director stated that he contemplated the review when he issued the Certificate and took it into consideration when establishing the terms, conditions, and expiry dates of the Certificate and Proposed Licence. The Director submitted that the Certificate Holder is entitled to a timely resolution of the appeals facing it, and therefore, the appeal process should not be put into abeyance.

[16] The Certificate Holder argued that it is entitled to proceed under the existing policy. It understands that there may be changes depending on the results of the oilfield injection review, but there must still be a balance between environmental interests and economic development. The Certificate Holder stated that it hopes the recommendations resulting from the review will be applied equally to all users. It further stated that under section 4 of the *Oil and Gas Conservation Act* it is required to efficiently conserve and develop the resource.<sup>11</sup>

[17] The Certificate Holder argued that it is not proper to defer decisions on the basis of things that *might* happen. According to the Certificate Holder, society could not function if it had to wait for all of the policy choices to be made. The Certificate Holder agreed with the Director that the shelf life of the Certificate and the Proposed Licence are limited. It also argued that it was unaware of any cases where arguments were heard but the decision was not released

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<sup>11</sup> Section 4 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, provides:

“The purposes of this Act are

- (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
- (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas;
- (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;
- (d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;
- (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;
- (f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.”

pending the outcome of a higher court's decision.<sup>12</sup> Based on these arguments, the Certificate Holder did not want the appeals to be held in abeyance.

[18] In reply to the comments of the Director and the Certificate Holder, Mr. Bester argued that it would be to the Certificate Holder's benefit to wait as it had indicated it had limited resources, and if changes were required as a result of the oilfield injection review, the Certificate Holder would be expending additional funds in order to comply.

## **B. Analysis**

[19] What the Board must do when faced with a request, such as this, to put an appeal into abeyance, is balance the competing interests of not only the Parties before it, but also the competing procedural interests of being efficient and hearing the matters quickly with waiting to receive the results of a government policy review that may provide additional clarity on the issues before the Board. The Board faced a similar situation when, shortly before a hearing respecting TransAlta's water treatment plant at Lake Wabamun, it was announced that Alberta Environment was undertaking an investigation into problems (heavy metals and fish kills) at the Lake.<sup>13</sup> In that case, granting a *short* adjournment, the Board stated:

"The Board has decided the hearing should be adjourned for a short time. We do not know all of the answers on heavy metal and fish, but we believe it is better to adjourn for 90 days, allow the Directors to complete their investigations, and then make an informed decision in proceeding with the hearing. The adjournment is consistent with the principles of natural justice and procedural fairness...."

The Board is concerned its hearing be held in an efficient and expeditious manner. Yet, we have to balance two competing interests – to hold a hearing as quickly as possible versus having the best information possible available to the parties, and ultimately the Board, to provide the best information to the Minister. When assessing which interest (expediency versus information) will supercede the other, the Board must look at where the prejudice, if any, will fall. In this case, although an adjournment will delay the actual hearing for 90 days, no Party is significantly prejudiced if the hearing were adjourned."<sup>14</sup>

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<sup>12</sup> In response to the Certificate Holder questioning previous cases, counsel for the City of Red Deer stated the cases he had in mind were with respect to Charter challenges.

<sup>13</sup> See: Adjournment Motion: *Carmicheal et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.) ("*TransAlta*").

<sup>14</sup> Adjournment Motion: *Carmicheal et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID at paragraphs 49 and 50 (A.E.A.B.).

[20] However, the Board believes that the circumstances of the case currently before it are different than the *TransAlta* case. First, in the *TransAlta* case, the appellants were requesting that the Board wait for a factual scientific report to be completed; a report that the appellants argued could be used as factual evidence directly relating to the matter before the Board. In the case currently before the Board, the Board is being asked to wait for a policy review to be completed and then for the Government of Alberta to adopt that policy. Second, in the *TransAlta* case, the Board was of the view that no party would suffer prejudice. However, in this case, the Board is of the view that Capstone may suffer prejudice – the potential expiry of its Certificate among other matters - if the appeals were put into abeyance.

[21] The Supreme Court of Canada addressed the question of adjourning a matter pending a legislative change (or a policy change, which the Board believes is analogous) in *Canada Pacific Railway Co. v. Alberta*.<sup>15</sup> In *Canada Pacific Railway*, which we rely on to reject the motion to put the appeals into abeyance, the Supreme Court of Canada determined that an adjournment granted by the Board of Transport Commissioners to wait for the findings of a Royal Commission was improper. The Supreme Court held:

“...[I]t was not competent of the Board to await the investigation of such matters by some other body or the passing by Parliament of some future legislation with respect to them. Such a decision involves, in our opinion, a decline of jurisdiction. ...

In our opinion to postpone passing upon a matter by reason of matters which are entirely irrelevant to the proper discharge of the duty placed upon the Board under the statute to decide these matters for itself amounts in effect to a refusal to function.”<sup>16</sup>

[22] The *Canada Pacific Railway* case is discussed in *Macaulay's Practice and Procedure Before Administrative Tribunals*,<sup>17</sup> and following a review of other cases that consider requests for adjournment in face of a policy change, Maccaulay concludes:

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<sup>15</sup> *Canada Pacific Railway Co. v. Alberta*, [1950] 2 S.C.R. 25, 2 D.L.R. 405 (S.C.C.) (“*Canada Pacific Railway*”).

<sup>16</sup> *Canada Pacific Railway Co. v. Alberta*, [1950] 2 S.C.R. 25, 2 D.L.R. 405 at pages 410 to 412 (S.C.C.). See also: *Sethi v. Canada (Minister of Employment and Immigration)*(1988), 31 Admin. L.R. 123 (Fed.C.A.), leave to appeal to S.C.C. refused (1988), 36 Admin. L.R. XI (note) (S.C.C.) and R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001), at pages 12-132 and 12-135.

<sup>17</sup> R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001), at pages 12-132 and 12-132.1.

“Thus, it appears to me that the propriety of granting an adjournment on the basis of pending legislative change has to be evaluated in light of a number of factors:

- i. proximity – (how soon is the change likely to take place);
- ii. certainty – (how likely is the change); and
- iii. impact – (what will the consequences of the change be).

If this evaluation results in a material relevance between the change and the proceedings one then considers the balance of convenience: will a refusal to grant the adjournment cause more prejudice to the applicant than a grant of adjournment would cause to the respondent.”<sup>18</sup>

[23] Taking into account the Supreme Court of Canada’s comments in *Canada Pacific Railway*, the Board believes that the Certificate Holder is entitled to a timely resolution of the appeals facing it and putting the appeals into abeyance to wait for possible policy changes is not appropriate in this case. If there was *some* guarantee as to when the oilfield injection review was going to be completed and if and when the Government of Alberta was going to adopt a revised policy, we may have determined the matter differently. Further, the Board anticipates that any recommendations that come out of the policy review will be applied generally to the industry and will not include recommendations specifically to the Certificate Holder.

[24] Significantly, with respect to the question of prejudice, in the case before the Board, the Certificate Holder has agreed not to proceed with any work until the appeals are resolved. Further, *the Preliminary Certificate is set to expire on July 23, 2004*. Based on these and other factors, the Board believes that, unlike in the *TransAlta* case, the Certificate Holder could suffer prejudice if these appeals were put into abeyance pending any policy changes. Therefore, the Board has decided that these appeals will proceed to the substantive hearing as soon as possible.

[25] In making this decision, the Board has taken into account that the Director has attempted to include terms, conditions, and expiry dates in the Preliminary Certificate and Proposed Licence to permit him to implement any policy changes that may be made. The Board believes that to some degree these terms, conditions, and expiry dates mitigates the concerns raised by the Appellants about proceeding with these appeals. However, taking into account the

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<sup>18</sup> R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001), at page 12-135.

concerns raised by the Appellants, the Board has decided that one of the issues that will be considered in the hearing of these appeals is:

Do the Preliminary Certificate and Proposed Licence adequately allow for any changes regarding the policy directions on oilfield injection?

### **III. DIRECTLY AFFECTED**

[26] Turning now to the first issue that was sent for the Board to consider as part of the Preliminary Meeting:

“...[W]hether the Appellants (the Mountain View Regional Water Services Commission, the City of Red Deer, the Butte Action Committee, Mr. Gallie, Mr. Oxtoby, Mr. Little and Mr. Smith) are directly affected by Alberta Environment’s decision to issue Preliminary Certificate No. 00198509-00-00 to Capstone Energy Ltd....”

