

ALBERTA  
ENVIRONMENTAL APPEALS BOARD

Decision

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Date of Decision – March 31, 2005

**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 Bill and Linda (Margaret) Heintz, and E.K. Atkinson-Place and Marjorie Bencz, with respect to *Water Act* Licence No. 00199977-00-00 issued to Jaydel Farms Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Heintz et al. v. Director, Central Region, Regional Services, Alberta Environment re: Jaydel Farms Ltd.* (31 March 2005), Appeal Nos. 04-006 and 04-007-D (A.E.A.B.).

**PRELIMINARY MEETING BEFORE:** Dr. Steve E. Hrudehy, Panel Chair.

**SUBMISSIONS:**

**Appellants:** Mr. Bill and Ms. Linda (Margaret) Heintz, represented by Mr. Klaus Puhlmann; and Ms. E.K. Atkinson-Place and Ms. Marjorie Benz.

**Licence Holder:** Jaydel Farms Ltd., represented by Mr. Arnold DeLeeuw.

**Director:** Mr. Tom Slater, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

## EXECUTIVE SUMMARY

Alberta Environment issued a *Water Act* licence to Jaydel Farms Ltd., authorizing the diversion of 14,693 cubic metres of water annually from the well in NE 30-53-13-W5M for agricultural purposes (a confined feeding operation) near Carrot Creek, Alberta.

Notices of Appeal were received from Mr. Bill and Ms. Linda (Margaret) Heintz and from Ms. Marjorie Bencz, on behalf of herself and Ms. E.K. Atkinson-Place.

At issue was whether or not all of the issues in the Notices of Appeal were adequately dealt with by the Natural Resources Conservation Board (NRCB) in its hearing of the confined feeding operation application under the *Agricultural Operation Practices Act*.

After reviewing the submissions and the NRCB review decision, the Board determined that all the matters raised in the Notices of Appeal were adequately dealt with by the NRCB. Therefore, the appeals were dismissed.

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## **I. BACKGROUND**

[1] On April 14, 2004, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Licence No. 00199977-00-00 under the *Water Act*, R.S.A. 2000, c. W-3 (the “Licence”) to Jaydel Farms Ltd. (the “Licence Holder”) authorizing the diversion of 14,693 cubic meters of water annually from the well in NE 30-53-13-W5M for agricultural purposes, a confined feeding operation, near Carrot Creek, Alberta.

[2] On May 17, 2004, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Bill and Ms. Linda (Margaret) Heintz and Ms. Marjorie Bencz on behalf of herself and Ms. E.K. Atkinson-Place (collectively the “Appellants”), appealing the Licence.<sup>1</sup>

[3] On May 19, 2004, the Board wrote to the Appellants, the Licence Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals, and the Parties provide available dates for a mediation meeting or hearing.<sup>2</sup>

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (“NRCB”) and the Alberta Energy and Utilities Board (“AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The AEUB responded in the negative.

[5] On June 1, 2004, the Board received a letter from the Director, advising that the approval from the NRCB with respect to the confined feeding operation operated by the Licence Holder was under review, and it was the view of the Director that the NRCB proceeding should be completed prior to the Board conducting its hearing of these appeals.

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<sup>1</sup> The Board also received a Notice of Appeal from Mr. William and Ms. Martha Kashmere. The Board dismissed the Kashmere appeal for being filed past the prescribed time limit of 30 days and for not providing sufficient reasons for granting an extension for filing the Notice of Appeal. See: *Kashmere v. Director, Central Region, Regional Services, Alberta Environment re: Jaydel Farms Ltd.* (8 August 2004) Appeal No. 04-010-D (A.E.A.B.).

<sup>2</sup> The Director provided a copy of the Record on June 9, 2004, and copies were forwarded to the Parties on June 15, 2004.

