

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Preliminary Meeting by Written Submissions Only
Date of Decision – May 30, 2008

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 an appeal filed by Anne Wasson with respect to the decision by the Director, Southern Region, Regional Services, Alberta Environment to refuse to issue a Water Management Order under the *Water Act* to David and Nancy McDonald for the McDonald Subdivision Development Phase III in the County of Bighorn No. 8.

Cite as: *Wasson v. Director, Southern Region, Regional Services, Alberta Environment re: McDonald Subdivision Development Phase III* (30 May 2008), Appeal No. 04-091-D (A.E.A.B.).

**PRELIMINARY MEETING VIA
WRITTEN SUBMISSIONS BEFORE:**

Dr. Steve E. Hrudehy, Panel Chair,
Mr. Al Schulz, Board Member, and
Mr. Dallas Miller, Q.C., Board Member.

WRITTEN SUBMISSIONS:

Appellant: Ms. Anne Wasson, represented by Ms. Maureen Bell, Water Rights Inc.

Director: Ms. May Mah-Paulson, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Proponents: Mr. David and Ms. Nancy McDonald, represented by Mr. T.W. Bardsley, Brownlee LLP.

Others: Municipal District of Bighorn, represented by Mr. Greg Birch, Assistant Municipal Manager.

EXECUTIVE SUMMARY

The Municipal Development Board approved the McDonald Subdivision Development in the Municipal District of Bighorn No. 8, near Ghost Lake, Alberta. The development is upstream of Ms. Anne Wasson, who holds an existing water licence with a 1989 priority. Ms. Wasson requested Alberta Environment issue a water management order to the McDonald Subdivision Development since she believed the subdivision would have an impact on her existing water licence. Each household in the subdivision would be using the water for household use only. Household use does not require a water licence and has a legislated priority over all other uses, licences, approvals, or registrations. The Board received a Notice of Appeal from Anne Wasson appealing Alberta Environment's decision not to issue a water management order.

The Board conducted a Preliminary Meeting via written submissions to deal with Alberta Environment's motion to dismiss the appeal on the basis there is no legitimate appeal right under the *Water Act* or the *Environmental Protection and Enhancement Act* for not issuing a water management order.

Based on the arguments presented, the Board decided the appeal must be dismissed, as there is no right of appeal under the *Water Act* or the *Environmental Protection and Enhancement Act* if Alberta Environment does not issue a water management order.

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I. BACKGROUND

[1] On January 11, 2005, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), refused to issue a water management order at the request of Ms. Anne Wasson to Mr. David and Ms. Nancy McDonald (the “Proponents”) with respect to the McDonald Subdivision Development Phase III (“McDonald Subdivision”) in the County of Bighorn No. 8, near Ghost Lake, Alberta. Ms. Anne Wasson (the “Appellant”) requested the Director issue a water management order under the *Water Act*, R.S.A. 2000, c. W-3, in order to protect the existing Interim Water Licence No. 17157 (the “Licence”) issued to Mr. William A. Wasson (the “Licensee”). The McDonald Subdivision, consisting of more than 25 lots in less than one half of a quarter section, is upstream of the Appellant’s source of water.

[2] On February 10, 2005, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Appellant as executor and beneficiary of the estate of the Licensee, appealing the decision of the Director not to issue a water management order. The Appellant was concerned the final stage of development and the cumulative effect of the subdivision would interfere with and adversely impact the priority and availability of water under the existing Licence.

[3] On February 15, 2005, the Board wrote to the Appellant and the Director acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal, and for the Participants to provide available dates for a mediation meeting or hearing.

[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] On February 24, 2005, the Board received a letter from the Director requesting the appeal be dismissed on the basis there is no appeal right under the *Water Act* or the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).

[6] On March 2, 2005, the Board wrote to the Appellant and Director acknowledging a telephone call made on behalf of the Proponents requesting an opportunity to participate in the appeal, which the Board allowed.¹ In this same letter, the Participants were advised the Board had decided to schedule a written submission process to deal with the Director's motion to dismiss the appeal. The letter set out the dates for the submissions to be received by the Board.

[7] On March 17, 2005, the Board received a letter from the Director advising that she would not be supplying a copy of the Record at this time, as she took the position the Board does not have jurisdiction to deal with this matter.

[8] On March 18, 2005, the Board received a letter from the Municipal District of Bighorn No. 8 (the "Municipal District"), requesting that it be allowed to provide a written submission with respect to the matter. The Board received submissions from the Participants regarding the Municipal District's request. The Board wrote to the Participants and the Municipal District on March 23, 2005, advising that the Municipal District would be able to participate in the written submission process.

[9] Between March 15 and April 21, 2005, the Board received the submissions from the Participants and the Municipal District.

[10] On May 31, 2005, the Board received a request from the Appellant to allow her to supplement her submission with additional authority in the decision of the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*.²

[11] On June 7, 2005, the Board wrote to the Participants and the Municipal District stating:

"The Board has reviewed Ms. Bell's letter and has determined that it would not be appropriate to reopen the written submission process, which concluded on April 21, 2005, for additional legal argument. Therefore, Ms. Bell's request to supplement her legal arguments in this matter is denied. The Board is aware of the 1992 decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*."

¹ In this decision, the Appellant, Director, and Proponents will be referred to collectively as the "Participants."

² *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

[12] In the same letter, the Board advised the Participants and the Municipal District that the appeal was dismissed for lack of jurisdiction. The Board's reasons are provided in the following.

II. PRELIMINARY MATTER – MD PARTICIPATION

A. Submission Summary

[13] The Municipal District requested the opportunity to provide written submissions with respect to the Appellant's appeal. The Board asked the Participants to respond to the request.