#### **A. Statutory Background**

[27] Before the Board can accept a notice of appeal as being valid, the person filing the notice of appeal must show that he is directly affected. Under section 115 of the *Water Act*, a person who is directly affected by the decision of the Director – here the issuance of the Certificate and Proposed Licence - has the right to file a notice of appeal with the Board.<sup>19</sup> The Board has examined the term “directly affected” in numerous previous appeals, providing a framework to determine if appellants should be given standing to appear before this Board. The test is the same whether the appeal is filed under the *Water Act* (for an approval, preliminary certificate, or a licence) or the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA” or the “Act”) (for an approval). Although this framework is in place, the Board

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<sup>19</sup> Section 115(1) of the *Water Act* provides:

“A notice of appeal under this Act may be submitted to the Environmental Appeal 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....”

recognizes that there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.<sup>20</sup>

[28] The requisite test for determining a person's directly affected status has two elements; the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*, the Board stated "...that the word 'directly' requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Approval [(here the Certificate or associated Proposed Licence)] in question."<sup>21</sup>

[29] The principle test for determining directly affected was stated in *Kostuch*:

"Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' means the person claiming to be 'affected' must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."<sup>22</sup>

[30] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "...must have a substantial interest in the outcome of the approval [(here the Certificate or associated Proposed Licence)] that surpasses the common interest of all

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<sup>20</sup> See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

<sup>21</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta.Env.App.Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

<sup>22</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta.Env.App.Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

residents who are affected by the approval [(here the Certificate or associated Proposed Licence)].”<sup>23</sup> In *Kostuch*, the Board considered its previous decision in *Ross*,<sup>24</sup> saying directly affected “...depends upon the chain of causality between the specific activity approved...and the environmental effect upon the person who seeks to appeal the decision.”<sup>25</sup>

[31] Further, in *Kostuch* the Board stated that the determination of directly affected is a

“...multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act.”<sup>26</sup>

The Board further stated that:

“If the person meets the first test, they must then go to show that the action by the Director will cause a direct effect on that interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified.”<sup>27</sup>

[32] A similar view was expressed in *Paron* where the Board held that the

“...Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar

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<sup>23</sup> *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) (“*Ross*”).

<sup>24</sup> *Ross v. Director, Environmental Protection* (May 24, 1994), Appeal No. 94-003 (A.E.A.B.).

<sup>25</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta.Env.App.Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

<sup>26</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (Alta.Env.App.Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

<sup>27</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39 (Alta.Env.App.Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”<sup>28</sup>

[33] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the Appellants. In *Paron*, the Board held that:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”<sup>29</sup>

The Board’s Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.<sup>30</sup> The onus or burden of proof issue, in a slightly different context, was recently upheld in by the Court of Queen’s Bench.<sup>31</sup>

[34] In the recent *Court*<sup>32</sup> decision, Justice McIntyre reversed a standing decision based on the Board’s previous cases and provided the following summary on the principles of standing before the Board:

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B.D. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved

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<sup>28</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) (“*Paron*”).

<sup>29</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

<sup>30</sup> Section 29 of the Board’s Rules of Practice provide:

“Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

<sup>31</sup> See: *Imperial Oil Ltd. v. Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

<sup>32</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating

history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”<sup>33</sup>

[35] Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”<sup>34</sup>

[36] As the position of the Appellants varies, the Board will assess the Appellants individually to determine their directly affected status.

**B. Mountain View Regional Water Services Commission, Gerald Oxtoby, The City of Red Deer, Terry Little, and Kelly Smith**

[37] In his written submission, the Director did not object to the standing of the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith as he had accepted their Statements of Concern.

[38] In its written submission, the Certificate Holder did not take a position on whether the Mountain View Regional Water Services Commission is directly affected.<sup>35</sup> However, the Certificate Holder stated it is debatable whether Mr. Little and Mr. Smith are directly affected, notwithstanding the proximity of their properties to the intended diversion site. The Certificate Holder stated its diversion site is on the riverside of an impervious layer of rock, and therefore, nearby groundwater users will not be affected.

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<sup>33</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.); *Mizera et. al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal No. 98-231-98-234-D (A.E.A.B.); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal No. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

<sup>34</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

<sup>35</sup> Certificate Holder’s submission, dated October 31, 2003, at page 3.

[39] Mr. Bester stated Mr. Little and Mr. Smith own and operate cattle ranches directly east of the proposed project and are within the environmental impact area as stated by the Director. Therefore, according to Mr. Bester, Mr. Little's and Mr. Smith's water supply, needed for their cattle operations, could be affected. Mr. Bester submitted the water wells and dugouts are "...recharged from the same Red Deer River gravel sands from which Capstone plans to withdraw fresh water to supply their oilfield."<sup>36</sup> It was further argued that no evidence was presented to show the Appellants' water sources would not be affected by the project, and "...the observation wells that were used in the project are in direct proximity of the producing well and the short test period can only be considered flush production which does not give a true indication of long term impact on downstream wells or dugouts."<sup>37</sup>

[40] Mr. Bester argued the Director dismissed Mr. Little's Statement of Concern on the basis of his residence, which was listed as being in Red Deer, even though Mr. Little's ranch land holding is directly between Mr. Smith's and Mr. Oxtoby's holdings. Apparently, the Director did not inform Mr. Little that he had a right to appeal the Director's decision if the project was approved. (Based on the additional information provided to the Director regarding Mr. Little's land holding, the Director now accepts Mr. Little's Statement of Concern as being valid.)<sup>38</sup>

[41] Mr. Oxtoby stated he is directly affected by the Director's decision, as his place of residence and land holdings are adjacent to the project and downstream within the environmental impact zone as indicated by the Director. Therefore, according to Mr. Oxtoby, any negative impact on the river will affect him. Mr. Oxtoby also expressed concern about his water resources.

[42] To the credit of the Director and the Certificate Holder, at the Preliminary Hearing in their oral submissions, the Director and Certificate Holder did not take issue with the standing of the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the

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<sup>36</sup> Butte Action Committee's submission, dated November 7, 2003.

<sup>37</sup> Butte Action Committee's submission, dated November 7, 2003.

<sup>38</sup> The Board notes that on August 22, 2003, the Director notified Mr. Little that he was considered directly affected and as a result, the Director provided Mr. Little with a copy of the Certificate. The Director reversed his previous decision of May 5, 2003, based on the information provided by Mr. Bester on behalf of Mr. Little. Mr. Bester explained in his August 22, 2003 letter to the Director that Mr. Little has land directly east of the proposed diversion site (NW 02-36-01 W5M and SW 02-36-01 W5M).

City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith. The Director and the Certificate Holder presented arguments only against the standing of the Butte Action Committee and Mr. Mike Gallie.

[43] As the Board indicated at the Preliminary Hearing, the Board is of the view that the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith are all persons directly affected. For the reasons listed below the Board will hear their appeals.

[44] The Mountain View Regional Water Services Commission provides water to a number of communities in the area, including Olds, Didsbury, Carstairs, Innisfail, Bowden, and Crossfield.<sup>39</sup> The Mountain View Regional Water Services Commission is the public body with water sources closest to the proposed diversion site, and, therefore, it represents the interests of a large number of individuals who rely on the Red Deer River as their water source. This is clearly an environmental issue of tremendous personal importance to these individuals. The insights the Commission will provide will assist the Board in its final determination of the appeals. The Board accepts that the Mountain View Regional Water Services Commission is directly affected by the Director's decision.

[45] Similarly, the City of Red Deer represents the concerns of the residents within the City. The Board notes that the City of Red Deer has four licences or approvals downstream of the Dickson Dam. Three of these projects, located at SE 20-38-27 W5M, are in relation to urban activities and have priority dates from 1905 to 1980. The fourth project, with a priority date of 1976, is for recreational purposes and is located at NW 17-38-27.<sup>40</sup> The City is in the position to present evidence as to how its populace will be affected by the proposed diversion and how it, as a holder of four water licences in the area, will be affected. The City of Red Deer is directly affected.

[46] Mr. Oxtoby (SE 09-36-01 W5M) and Mr. Smith (NW 8-36-01 W5M) own properties adjacent to the diversion site identified in the Proposed Licence. They run cattle operations on these properties and, therefore, depend for their livelihood on reliable water sources. The proximity of their water sources to the diversion site indicates that they could be

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<sup>39</sup> See: Record at page 201.

<sup>40</sup> See: Record at page 221.

affected in a manner more than the average Albertan. If the proposed diversion has an effect, Mr. Oxtoby and Mr. Smith would be the individuals affected. Therefore, Mr. Oxtoby and Mr. Smith are directly affected.

[47] The Board notes the Director did not accept the Statement of Concern filed by Mr. Little. The address provided by Mr. Little in his Statement of Concern indicated his residence was some distance from the proposed diversion site. However, according to information provided to the Board, Mr. Little owns land between Mr. Smith and Mr. Oxtoby. Therefore, it is a reasonable conclusion that if Mr. Oxtoby and Mr. Smith could be affected by the issuance of the Certificate and the Proposed Licence, Mr. Little could also be affected. Based on the information that the Board now has, the Board finds Mr. Little is directly affected.