[6] On June 22, 2004, the NRCB notified the Board that it had granted a review of NRCB Decision Report BA 02022 respecting the Licence Holder's confined feeding operation. The NRCB explained its approval officer consulted with Alberta Environment and requested comments on the application. The NRCB stated that, after reviewing the application, the Director was prepared to grant the Licence pending the approval officer's approval of the application. The NRCB stated the Licence was issued after NRCB Decision Report BA 02022 was issued, approving the application. The NRCB explained it received a reconsideration request from Mr. Klaus Puhlmann on behalf of several parties, including the Appellants. The NRCB stated it intended to set a review and would provide the Board with a copy of the hearing notice.

[7] On July 21, 2004, the NRCB notified the Board that a hearing was scheduled for August 25, 2004, to hear evidence regarding the review of Decision Report BA 02022.

[8] On August 3, 2004, the Board notified the Parties that it had decided to hold the appeals in abeyance pending the NRCB's decision from its review hearing.

[9] On September 29, 2004, the Board received a copy of the NRCB Board Decision 04-07 regarding the review.

[10] On September 30, 2004, the Board notified the Parties of the schedule to receive submissions to determine whether it can proceed with the appeals bearing in mind the NRCB Decision 04-07.

[11] The Board received submissions from the Parties between October 13, 2004, and November 12, 2004.

## **II. SUBMISSIONS**

### **A. Appellants**

[12] The Appellants explained a group of concerned, affected individuals were represented at the NRCB review at which four key issues were discussed: catch basins; groundwater monitoring; adequacy of water volume; and community impacts.

[13] The Appellants stated they still have concerns regarding the diversion of groundwater and the monitoring of water and air. They also expressed concern regarding the long-term impact of increased water consumption and the possibility of pollution. The Appellants explained that while “...the scientific evidence presented [at] the NRCB Hearing stated that the volume of water was not considered excessive or unreasonable, we are requesting assistance from Alberta Environment to ensure that all monitoring and conditions are maintained ... pertaining to water use and quality.”<sup>3</sup> They asked for guarantees that Alberta Environment would safeguard the water in their wells, streams, and Carrot Creek.

**B. Licence Holder**

[14] The Licence Holder stated the condition precedent in section 95(5)(b) of the *Environmental Protection and Enhancement Act* (“EPEA”) has been met, and therefore, the appeals should be dismissed. It submitted all matters raised in the appeals have been adequately dealt with by a review conducted under the *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, and the Appellants participated in the review.<sup>4</sup>

**C. Director**

[15] The Director explained he did not issue the Licence until after he had received a copy of the NRCB approval officer’s decision to approve the Licence Holder’s application for its expansion of a confined feeding operation. According to the Director, the approval officer’s decision was reviewed by the NRCB as requested by a number of participants, including the Appellants.

[16] The Director stated all of the Appellants participated in and were present at the NRCB review held on August 25, 2004.

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<sup>3</sup> Appellants’ submission, dated October 13, 2004.

<sup>4</sup> See: Licence Holder’s submission, dated October 26, 2004.

[17] The Director explained, “Alberta Environment is responsible for allocation of groundwater and any monitoring related to the allocation. This issue was considered by the NRCB at Section 4(b) of its Decision Report.”<sup>5</sup>

[18] The Director stated the issues of monitoring air and groundwater quality fall within the jurisdiction of the NRCB under the *Agricultural Operation Practices Act*.

[19] The Director explained that in a joint approval process where approvals are required from both the NRCB and Alberta Environment, it was intended there would be only one hearing process. He stated the NRCB, “...in its pursuit of its public interest decision-making, considers information from Alberta Environment.”<sup>6</sup> The Director stated the NRCB approval officer consulted with Alberta Environment regarding water adequacy, and the Director presented evidence during the NRCB review. Therefore, according to the Director, the NRCB clearly received and considered evidence from Alberta Environment regarding the adequacy of water, and the issue was completely considered by the NRCB in its decision-making process.

[20] The Director submitted that “...the prohibition set out in s. 95(5)(b)(i) of the *Environmental Protection and Enhancement Act* has been met and the Environmental Appeals Board is prohibited from undertaking a further hearing and that the appeals should be dismissed.”<sup>7</sup>

[21] The Director stated Alberta Environment will ensure the terms and conditions set out in the Licence will be complied with.