### **C. Butte Action Committee**

[48] The Director objected to the standing of the Butte Action Committee in its capacity as an organization. The Director submitted that the Butte Action Committee did not demonstrate that an "...individual member of the organization will be directly affected by the approved activity."<sup>41</sup> The Director stated there was no information if any water rights of the Butte Action Committee or its members are directly impacted. He argued the Notice of Appeal does not indicate if the majority of its individual members are individually and personally impacted, which previous Board cases on standing have required.<sup>42</sup>

[49] The Certificate Holder also stated it had concerns as to whether the Butte Action Committee is directly affected by the Director's decision as the Butte Action Committee raised general concerns regarding the river levels and stated how Mr. Gallie will be affected. The Certificate Holder argued there is no indication of the organization's make-up, its objects, its membership, or any membership resolutions with respect to this matter. The Certificate Holder

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<sup>41</sup> Director's submission, dated October 31, 2003, at paragraph 5.

<sup>42</sup> See: *Trans Alta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (Alta. Env. App. Bd.), (*sub nom. Baily et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011 (A.E.A.B.); *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (Alta. Env. App. Bd.), (*sub nom. Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*) (20 March 2001), Appeal No. 00-073-D (A.E.A.B.); *Ouimet* (2002), 44 C.E.L.R. (N.S.) 114 (Alta. Env. App. Bd.), (*sub nom. Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.*) (28 January 2002), Appeal No. 01-076-D (A.E.A.B.); and *Hazeldean Community*

acknowledged that the Butte Action Committee had listed several of the Appellants, Mr. Gallie, Terry and Scott Little, and Mr. Smith,<sup>43</sup> as members, but the Butte Action Committee did not indicate what percentage of the total membership these Appellants represent.

[50] At the Preliminary Meeting, Mr. Bester advised that while the Butte Action Committee would like to be found directly affected and have the opportunity to participate in the hearing, he realized the difficulty in obtaining standing for the organization.<sup>44</sup> Therefore, recognizing that he faced an uphill battle, he did not argue that the Butte Action Committee should be granted standing. Instead, Mr. Bester focused his efforts on presenting an argument that Mr. Gallie should be accepted as directly affected, and advised that he would act as Mr. Gallie's agent. Therefore, the Board need not consider the standing of the Butte Action Committee. If we would make a ruling on the Butte Action Committee, based on the information that is presently before the Board, the Board would deny standing to Butte Action Committee. There is currently insufficient information before the Board for the Butte Action Committee to meet the standing test for groups that the Board has previously outlined.<sup>45</sup>

#### **D. Mr. Mike Gallie**

[51] The Director objected to the standing of Mr. Mike Gallie on two grounds – he is not directly affected and he failed to file a Statement of Concern.

[52] The Director argued that Mr. Gallie's concern that lowering the Red Deer River could have serious impacts on the sports fishery does not demonstrate a personal interest that is directly affected by the Certificate. The Director submitted that because of Mr. Gallie's failure

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*League v. Director of Air and Water Approvals, Alberta Environmental Protection* (6 July 1995), Appeal No. 95-02 (A.E.A.B.).

<sup>43</sup> In the Butte Action Committee's submission, dated November 7, 2003, it is noted that Mr. Smith is not a member of the Butte Action Committee

<sup>44</sup> See: *Trans Alta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (Alta. Env. App. Bd.), (*sub nom. Baily et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011 (A.E.A.B.); *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (Alta. Env. App. Bd.), (*sub nom. Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*) (20 March 2001), Appeal No. 00-073-D (A.E.A.B.); *Ouimet* (2002), 44 C.E.L.R. (N.S.) 114 (Alta. Env. App. Bd.), (*sub nom. Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.*) (28 January 2002), Appeal No. 01-076-D (A.E.A.B.) and *Hazeldean Community League v. Director of Air and Water Approvals, Alberta Environmental Protection* (6 July 1995), Appeal No. 95-02 (A.E.A.B.).

<sup>45</sup> For example, the Board has no information on who the members of the Butte Action Committee are or

to submit a Statement of Concern, and the lack of evidence of any special or exceptional circumstances, his Notice of Appeal is not valid. No arguments were received from the other parties on the failure to file the Statement of Concern.<sup>46</sup>

[53] The Certificate Holder argued that Mr. Gallie lives some distance from the intended withdrawal point, and the concerns presented by Mr. Gallie were general in nature. The Certificate Holder argued there is no evidence the river water levels will be lowered, and in particular, not enough to affect the fish population. The Certificate Holder stated the Certificate requires a significant flow past the diversion point before any water can be withdrawn, the minimum flow level can be changed at any time, and monitoring must be in place.<sup>47</sup>

[54] Mr. Bester argued Mr. Gallie is directly affected as further water withdrawals from the Red Deer River could potentially reduce the fish population, affecting his sports fishing and his use of the natural resource. It was further argued that Mr. Gallie "...regularly makes direct and personal use of the public lands on the Red Deer River."<sup>48</sup> Mr. Bester stated the Red

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where they live, other than there are a relatively large number of members who live in the Red Deer River basin.

<sup>46</sup> The requirement to filing a timely Statement of Concern as a prerequisite to filing a Notice of Appeal has been previously dealt with by the Board under EPEA and the *Water Act*. The Statement of Concern and Notice of Appeal process under EPEA are virtually identical to those under the *Water Act*, and therefore, the Board is of the view that the same principles should apply. In the case of *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (12 March 1999), Appeal No. 98-0250-D (A.E.A.B.), paragraph 14, we held:

"Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even where a statement of concern has not been filed – due to an extremely unusual case (e.g. directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. 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. His appeal cannot proceed." (Emphasis in the original, footnotes omitted.)

The Board has applied the principles outlined in *O'Neill* in a number of cases, resulting in the dismissal of Notices of Appeal where no Statement of Concern has been filed. See: Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment* re: *Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Grant and Yule v. Director, Bow Region, Natural Resources Services, Alberta Environment*, re: *Village of Standard* (15 May 2001), Appeal No. 01-015 and 016-D (A.E.A.B.); *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot Holdings* (17 July 2001), Appeal No. 01-055-D (A.E.A.B.); and *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment*, re: *AAA Cattle Company Ltd.* (15 June 2002), Appeal No. 01-113 and 01-115-D (A.E.A.B.).

<sup>47</sup> Certificate Holder's submission, dated October 31, 2003, at pages 2 to 3.

<sup>48</sup> Butte Action Committee's submission, dated November 7, 2003.

Deer River is "...currently at a critical stage and to add further stress is environmentally unsound."<sup>49</sup>

[55] During the Preliminary Meeting, the Board heard arguments in support of Mr. Gallie directly affected status. However, the Board had additional questions for Mr. Gallie and, therefore, asked that he be sworn in. Mr. Bester objected to the direct questioning of Mr. Gallie as he had not had the opportunity to prepare him. Mr. Bester was also concerned in that he did not want Mr. Gallie to be subject to cross-examination by the Director and the Certificate Holder. Mr. Bester pointed out the directions of the Board clearly stated that evidence and cross-examination would not take place; only oral arguments were to be presented.

[56] The Board notes Mr. Bester's objections, and as stated by the Chairman at the Preliminary Meeting, there are times in Preliminary Meeting where it becomes necessary to call a witness and receive oral evidence. In the Board's view the information that was before it, including the oral arguments presented by Mr. Bester, was insufficient to convince the Board that Mr. Gallie was directly affected. As the onus to demonstrate that he is directly affected falls on Mr. Gallie, the Board wished to give and did give Mr. Gallie every opportunity to make the case that he was directly affected, and as a result, requested that Mr. Gallie be sworn and speak to the Board regarding his personal interests in this matter.

[57] Mr. Bester was particularly concerned about the cross-examination of Mr. Gallie by the Certificate Holder. The Board notes that the rules of natural justice and procedural fairness require that when evidence is presented there must be an opportunity to cross-examine that evidence. However, the Board wishes to note that the cross-examination of Mr. Gallie by the Certificate Holder was not determinative in this matter. Even if the Board were not to consider the cross-examination of Mr. Gallie by the Certificate Holder, the additional oral evidence provided by Mr. Gallie still did not convince the Board that he was directly affected.<sup>50</sup>

[58] In his oral evidence, Mr. Gallie explained he fished a substantial reach of the Red Deer River from the Raven River to the Town of Innisfail and has done so since 1985. He stated the Red Deer River was closed between March 1 and May 15 and not fishable at other times of the year due to low water levels. He indicated he fished about once a month or twelve times in a

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<sup>49</sup> Butte Action Committee's submission, dated November 7, 2003.

year, depending on weather and available time, but now that he has retired, he hoped to be able to go out fishing more often. Mr. Gallie said the number of fish allowed to be taken from the River as prescribed by the regulations has been decreasing over the years. From his testimony, it is obvious Mr. Gallie has taken an active interest in the condition of the Red Deer River as he has been involved in the Red Deer River Corridor Hearings, which the Board understands were part of the process to develop the Red Deer River Integrated Management Plan.

[59] Mr. Gallie also brought to the Board's attention a number of documents, including the Red Deer River Integrated Management Plan, published in March 2000 by Alberta Environment, and a brochure on the Dickson Dam, also published by Alberta Environment.

[60] Mr. Gallie's concerns relate to the condition of the Red Deer River in general, and in particular that river levels are dropping and fish stocks are diminishing. Mr. Gallie's concern is admirable, but regrettably, it is insufficient to give him standing.

[61] Mr. Bester argued Mr. Gallie's position is analogous to the *Bildson* case.<sup>51</sup> In *Bildson*, Mr. Bildson used the area adjacent the project that was under appeal (a coal mine) "...extensively for his own pleasure, family pleasure, and for his family-run 'eco-tourism' business."<sup>52</sup> However, one of the key factors in the *Bildson* case for establishing directly effected was that the effluent from the approved project entered directly into the stream and Mr. Bildson used the water from the stream for drinking.<sup>53</sup> Mr. Gallie does not. In the *Bildson* case, there was a direct connection between the approved project and its effect on Mr. Bildson. Although Mr. Bester argued that Mr. Gallie is in the same position as Mr. Bildson, the causal connection or the "directness" of the effect is lacking in Mr. Gallie's case. The issuance of the Certificate has not caused the water levels in the Red Deer River to fall, and Mr. Gallie stated the drought conditions over the past few years has contributed to the low water levels. Mr. Gallie is concerned with the present conditions of the Red Deer River, conditions that are obviously not a result of the issuance of the Certificate and Proposed Licence.

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<sup>50</sup> The Board also notes that although the Director had the opportunity to cross-examine Mr. Gallie, he did not have any questions.

<sup>51</sup> *Bildson v. Director, North Eastern Slopes Region, Alberta Environmental Protection re: Smokey River Coal* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.) ("*Bildson*").

<sup>52</sup> *Bildson v. Director, North Eastern Slopes Region, Alberta Environmental Protection re: Smokey River Coal* (19 October 1998) Appeal No. 98-230-D at paragraph 17 (A.E.A.B.).

[62] The Board notes that Mr. Gallie fishes the reach of the Red Deer River from the Raven River to Innisfail, a distance of approximately 70 kilometres. If Mr. Gallie had fished only one spot of the River adjacent to the well, the Board may have decided the matter differently. However, it is unlikely that any impact the Certificate Holder may have on the Red Deer River will be observed over this great distance, and therefore, any effect on Mr. Gallie's use of the Red Deer River fisheries – the natural resource that Mr. Gallie is concerned about - will be too remote. As the Board stated in *Bildson*, and is adopted by Mr. Justice McIntyre in *Court*, in meeting the directly affected test:

“...[w]hat is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing.”<sup>54</sup>

Based on the evidence before it, the Board finds that the direct causal link that is required for Mr. Gallie to be directly affected is not present and, therefore, Mr. Gallie is not directly affected by the Director's decision to issue the Certificate and Proposed Licence. As a result, the Board dismisses Mr. Gallie's appeals (03-122 and 03-123).

[63] However, this being said, one of the issues raised in these appeals by some of the other Appellants is the impact of this project on in-stream flows and the resulting impacts on wildlife, including fisheries, and recreational users. (This issue, as is discussed below, will be included as one of the issues to be considered at the hearing of these appeals.) Section 95(6) of EPEA<sup>55</sup> allows for the Board to name a person as parties to an appeal who may materially assist the Board in making its decision.

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<sup>53</sup> *Bildson v. Director, North Eastern Slopes Region, Alberta Environmental Protection re: Smokey River Coal* (19 October 1998) Appeal No. 98-230-D at paragraph 24 (A.E.A.B.).

<sup>54</sup> *Bildson v. Director, North Eastern Slopes Region, Alberta Environmental Protection re: Smokey River Coal* (19 October 1998) Appeal No. 98-230-D at paragraph 33 (A.E.A.B.). This passage is cited with approval in *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 70, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

<sup>55</sup> Section 95(6) of EPEA 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.”

[64] The Board believes Mr. Gallie may be of assistance in addressing this and other issues; Mr. Gallie has personal knowledge of the fisheries on the Red Deer River; the effect of low water levels; Mr. Gallie has personal background evidence that is different from the other Parties. Thus, while rejecting Mr. Gallie's Notices of Appeal, the Board uses section 95(6) of the Act to grant Mr. Gallie full party status to participate in the hearing. Mr. Gallie will be permitted to speak to all of the issue set by the Board, including the issues that relate to the fisheries.

[65] While the issues identified in Mr. Gallie's Notices of Appeal are not, in and of themselves, going to be considered at the hearing, the Board wishes to comment on one of the concerns included in Mr. Gallie's appeals. In Mr. Gallie's Notices of Appeal, the Board was asked to recommend changes to the Director's process of not providing notice of his decisions to statement of concern filers he has determined are not directly affected. There is no specific requirement in the legislation to notify a party whose statement of concern has been rejected that a decision has been made. But, the Board recognizes the purposes of the *Water Act* as stipulated in section 2,<sup>56</sup> and in particular section 2(d), which identifies "...the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making." Based on this section of the *Water Act*, the Board believes citizens have an obligation to take an active step in protecting water resources, and this includes contacting Alberta Environment to obtain current updates on impending approvals and licences. This onus is placed on the citizens of Alberta, particularly in

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<sup>56</sup> Section 2 of the *Water Act* 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:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act."

situations where individuals are aware of applications that have been made to the Director and are awaiting approval.

[66] Because of the obligation that the *Water Act* (and the corresponding section of EPEA for that matter) places on the citizen of Alberta, as the Board stated in *Rew*:

“The Board is of the view that even where the Director does not accept a Statement of Concern, the Director should still advise the person who attempted to file the Statement of Concern that he has made a decision regarding the application. Providing such advice would create greater certainty in the appeal process.”<sup>57</sup>

If nothing else, the Board considers it a matter of common courtesy for the Director to provide at least some sort of notice to a person who attempted to file a statement of concern that was rejected regarding a decision that he has made.<sup>58</sup> The Board notes that in the past it has heard arguments that the Director does not want to create confusion between the valid statement of concern filers that he is required by the legislation to notify and the people whose statement of concern he has rejected. But we believe and we encourage the Director to find the proper wording in a notification letter to prevent such confusion.

#### **IV. ISSUES**

##### **A. Submissions**

###### **1. The Director**

[67] The Director stated there are two major concerns arising from the Notices of Appeal. He submitted the first issue, regarding the use of water for oilfield injection, could be stated as follows:

“...[W]hat role does the purpose for which the water is going to be used, play in the Director’s determination if he should allow the application for this

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<sup>57</sup> *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-009-D at footnote 3 (A.E.A.B.).

<sup>58</sup> The Board also notes that in the August 22, 2003 letter to the Director, Mr. Bester purported to file a Statement of Concern on behalf of Mr. Gallie. In the Director’s response letter of August 22, 2003, the Director stated that the Statement of Concern was filed beyond the stipulated timeframe, and therefore it would not be considered. In actual fact, the Director had already made his determination on the application and the Certificate had already been issued on July 23, 2003. Surely the Director could have easily forwarded a copy of the Certificate to Mr. Gallie along with the letter stating that his Statement of Concern could not be considered, or at the very least advised Mr. Gallie that the Certificate had already been issued.

Preliminary Certificate to be granted? Is the proposed use for oilfield injection a valid reason, under the Water Act, to refuse this application?”<sup>59</sup>

[68] The second issue, as submitted by the Director, relates to the protection of the Appellants’ water rights: “What consideration did the Director give to ensure protection of the water rights of the various Statement of Concern filers and other area water users when issuing the Preliminary Certificate?”<sup>60</sup>

[69] The Director also identified two possible sub-issues:

“Are the terms and conditions of the Preliminary Certificate adequate to ensure protection?

What consideration was given to the amount of water available for allocation in the Red Deer River in the consideration of this application?”<sup>61</sup>

The Director also submitted that the Appellants should provide clarification on whether the issue of protection of their water rights would be an issue if the allocation allowed under the Preliminary Certificate was not oilfield injection.