### **III. ANALYSIS**

#### **A. Statutory Basis**

[22] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if, in its opinion, the matter has been heard and adequately dealt with by the NRCB and the person had the opportunity to participate in the hearing. Section 95(5)(b)(i) states:

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<sup>5</sup> Director’s submission, dated October 29, 2004.

<sup>6</sup> Director’s submission, dated October 29, 2004.

<sup>7</sup> Director’s submission, dated October 29, 2004.

“The Board ...

(b) shall dismiss a notice of appeal if in the Board’s opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with....”

## **B. Discussion**

[23] There are two basic conditions that have to be met in order to have the Board lose jurisdiction in these appeals pursuant to section 95(5)(b)(i). What the Board needs to determine is whether: (1) the Appellants received notice of, participated in, or had the opportunity to participate in a NRCB review of the project at issue; and (2) the NRCB adequately dealt with the matters raised by the Appellants in their Notices of Appeal. The basis of determining whether an appellant participated in a review is the same whether it was an NRCB or an AEUB proceeding.

1. Did the Appellants receive notice of or participate in a NRCB review?

[24] The Director explained he notified the Appellants of the NRCB review in letters dated August 4, 2004, and the Appellants stated they were represented at the NRCB review.

[25] As the Board stated in *Bildson*,<sup>8</sup> “...the underlying question in this appeal is whether Mr. Bildson had a reasonable chance to make his views known to the [A]EUB.”<sup>9</sup>

[26] The Board further stated:

“...the Legislature’s apparent objectives in adopting section 87(5)(b)(i) [now section 95(5)(b)(i)] are to promote efficiency and fairness – i.e., to prevent this Board from duplicating an [A]EUB review, at least, when the appellant before the [A]EUB had a reasonable chance to participate in the [A]EUB’ review. Notably, by requiring dismissal if the appellant chose not to participate in the [A]EUB review but ‘received notice of’ and ‘had the opportunity to participate in’ that

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<sup>8</sup> *Bildson v. Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection re: Smoky River Coal Limited* (8 December 1998), Appeal No. 98-230-D2 (A.E.A.B.).

<sup>9</sup> *Bildson v. Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection re: Smoky River Coal Limited* (8 December 1998), Appeal No. 98-230-D2 (A.E.A.B.) at paragraph 14.

review, the Legislature intended to preclude this Board from addressing particular concerns simply because they were never raised before the [A]EUB.”<sup>10</sup>

[27] If the party participated in the review, whether it be an AEUB review as in *Bildson* or an NRCB review as is the present case, the Board will lose jurisdiction to hear the appeal *if* all the matters were adequately dealt with by the review panel. This does not mean that an appellant can choose to participate either in the NRCB review or in front of the Board, as the legislation clearly precludes the Board from the hearing the appeal if the opportunity was given to participate but the appellant chose not to and all the issues were dealt with by the review panel. An appellant should not be able to use appeal process to achieve what should have been done under the original jurisdiction process. If the opportunity is available to participate in a NRCB review, those affected by the proposed project must make the best effort to be heard during that process.

[28] Conversely, the Director or the NRCB should not be able to simply state that a mere appearance by the Director or the presentation of broad general evidence at the NRCB review precludes all appeals to the Board. There are fact specific determinations to be made under section 95(5)(b)(i).

[29] The Appellants were made aware of the NRCB review, if not by the NRCB, then definitely by the Director.<sup>11</sup> The Appellants stated they attended the NRCB review, and according to the NRCB Board Decision 04-07, the Appellants were in attendance at the review hearing and were represented by Ms. Margaret Heintz, Mr. Darrell Robinson, and Mr. Klaus Puhlmann.<sup>12</sup>

[30] There is no doubt the Appellants had the opportunity to participate and did, in fact, participate in a review by the NRCB under the *Agricultural Operation Practices Act*. What the Board must now determine is whether all of the issues identified in the Notices of Appeal were adequately dealt with by the NRCB.