[70] The Director pointed out two policies and planning initiatives being undertaken by Alberta Environment. The first is a review on the policy of oilfield injection, which the Director points out is part of a broader review of water use, and the second is Phase 2 of the South Saskatchewan River Basin Water Management Plan, which includes the Red Deer River. According to the Director, Phase 2 of the South Saskatchewan River Basin Water Management Plan addresses water management issues, including finding a balance between water consumption and environmental protection.<sup>62</sup> During the course of questioning by the Board, the Director also confirmed that the current oilfield injection policy relates to ground water, but that the Director applied that policy, as applicable, to his consideration of this project, for which the source of supply is surface water.

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<sup>59</sup> Director’s submission, dated October 31, 2003, at paragraph 21.

<sup>60</sup> Director’s submission, dated October 31, 2003, at paragraph 23.

<sup>61</sup> Director’s submission, dated October 31, 2003, at paragraph 24.

<sup>62</sup> Director’s submission, dated October 31, 2003, at paragraphs 28 and 29.

2. The Certificate Holder

[71] The Certificate Holder identified two issues: whether the Director's decision was consistent with the *Water Act* and its regulations, and whether the Director took into account competing considerations such as maintaining adequate minimum levels of flow in the river.

3. Mountain View Regional Water Services Commission

[72] In their written submission, the Water Commission identified seven issues.<sup>63</sup> First, the use of water for oil injection.<sup>64</sup> Second, the Water Commission argues that the Certificate Holder should be required to reclaim the water that is used for oilfield injection so that it is not removed from the hydrological cycle. Third, the volume of water, particularly when considered over the 15 to 25 year life of the project, is too great.<sup>65</sup> Fourth, the terms and conditions of the Certificate and Proposed Licence are not specific enough, particularly with respect to the protection of the public, the cost of water to the Certificate Holder, the reclamation of water, and the staging of the Proposed Licence. Fifth, the relationship between the Certificate and Proposed Licence, the Water for Life Strategy, and the sustainability of the Red Deer River and South Saskatchewan River basins. Sixth, whether the economics of the project have been properly taken into account. Seventh, the length of use, in that the Proposed Licence should have conditions that require the Certificate Holder to apply for varying volumes of water and reapply for water at certain intervals.

[73] At the Preliminary Meeting, the Water Commission argued that the use of water for oilfield injection, and the loss of the water from the hydrological cycle, was their primary concern. The Water Commission argued that the Certificate Holder should be required to reclaim the water after it is used. The Water Commission argued that the Director did not properly balance the economics (advantageous to one company) of this project with the long-term environmental effects on society. With respect to the terms and conditions of the Certificate and Proposed Licence, the Water Commission expressed concern that there was

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<sup>63</sup> Water Commission's submission, dated November 7, 2003, at paragraph 2(a) to (g).

<sup>64</sup> The Water Commission is of the view that this is not an appropriate use of water, particularly taking into account that water used for such a purpose is removed from the hydrological cycle.

<sup>65</sup> In setting the volume of water, the Water Commission is concerned that the Director has not properly balanced the economic interests of the Certificate Holder with interests of the general public.

insufficient protection for the public, the length of use was too long, and there should not be an automatic right of renewal.

4. The City of Red Deer

[74] In its written submission, the City of Red Deer identified four issues that should be addressed at the hearing. These issues were:

- “(a) Given the current as well as future water commitments with respect to the Red Deer River Basin and the South Saskatchewan River Basin, should any further amount of water be taken out for oilfield injection purposes?
- (b) Is it appropriate that any licence or priority be issued without either a fixed expiration date or the requirement for formal review and renewal periodically including further written application by Capstone with, on each occasion, a right of appeal to affected parties?
- (c) Are the conditions in the Preliminary Certificate for diversion of water adequate?
- (d) Should Capstone be required to report on a quarterly basis directly to the City of Red Deer to allow the City to evaluate that conditions are being met and that appropriate monitoring has taken place?”<sup>66</sup>

[75] The City of Red Deer argued the Certificate Holder has not provided any economic analysis to show that water injection is the only feasible solution and no other economically feasible alternative is available. The City of Red Deer stated that without “...convincing economic evidence or over riding economic advantage to the citizens of Alberta, no amount of water taken out of the basin is acceptable.”<sup>67</sup>

[76] The City of Red Deer submitted the Board should “...address the impact and the affect of the Preliminary Certificate on a cumulative basis having regard to the water commitments currently in place.”<sup>68</sup> The City of Red Deer requested the issues be considered on information for the South Saskatchewan River Basin as a whole and broader objectives.

[77] The City of Red Deer stated that the conditions of the Certificate should be reviewed. Example of the changes that the City suggested should be made to the Certificate included: an expiry date of two years without an automatic right of renewal; a lower allowable

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<sup>66</sup> City of Red Deer’s submission, dated October 31, 2003, at paragraph 29.

<sup>67</sup> City of Red Deer’s submission, dated October 31, 2003, at paragraph 30.

<sup>68</sup> City of Red Deer’s submission, dated October 31, 2003, at paragraph 30.

withdrawal limit; stricter conditions regarding acceptable flow levels and maximum pumping rates; stricter conditions regarding the impact of the diversion on the source, surrounding users, and the environment; and stricter monitoring and reporting conditions.

[78] At the Preliminary Meeting, the City of Red Deer stated that they were in basic agreement with the issues as stated by the Director. In general terms, the City argued that the issues to be considered are: should the Certificate and Proposed Licence have been granted, and whether the terms and conditions are sufficient and appropriate. The City had concerns about the removal of water from the hydrological cycle, whether oilfield injection is a proper purpose for allocating water, and whether the impacts on future water users was considered. The City also had concerns that alternatives to the use of potable water for oilfield injection were not considered by the Director. The City also had concerns about the volume of water being taken for the project and the impact that this will have on other water users, wildlife, recreational users, instream flows, and the ability of municipalities to expand. The City also had concerns regarding a number of the terms and conditions of the Certificate and Proposed Licence.

5. Mr. Oxtoby

[79] In his written submission, Mr. Oxtoby listed a number of issues for the hearing:

- “A) Impact on our livelihood.
- B) General health and condition of the Red Deer River.
- C) Decrease in flow over the past years and increase in drought years on the prairies.
- D) The importance of fresh water for human consumption and food production as compared to oil and gas production.
- E) Future demands on the river such as increased population and more drought years that are predicated because of such factors as global warming.
- F) The effects of this project on the rural population that make their living on the land.”<sup>69</sup>

[80] At the Preliminary Meeting, Mr. Oxtoby supported the submissions of the City of Red Deer with respect to issues. Mr. Oxtoby stated that his main concern was protecting his

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<sup>69</sup> Mr. Oxtoby's submission, dated October 26, 2003.

livelihood. He was also concerned that if there was a problem, the onus would be on him to prove that he had been negatively impacted and he did not have the resources to do this.

6. Butte Action Committee/Mr. Gallie

[81] As indicated above, the Butte Action Committee did not pursue its argument for standing and the Notices of Appeal of Mr. Gallie have been dismissed.

7. Mr. Little and Mr. Smith

[82] With respect to Mr. Little and Mr. Smith, Mr. Bester indicates that they are the owners of cattle operations adjacent to the proposed project and as a result, are concerned with the environmental impacts of the project on their cattle operations, and in particular, their water supply.<sup>70</sup> Mr. Little's and Mr. Smith's water supply, which are essential to their cattle operation, include water wells and dugouts directly downstream and to the east of the proposed project.<sup>71</sup> Mr. Bester argued that Mr. Little's and Mr. Smith's wells and dugouts are recharged from the same Red Deer River gravel sands that the Certificate Holder will be using and argue that there are serious errors in the material presented to and accepted by the Director to support the Certificate Holder's application.<sup>72</sup> In particular, there is a concern that the short term testing that was carried out by the Certificate Holder does not give a true indication of long term impacts on Mr. Little's and Mr. Smith's wells and dugouts.<sup>73</sup>

[83] Mr. Bester also expressed concern about the notification process that the Director followed, and argued that the process was "so defective" that the Certificate and Proposed Licence should be summarily cancelled.

**B. Analysis**

[84] The Board has reviewed the submissions of the Parties with respect to issues, and it appears that there is general agreement as to the issues that should be considered at the hearing of these appeals. In general terms, the concerns of the Parties fall into five general areas. These

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<sup>70</sup> Mr. Bester's written submission, dated November 10, 2003, at page 8.

<sup>71</sup> Mr. Bester's written submission, dated November 10, 2003, at page 9.

<sup>72</sup> Mr. Bester's written submission, dated November 10, 2003, at page 9.

<sup>73</sup> Mr. Bester's written submission, dated November 10, 2003, at page 9.

areas are: purpose, protection, volume, immediate neighbours, and policy considerations. Within each of these areas, the Parties have raised a number of specific issues, some of which may overlap between the various areas. Given the broad public import of these appeals, the Board is of the view that all of these issues should be addressed at the hearing of these appeals. Therefore, pursuant to section 95(5)(2), (3) and (4),<sup>74</sup> the Board has determined that the issues to be considered at hearing of these appeals are:

1. Purpose
  - a. What role does purpose for which the water will be used have with respect to the allocation of water under the *Water Act*?
  - b. Is the use of water for oilfield injection a valid reason to refuse to grant an allocation of water under the *Water Act*?
  - c. Has the Director adequately balanced the economic benefits and environmental impacts of this project?
  - d. Has the Director adequately considered alternatives to the use of water for this project, including the economics of those alternatives?
  - e. Has the Director adequately considered the removal of the allocated water from the hydrological cycle?
2. Protection
  - a. Does the Preliminary Certificate and Proposed Licence provide adequate protection for: (1) other water users, (2) recreational users, (3) fish and wildlife, and (4) the aquatic environment, including instream flow needs?
  - b. Are the terms and conditions of the Preliminary Certificate and Proposed Licence adequate with respect to: (1) monitoring, (2) reporting, (3) minimum flow rates, and (4) maximum pump rates.
  - c. Is the term of the Proposed Licence appropriate?
  - d. Are the renewal mechanisms relating to the Proposed Licence appropriate?

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<sup>74</sup> Section 95(5) of EPEA provides:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal ....

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

3. Volume
  - a. Is the volume of water allocated appropriate, including taking into account the proposed length of the project and the availability of water in the Red Deer River?
  - b. Has the Director adequately considered the impact of this allocation on future water users, including the future needs of municipalities?
  - c. Should the volumes of water be allocated in some staged manner?
4. Immediate Neighbours
  - a. Has the Director adequately considered the potential impacts of the project on the immediate neighbours to the project, being Mr. Oxtoby, Mr. Little, and Mr. Smith?
  - b. Was the testing undertaken sufficient and adequate to predict the long-term impacts of the project on the immediate neighbours?
  - c. Do the immediate neighbours to the project have adequate protection in the event that there is an impact on them?
5. Policy Considerations
  - a. Has the Director properly taken into account all the applicable policies of the Government of Alberta?
  - b. Do the Preliminary Certificate and Proposed Licence adequately allow for any changes regarding the policy directions on oilfield injection?
  - c. Has the Director adequately taken into account the sustainability of the Red Deer River Basin and the South Saskatchewan River Basin?

[85] The Board notes that Mr. Bester also expressed concern about the notification process that the Director followed, and argued that the process was “so defective” that the Certificate and Proposed Licence should be summarily cancelled. As the Board has addressed this topic in these reasons, the Board is of the view that this is not an issue that should be addressed at the hearing of these appeals.

## **V. INTERIM COSTS**

### **A. Legislation**

[86] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which reads as follows: “The Board may award costs of and incidental to any

proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.”

[87] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen’s Bench in *Cabre Exploration Ltd.*:<sup>75</sup>

“Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs ‘of and incidental to any proceedings before it...’. The legislation gives the Board broad discretion in deciding whether and how to award costs.”<sup>76</sup>

Further, Mr. Justice Fraser stated:

“I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board ‘*may* award costs ... and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid....’” [Emphasis in the original.]<sup>77</sup>

Although Mr. Justice Fraser’s comments were in relation to final costs, the principles are equally relevant to interim costs applications.

[88] Sections 18 and 19 of the *Environmental Appeal Board Regulation*, A.R. 114/93, (the “Regulations”) specify the requirements of applying for interim costs. These sections state:

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

(a) the matters contained in the notice of appeal, and

(b) the preparations and presentation of the party’s submission.

19(1) An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board had determined all parties to the appeal.

(2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission,

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<sup>75</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.).

<sup>76</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

<sup>77</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

- (3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:
  - (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
  - (b) whether the party has a clear proposal for the interim costs;
  - (c) whether the party has demonstrated a need for the interim costs;
  - (d) whether the party has made an adequate attempt to use other funding sources;
  - (e) whether the party has attempted to consolidate common issues or resources with other parties;
  - (f) any further criteria the Board considers appropriate.
- (4) In an award of interim costs the Board may order the costs to be paid by either or both of
  - (a) any other party to the appeal that the Board may direct;
  - (b) the Board.
- (5) An award of interim costs is subject to redetermination in an award of final costs under section 20.”

[89] Section 33 of the Board’s Rules of Practice states:

“Any party to a proceeding before the Board may make an application in writing to the Board for an award of costs on an interim or final basis. A party may make an application for all costs that are reasonable and are directly and primarily related to the matters contained in the notice of appeal in the preparation and presentation of the party’s submission.

An application for an award of interim costs can be made by a party at any time prior to the close of a hearing of the appeal but after the Board has determined all parties to the appeal.

An application for interim costs shall contain sufficient information to demonstrate to the Board that interim costs are necessary in order to assist the party in effectively preparing its submission at a hearing or mediation meeting.”

[90] The Board has generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties.<sup>78</sup> There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.

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<sup>78</sup> Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

**B. Submissions**

[91] At the Preliminary Hearing, Mr. Bester confirmed the interim costs application filed is on behalf of Mr. Oxtoby, Mr. Smith, Mr. Little, and Mr. Gallie. Mr. Bester expressed concerns that the costs application was not processed in advance of the preliminary hearing.

[92] The Director argued the interim costs application did not meet the test for an award as it failed to indicate:

- “• what efforts were made to identify and make use of other means or resources,
- any information that the applicants lack their own resources,
- no description of how these items of costs will enable the application to prove their case or even a general outline of the merits of their case,
- no evidence of market rate for the service, and
- no information if any further interim costs will be required.”<sup>79</sup>

[93] The Director noted the Appellants did not specify from whom costs should be received, but the Director stated he is not the proper party against whom an award of costs should be made. The Director submitted that no evidence has been provided to indicate the Director was not acting in good faith.

[94] The Director submitted that the application for interim costs may be premature as the issues have not yet been determined by the Board, and the Board’s decision may affect research costs, the technical review, and expert witnesses required.

[95] The Certificate Holder argued that the Butte Action Committee is not a properly interested party and therefore, interim costs should not be allowed. In the alternative, if the Board determined the Butte Action Committee to be a party, the Certificate Holder argued that the Butte Action Committee had failed the tests laid down by the Board in previous decisions.

[96] The Certificate Holder submitted that the Butte Action Committee has not provided any information on what case will be advanced by it nor the substance of its expert’s testimony. The Certificate Holder further argued that the Butte Action Committee had not demonstrated its need for interim costs and whether it has made any attempt to use other funding sources.

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<sup>79</sup> Director’s submission, dated October 31, 2003, at paragraph 35.

[97] Mr. Oxtoby stated interim costs should be granted. He agreed with the Butte Action Committee, stating the Director "...has the benefit of an attorney paid for by the taxpayer, therefore the appellants should be granted the same."<sup>80</sup> Mr. Oxtoby supported the application on behalf of himself. He argued that he does not have the financial resources to fight such an appeal. Mr. Oxtoby made reference to difficult financial situation the cattle operations have been placed in the past few years.

[98] The Mountain View Regional Water Services Commission had no comments with respect to the present application, but did reserve its right to claim final costs.

[99] At the Preliminary Hearing, Mr. Bester stated they had tried to reduce costs as much as possible by making a joint application and presentation. He stated they do not have the financial resources to deal with the appeals, and as the issues are complex, they require legal counsel to assist in presenting their case. Mr. Bester stated the individuals making the application for costs are employed in the cattle industry and are in a difficult financial position.<sup>81</sup>

**C. Analysis**

[100] The application for costs on behalf of Mr. Oxtoby, Mr. Little, Mr. Smith, and Mr. Gallie was for a total of \$3,489.00. This request was arrived based on the following information:

<u>Legal Costs</u>			
Preparation	3 hours	@ \$250.00/hr	\$ 750.00
Travel Time	3 hours	@ \$125.00/hr	\$ 375.00
Hearing Time	7 hours	@ \$250.00/hr	\$1,750.00
Consultation	1 hours	@ \$250.00/hr	<u>\$250.00</u>
Subtotal			\$3,125.00
 <u>Disbursements</u>			
Research costs, photocopying and printing			\$120.00
Faxing (\$80.00) and Long Distance (\$35.00)			<u>\$115.00</u>
Subtotal			\$235.00
 <u>Technical Review (Donated)</u>			 \$0.00

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<sup>80</sup> Mr. Oxtoby's submission, dated October 26, 2003.