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<sup>10</sup> *Bildson v. Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection re: Smoky River Coal Limited* (8 December 1998), Appeal No. 98-230-D2 (A.E.A.B.) at paragraph 12.

<sup>11</sup> See: Director’s letter to the Appellants and copied to the Board, dated August 4, 2004, in which he stated: “We wish to draw to your attention that the Natural Resources Conservation Board has scheduled a hearing for August 25, 2004 at the Carrot Creek Community Hall.”

<sup>12</sup> See: Letter from Ms. E.K. Atkinson-Place and Ms. Marjorie Bencz, July 18, 2004. See also: NRCB Board Decision No. 04-07, dated September 29, 2004, at page 3.

2. Were the issues adequately dealt with by the NRCB?

[31] The issues raised in the Notices of Appeal were essentially: the amount of water to be used by the Licence Holder under the Licence; the effects on neighbouring wells, operations, and the environment; and the potential pollution from large feedlots. The Appellants also expressed concerns regarding monitoring and reporting back to the community.

[32] The purpose of section 95(5) of EPEA is to avoid duplication in the hearing process.<sup>13</sup> As stated in the previous case, *Carter Group*:<sup>14</sup>

“The jurisdiction of this Board to become involved in a ‘review’ of ERCB [now the AEUB] decisions that led to approvals which are eventually appealed here – is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence....

The Board interprets s. 87(5)(b)(i) [now section 95(5)(b)(i)] of [the] *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually.... In other words, there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB.”<sup>15</sup>

[33] In *Graham*,<sup>16</sup> the Board examined the specific terms of section 95. The Board interpreted “matter” to mean:

“...subject matter or issues raised in the proceedings before the NRCB and before this Board. But it cannot encompass generic subject matters, such as air pollution, generally. Nor is ‘matter’ a static concept so that a subject once raised before the NRCB can never be the subject of appeal to this Board.... [C]ounsel for the Director acknowledged that new information that substantially alters one’s previous understanding of the facility may be a new matter.”<sup>17</sup>

The Board then interpreted the term “considered” as meaning “to look at closely, examine, contemplate.” The Board continued:

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<sup>13</sup> *Ed Graham et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.) (“Graham”).

<sup>14</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) (“Carter Group”).

<sup>15</sup> *Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.).

<sup>16</sup> *Ed Graham et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.).

<sup>17</sup> *Ed Graham et al. v. Director of Chemicals Assessment and Management, Alberta Environmental*

“Consideration, in the context of this appeal, requires that a matter be raised or presented through submissions by parties or questions by the NRCB. This must be reasonably explicit rather than merely inferential, and must not be arbitrary. The matter must then be subject to a meaningful consideration. Further, consideration requires that the NRCB respond to the matter, at least by treating it as relevant and properly taking it into account in its decision.”

[34] When the NRCB reviews applications, the public interest element is always a part of its decision making process.<sup>18</sup> If a person has a specific concern regarding the project and how they will be affected, it is important to convey the information to the NRCB. If the opportunity is there to participate and provide information to the NRCB, that opportunity must be taken, unless new information surfaces that was not available at the time the NRCB was making its decision. Section 95(5)(b)(i) of EPEA was included to prevent an abuse of the administrative process, and as stated, to avoid duplication in the hearing process and to ensure there is no multiplicity of proceedings based on similar evidence.<sup>19</sup>

[35] As part of their Notice of Appeal, the Appellants provided a copy of their NRCB review request. As a result of this request, the NRCB identified the issues that would be considered at the review, including: catch basins; groundwater monitoring; adequacy of water volume; community impacts, both considered and expected; and the application process.<sup>20</sup> These are essentially the same issues identified in the Notices of Appeal, with the exception of the application process, which is irrelevant to the Board in the present appeals. The Appellants stated the NRCB dealt with four key issues: catch basins; groundwater monitoring; adequacy of water volume; and community impacts. Therefore, it is clear the NRCB did deal with the Appellants’ issues. What the Board must now consider is whether the issues were adequately with by the NRCB in such a manner to remove the appeals from the Board’s jurisdiction.

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*Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.).