<sup>81</sup> The Board notes that in the past number of years the agriculture industry, and particularly the cattle industry, has faced a number of challenges including drought conditions and BSE (bovine spongiform encephalopathy), more commonly known as mad cow disease.

<u>Expert Witness</u>		
Travel Costs	(300km @ \$0.38/km)	\$114.00
Expenses	(Meals)	<u>\$15.00</u>
Subtotal		\$129.00
Total Costs		\$3,489.00

[101] In reviewing the interim costs application, the Board agrees with the Director that the information provided is insufficient upon which to base an award of costs. In particular, the Board is of the view that the request for legal costs is not a reasonable estimate of the costs to retain legal counsel to assist the parties with respect to this appeal. Based on the number of parties involved and the complexity of the issues, the Board is of the view that the hearing of these appeals is likely to take at least three days. As a result, the Board is denying the request for interim costs at this time.

[102] The Board believes that it is possible that the current estimate for legal costs that was provided may have either been for a portion of the total legal costs or may have related to assisting the parties with the Preliminary Meeting rather than the hearing of the appeals. As a result, without a more complete estimate of the legal costs for representing these appellants, accompanied by a clear indication of what portion of the legal costs the application represents, if that is the case, the Board is of the view that it would not be reasonable to grant costs at this time. Further, if the request relates to the costs for the Preliminary Meeting, the Board also believes that it would not be appropriate to grant the interim costs as interim costs are intended to be prospective, as opposed to retrospective, in nature.<sup>82</sup>

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<sup>82</sup> See: Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-0051D (A.E.A.B.). In this case, the Board discussed an interim costs request that related to an portion of the proceeding that was already concludes. At paragraph 150, the Board stated:

“LWEPA [(the appellant making the interim costs request)] specifically asks that ‘... these costs incurred be reimbursed now rather than at the close of the hearing...’ This statement identifies the problem. The costs application before the Board by LWEPA is an interim costs application. Interim costs are awarded to a party to assist them in preparing to participate in a future hearing. Interim costs are prospective in nature – the are not intended to cover past costs. This is clear from section 19(2) of the Regulation which provides:

‘An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission.’

[103] However, if additional information is provided, the Board would be prepared to reconsider its decision with respect to the interim costs application on the part of these appellants or any of the Parties, including Mr. Gallie.<sup>83</sup>

## **VI. NOTICE OF APPEAL - STATEMENT OF CONCERN**

[104] In the first Notice of Appeal (03-122) filed by Mr. Bester on behalf of the Butte Action Committee<sup>84</sup> and Mr. Gallie, indicated that he objected to the Director's decision "...denying my letter of concern as be being directly affected." He stated that wanted the Board to

"...deal with the issue of directly affected [and] review [the] Director's decision to reject my statement of concern as part of an appeal based on one of [the] grounds set out in section 84(1) EPEA [(now section 91(1) of EPEA)], given that those circumstances it would have (EAB) jurisdiction to review elements of the approval process as part of the whole appeal."

Following its review of this Notice of Appeal the Board set as an issue to be considered at the Preliminary Meeting the question:

"...[W]hether the Notice of Appeal filed by Mr. Bester in appeal No. EAB 03-122 [naming the Butte Action Committee and Mr. Gallie] is complete or properly before the Board because it appears to only appeal the Director's decision to reject Mr. Bester's Statement of Concern [filed on behalf of the Butte Action Committee and Mr. Gallie]."

The Board notes that Mr. Bester filed a subsequently filed a Notice of Appeal (03-123) with respect to the Certificate and Proposed Licence.

### **A. Submissions**

[105] The Director submitted that the Notice of Appeal filed by Mr. Bester on behalf of Mr. Gallie that challenges only the Director's decision to reject Mr. Gallie's Statement of Concern, cannot stand on its own basis. The Director stated "... once the EAB [(the Board)] has before it a valid appeal under s. 115 of the *Act* i.e. a Director decision to issue a Preliminary Certificate, the Board has the jurisdiction to review the Director's decision on any statement of

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<sup>83</sup> The Board notes that a revised application for interim costs was received from some of the Appellants and granted in part. The decision to grant costs with respect to the revised application is the subject of a separate decision.

<sup>84</sup> As noted previously, Mr. Bester decided not to advance the appeal on behalf of the Butte Action

concern filed.”<sup>85</sup> The Director concluded by submitting that if the Board were to accept this Notice of Appeal the “...issue of the acceptance or rejection of the statement of concern on the basis of ‘direct affect’ would, in essence, be determined by the standing decision of the Board.”<sup>86</sup>

[106] The Certificate Holder made no submissions as to whether Notice of Appeal (03-123) is properly before the Board.<sup>87</sup>

[107] Mr. Oxtoby stated that Mr. Bester’s appeal is proper.<sup>88</sup>

[108] Mr. Bester, in his submission on behalf of Mr. Gallie, he referred the Board to the *Metis Nation* case,<sup>89</sup> which dealt with the question of whether the Board had the jurisdiction to accept a Notice of Appeal that only appealed the Director’s decision to reject a Statement of Concern. Mr. Bester stated that the *Metis Nation*

“...filed a state of concern and subsequently the Director indicated that he would not accept their statement of concern on the basis the appellant was not directly affected. The appellant sought to appeal that decision to the EAB [(the Board)]. A focal point of this appeal was whether the EAB had jurisdiction to deal with the issue of the Director’s rejection of the appellant’s statement of concern. Relying on a previous Court of Queen’s Bench decision on the scope of its jurisdiction, the EAB found that it did not have jurisdiction to hear an appeal solely based on the Director’s decision to accept or reject a statement of concern. However, it went on to hold that it could review the Director’s decision to accept or reject a statement of concern as part of an appeal based on one of the grounds set out in s.84(1) [of] EPEA, [(now section 91(1))] given that in those circumstances it would have jurisdiction to review various elements of the approval process as part of the whole.”<sup>90</sup>

Mr. Bester went on to say that based on this discussion, and as

“...per discussions with EAB General Counsel and Settlement Officer, the Butte Action Committee requests the two appeals (03-122 & 03-123) be rolled into one. BAC further requests the EAB recommend changes to the process whereby a Director is not obligated to provide notice of approvals to parties whose

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Committee.

<sup>85</sup> Director’s submission, dated October 31, 2003, at paragraph 42.

<sup>86</sup> Director’s submission, dated October 31, 2003, at paragraph 44.

<sup>87</sup> Certificate Holder’s submission, dated October 31, 2003, at page 4.

<sup>88</sup> Mr. Oxtoby’s submission, dated October 26, 2003.

<sup>89</sup> *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (Alta. Env. App. Bd.), (*sub nom. Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*) (20 March 2001), Appeal No. 00-073-D (A.E.A.B.).

<sup>90</sup> Mr. Bester’s written submission, dated November 10, 2003, at page 3.

statements of concern have been rejected, which makes the public participation in the approval process more difficult.”<sup>91</sup>

## **B. Analysis**

[109] The question before the Board is whether it should accept Notice of Appeal 03-122 in that it purports to only appeal the Director’s decision to reject the statement of concern filed by Mr. Bester on behalf of the Butte Action Committee and Mr. Gallie. In the alternative, there is a request by Mr. Bester to roll the issue of the Director’s decision to reject the statement of concern into Notice of Appeal 03-123.

[110] The Board believes that Mr. Bester has stated the law correctly. As held in the *Metis Nation* case,<sup>92</sup> the Board is of the view that it does not have the jurisdiction to review the decision of the Director to reject a statement of concern in the absence of the appeal of one of the decisions listed in section 91 of EPEA or section 115 of the *Water Act*. On this basis, the Board dismisses Notice of Appeal 03-122 as it is not properly before the Board.

[111] However, the Board also dismisses Notice of Appeal 03-122 on another basis. This Notice of Appeal was filed by Mr. Bester on behalf of the Action Committee and Mr. Gallie. During the Preliminary Meeting, Mr. Bester indicated that he did not intend to advance an argument to support the standing of the Butte Action Committee and as a result, the Board has held that there is insufficient evidence before the Board to grant the Butte Action Committee standing. Further, with respect to Mr. Gallie, while the Board has made him a party to this

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<sup>91</sup> Mr. Bester’s written submission, dated November 10, 2003, at page 3. At the hearing, Mr. Bester requested the assistance of the Board’s General Counsel and Settlement Officer regarding the discussion to which he was referring. At the Preliminary Meeting, the Board’s General Counsel and Settlement Officer stated:

“Perhaps I could just clarify my conversation with Mr. Bester. He filed two separate Notices of Appeal. The first one purported to appeal only the Director’s decision not to accept the statement of concern of Mr. Gallie. The second one appealed the preliminary certificate. In my discussions with Mr. Bester about the *Metis AEC* case, I pointed out that the Board had held in the past that it did not have the jurisdiction to review solely the decision to reject a statement of concern but had to do that in the context of something like a preliminary certificate an example of this case. And that it may be more efficient for Mr. Bester, rather than trying to reargue that point, simply to request the Board role those two issues together. That his intent from reading those two together was to appeal the preliminary certificate. And one of his issues, one of the problems with the preliminary certificate, was the statement of concern had not been included as part of that. That was my conversation with Mr. Bester, sir.” (Excerpt from Preliminary Meeting Tape – Tape 2 of 3, Count 1638, November 14, 2003.)

<sup>92</sup> *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (Alta. Env. App. Bd.), (*sub nom. Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*) (20 March 2001), Appeal No. 00-073-D (A.E.A.B.).

appeal in any event, the Board has determined that Mr. Gallie is not directly affected. Therefore, Notice of Appeal 03-122 is also dismissed on the basis that neither the Butte Action Committee nor Mr. Gallie have standing to file it.

[112] For the same reason, the Board must deny also Mr. Bester's request to roll the issue of the Director's refusal to accept the statement of concern into Notice of Appeal 03-123. As the Board has indicated above, Notice of Appeal 03-123 has been dismissed because Mr. Gallie is not directly affected. In that Notice of Appeal 03-123 has been dismissed, there is nothing to roll the issue of the Director's refusal to accept the statement of concern into. As a result, the Director's decision to reject the statement of concern will not be an issue at the hearing of these appeals.

[113] The Board notes that Mr. Bester's principle concern with respect to this issues is that he wishes the Board to "...recommend changes to the process whereby a Director is not obligated to provide notice of approvals to parties whose statements of concern have been rejected, which makes the public participation in the approval process more difficult."<sup>93</sup> The Board has made a number of comments and observations respecting this concern in this decision.

## **VII. CEAA**

[114] During the Preliminary Meeting, the issue of a possible review under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), was raised. Mr. Bester indicated he had contacted the Federal Department of Fisheries and Oceans regarding the application by the Certificate Holder.

[115] Section 95(5)(b)(ii) of EPEA provides that: "The Board ... (b) shall dismiss a notice of appeal if in the Board's opinion ... (ii) the Government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal." As a result, if the Province has been involved in a CEAA review of this project, section 95(5)(b)(ii) requires that the Board dismiss these appeals.

[116] In response to the concern raised by Mr. Bester, the Board asked the Director if he was aware of the Province being involved in a CEAA review regarding the issues presently before the Board. The Director indicated the Province had not been involved in such a CEAA

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<sup>93</sup> Mr. Bester's written submission, dated November 10, 2003, at page 3.

review. The Board accepts the submissions of the Director, and therefore, concludes that section 95(5)(b)(ii) of EPEA is inapplicable in this case.

## **VIII. OTHER MATTERS**

[117] During the Preliminary Meeting, Mr. Bester asked whether the Federal Department of Fisheries and Oceans was notified of these appeals. The Board notes that the Department of Fisheries and Oceans was identified as a potentially interested party by Mr. Bester. The Board confirms that it will notify the Department of Fisheries and Oceans of the hearing of these appeals as it does with any persons identified by any of the Parties as potentially having an interest in the matter. Given the nature of the issues, primarily the use of potable water for oilfield injection, the Board has also decided that it will notify the Alberta Energy and Utilities Board and the Canadian Association of Petroleum Producers of these appeals.

[118] Mr. Bester also identified two people, Mr. Vance Buchwald and Ms. Sherry Dawn Annette, who he identified as being employed by Alberta Environment, who made statements to the press regarding the conditions in the Red Deer River. Mr. Bester requested these people attend the hearing.

[119] The Board understands that Ms. Annette is employed by the communications branch of Alberta Environment. Respectfully, the Board does not see the merit in requiring the attendance of Ms. Annette.<sup>94</sup>

[120] The Board understands that Mr. Buchwald is a fisheries biologist with Alberta Sustainable Resource Development. As stated above, one of the issues raised by the City of Red Deer is the potential effect on water levels and the impact on wildlife. As a result, the Board believes that Mr. Buchwald's expertise would assist the Board in dealing with this issue. Therefore, the Board is requesting that the Director arrange to have Mr. Buchwald attend the hearing.

[121] Finally, the Board also notes that the Certificate Holder has requested that the Board consider mediation of the appeals. The Certificate Holder raised this in its written

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<sup>94</sup> Ms. Annette's role with communications is to release information to the public, but the Board believes that she will be able to provide answers to the technical and scientific questions associated with the appeals. As a result, it is unlikely that Ms. Annette would be in the position to add anything that would assist the Board in its making its recommendations with respect to these appeals. Therefore, the Board is not requiring her attendance at the hearing.

submissions and at the Preliminary Meeting. The Board notes that the Water Commission and the City of Red Deer are having discussions with the Certificate Holder respecting these appeals. As always, the Board encourages such discussions. However, after careful consideration, given the public importance of the water issues involved in these appeals, the Board is of the view that it is more appropriate that the issues be address in a full public hearing process.

## **IX. CONCLUSION**

### **A. Standing**

[122] The Board finds that the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith are directly affected and are therefore parties to these appeals.

[123] The Board finds that Mr. Mike Gallie is not directly affected and therefore, his appeals (03-122 and 03-123) are dismissed. However, pursuant to section 95(6) of EPEA, the Board finds that Mr. Gallie has information that will benefit the Board, and therefore, Mr. Gallie is granted full party status to participate in these appeals. The Board notes that the Butte Action Committee will be acting solely as Mr. Gallie's agent.

### **B. Issues**

[124] The issues to be heard will be:

1. Purpose
  - a. What role does purpose for which the water will be used have with respect to the allocation of water under the *Water Act*?
  - b. Is the use of water for oilfield injection a valid reason to refuse to grant an allocation of water under the *Water Act*?
  - c. Has the Director adequately balanced the economic benefits and environmental impacts of this project?
  - d. Has the Director adequately considered alternatives to the use of water for this project, including the economics of those alternatives?
  - e. Has the Director adequately considered the removal of the allocated water from the hydrological cycle?

2. Protection
  - a. Does the Preliminary Certificate and Proposed Licence provide adequate protection for: (1) other water users, (2) recreational users, (3) fish and wildlife, and (4) the aquatic environment, including instream flow needs?
  - b. Are the terms and conditions of the Preliminary Certificate and Proposed Licence adequate with respect to: (1) monitoring, (2) reporting, (3) minimum flow rates, and (4) maximum pump rates.
  - c. Is the term of the Proposed Licence appropriate?
  - d. Are the renewal mechanisms relating to the Proposed Licence appropriate?
3. Volume
  - a. Is the volume of water allocated appropriate, including taking into account the proposed length of the project and the availability of water in the Red Deer River?
  - b. Has the Director adequately considered the impact of this allocation on future water users, including the future needs of municipalities?
  - c. Should the volumes of water be allocated in some staged manner?
4. Immediate Neighbours
  - a. Has the Director adequately considered the potential impacts of the project on the immediate neighbours to the project, being Mr. Oxtoby, Mr. Little, and Mr. Smith?
  - b. Was the testing undertaken sufficient and adequate to predict the long-term impacts of the project on the immediate neighbours?
  - c. Do the immediate neighbours to the project have adequate protection in the event that there is an impact on them?
5. Policy Considerations
  - a. Has the Director properly taken into account all the applicable policies of the Government of Alberta?
  - b. Do the Preliminary Certificate and Proposed Licence adequately allow for any changes regarding the policy directions on oilfield injection?
  - c. Has the Director adequately taken into account the sustainability of the Red Deer River Basin and the South Saskatchewan River Basin?

**C. Costs**

[125] Interim costs will not be awarded to the Appellants based on the application submitted.

**D. Notice of Appeal – Statement of Concern**

[126] The Board dismisses Notice of Appeal 03-122.

**E. Other Matters**

[127] The Board will notify the Federal Department of Fisheries and Oceans of the hearing of these appeals. Further, given the nature of the issues, the Board will also notify the Alberta Energy and Utilities Board and the Canadian Association of Petroleum Producers of these appeals.

[128] Mr. Bester requested that Board require Mr. Vance Buchwald and Ms. Sherry Dawn Annette to attend the hearing. The Board grants Mr. Bester's request to have Mr. Buchwald attend the hearing and requests that the Director make the appropriate arrangements. The Board will not require the attendance of Ms. Annette.

Dated on February 11, 2003, at Edmonton, Alberta.

*“original signed by”*

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Dr. William A. Tilleman  
Chair

*“original signed by”*

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Dr. Frederick C. Fisher  
Vice Chair

*“original signed by”*

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Mr. Al Schulz  
Board Member