<sup>18</sup> Section 2 of the *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, states:

“The purpose of this Act is to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board’s opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.”

<sup>19</sup> See: *Weber* (2003), 47 C.E.L.R. (N.S.) 61 (Alta. Env. App. Bd.), (*sub nom. Weber et al. v. Director, Approvals, Bow Region, Regional Services, Alberta Environment re: Corridor Pipeline Ltd.*) (10 May 2002), Appeal No. 01-072-D (A.E.A.B.) at paragraph 45).

<sup>20</sup> See: Notice of Appeal filed by Ms. E.K. Atkinson-Place and Ms. Marjorie Bencz, Appendix B, NRCB letter to Appellants, dated May 3, 2004.

[36] The catch basin, groundwater and air monitoring, and community impacts are under the control of the NRCB, as the construction of the facility is the NRCB's jurisdiction. It is not part of the Licence issued by the Director, which is the only decision the Board can consider in these appeals. Those issues clearly being outside of the Director's decision-making powers, are also outside of the Board's jurisdiction.

[37] In the NRCB Decision 02-07, the NRCB discussed groundwater monitoring. According to the NRCB, the approval officer considered it prudent to have some level of groundwater monitoring at the site due to the high water table and shallow aquifer. The NRCB stated that, given the catch basins were constructed into the water table, "...a leakage detection monitoring approach would be beneficial for this site."<sup>21</sup> In fact, the NRCB was not satisfied that one existing monitoring well was sufficient, and therefore, it required the Licence Holder to locate two additional leakage detection wells outside of the berms and down-gradient of the catch basin, and it required a groundwater monitoring well be installed up gradient of the facility. This indicates the NRCB did consider the issue of monitoring, both for measuring the effect on the groundwater levels and to detect any possible leakage from the catch basins. The requirement of these additional monitoring wells indicates to the Board that the NRCB did take the concerns of the Appellants into consideration in its review.

[38] The issues identified in the Notices of Appeal that are within the Board's jurisdiction are the quantity of water granted and the conditions set out in the Licence.

[39] With respect to the volume of water that was required, the NRCB explained it relied on information from the application for the Licence, Alberta Environment's review and assessment of the application, and the evidence provided by the review participants. The NRCB identified the issue of the adequacy of the aquifer to supply the Licence Holder's well without affecting other well users in the area as an issue raised in the Appellants' Notices of Appeal filed with the Board.

[40] In its decision report, the NRCB summarized the evidence presented regarding the testing completed to determine the drawdown effect on the aquifer and Alberta Environment's assessment of the results submitted. The NRCB stated it reviewed the Licence and was satisfied

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<sup>21</sup> NRCB Decision 02-07, at page 7.

the conditions included in the Licence would be adequate to deal with any potential impacts on adjacent wells that may be related to the subject well.

[41] The Board believes the NRCB had sufficient evidence regarding the amount of water to be diverted and the potential effect it might have on the neighbouring well users. For section 95(5)(b)(i) purposes, the NRCB adequately dealt with the issue of groundwater, both from a monitoring perspective and the volume issue.

[42] In their Notices of Appeal, the Appellants requested the Board require research into groundwater monitoring and the need for reporting the monitoring results to the community. Under the Licence, the Appellant is required to monitor its use of groundwater weekly and to provide the monitoring information to the Director on an annual basis. This information is available to the public by requesting it from Alberta Environment. This should assist the Appellants in keeping informed of the monitoring results, at least as it applies to the amount of water being used by the Licence Holder under its Licence.

[43] Therefore, based on the information provided by the Parties and the NRCB, the Board finds all of the issues raised by the Appellants in their Notices of Appeal that relate to the issuance of the Licence were adequately dealt with by the NRCB at its review of Decision Report BA 02022.

#### **IV. CONCLUSION**

[44] Pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeals, as the Appellants had the opportunity to participate, and did participate, in a review before the NRCB, and all issues were considered and adequately addressed by the NRCB.

Dated on March 31, 2005, at Edmonton, Alberta.

“original signed by”

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Dr. Steve E. Hrudey  
Panel Chair