[14] The Proponents supported the request of the Municipal District. The Director took no position, but she advised the Board that it does not have jurisdiction to determine issues surrounding municipal land use development matters.

[15] The Appellant objected to the Municipal District's request, arguing the Director could clarify matters regarding the proceedings before the Municipal District; the Municipal District's decision is not an issue before the Board; the submission would not materially assist the Board; the Municipal District has no tangible interest in the appeal; and the intervention would unnecessarily delay the proceedings.

B. Discussion

[16] Under section 95(3) of EPEA, the Board can determine who shall be allowed to provide representations to an appeal. It states:

“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.”

[17] The Board noted the concerns of the Director and the Appellant regarding jurisdiction, and the Board cannot and will not interfere with any decision made by the Municipal Development Board.

[18] The Board did not believe any of the Participants would be unduly prejudiced with the inclusion of the Municipal District in the proceedings. The Municipal District was required to submit its comments following the same schedule as the other Participants, and therefore, there would not be a delay in the proceedings.

[19] By receiving input from the Municipal District, the Board would have a more complete picture of what has occurred prior to the appeal being filed. Although the information provided by the Municipal District is not significantly different from that received from the other Participants, it does provide a more comprehensive understanding of the basis of the appeal. The Board prefers to be more inclusive whenever possible while remaining fair to all other participants, and the Board will assess the appropriate weight to the submission when received.

[20] Therefore, the Board decided to accept the submission of the Municipal District of Bighorn.

III. SUBMISSIONS

A. Appellant

[21] The Appellant argued she has a right to appeal the Director's decision, and the Board has the authority to hear the appeal based on statutory interpretation and the words of the statute. The Appellant stated household use, once established, has a higher priority than any other user, and therefore, she should have the right to protect the priority of her licence before the household use is established. She submitted the household use should be subject to terms and conditions that protect existing licences.

[22] The Appellant argued the interpretation of a statute cannot be based on the wording of the legislation alone, but it should be read in its entire context and its grammatical and ordinary sense with the scheme, object, and purpose of the legislation. She stated the "first in time, first in right" principle is fundamental to the scheme of the legislation and to the Alberta water strategy. The Appellant submitted, "At all times the Water Act ought to be read broadly to support the principle of the priority of existing Licenses over future users."³ The Appellant

³ Appellant's submission, dated March 10, 2005, at page 2.

argued the intent of sections 115(1)(m) and (n) of the *Water Act*⁴ clearly allows an appeal where priority is an issue and where the appellant is affected by the order. She submitted that, under the *Water Act*, existing licences are protected from any interference from any subsequent water users, including household users. The Appellant argued "...the priority of the Licensee over the household user is intended by the legislation where there is the possibility that the household user will interfere with the Licensee's priority."⁵

[23] The Appellant stated the *Water Act* could have expressly excluded an appeal where no water management order is issued but it did not. She argued it is not the intention of the *Water Act* to give new household use priority over existing licences.

[24] The Appellant claimed her licence priority is affected by the Director's decision not to issue a water management order, and section 115(1)(n) of the *Water Act* should be read to include her as a party who may be affected by the issuance of a water management order. The Appellant submitted the last part of section 115(1)(n) may be read and interpreted to include a decision not to issue a water management order that may have the same effect as the issuance of an order. The Appellant submitted, "By not granting the water management order, the Director affects the priority of the Licensee which is or ought to be protected by the Act,"⁶ and "...this section must be read to include all decisions of the Director with respect to water management orders that may affect priorities including a decision not to issue a water management order."⁷

[25] The Appellant stated the Director and the Board have no discretion to affect the priorities between household users that adversely affect the Appellant except by way of a water management order. The Appellant stated a licensee's priority can be protected through

⁴ Sections 115(1)(m) and (n) of the *Water Act* provide:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

- (m) if an inspector or the Director issues a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;
- (n) if an inspector or the Director issues a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority..."

⁵ Appellant's submission, dated March 10, 2005, at page 3.

⁶ Appellant's submission, dated March 10, 2005, a page 3.

monitoring, measuring, reporting, and remediating as conditions in a licence, but these obligations are not imposed on household users although it can be done by way of a water management order. She further argued the household users have no obligation to provide her with information concerning activities or events that are likely to impact her water source, without which she cannot adequately protect her priority.

[26] The Appellant stated her Licence can be terminated if it is breached, but there are no comparable terms imposed on household users in the event the Licensee is impacted, the diversion exceeds 1250 cubic metres per year, or for impairing the environment.

[27] The Appellant argued the technical reports relied on by the Director were incomplete and the Director's decision should be reviewed. The Appellant explained that at no time was her source water tested or monitored to support the information in the reports, and therefore, the Director should not have concluded the Appellant would not be impacted by the subdivision. The Appellant argued the cumulative impact of the water use and effluent discharge from the entire quarter section as contemplated in section 9 of the *Water (Ministerial) Regulation*, Alta. Reg. 205/98,⁸ (the "Regulation"), was not considered in the technical reports.

[28] The Appellant stated the Director did not refer to or comment on the information provided by the Appellant regarding the impact on her source water after the draw down testing, and even though it was anecdotal evidence, it was the best information available to her.

[29] The Appellant explained she did not have standing during the subdivision process and was not provided the opportunity to protect the priority of her Licence. She stated the

⁷ Appellant's submission, dated March 10, 2005, at page 4.

⁸ Section 9 of the *Water (Ministerial) Regulation* provides:

- "(1) Subject to subsection (2), a type of subdivision of land for the purposes of section 23(3) of the Act is a subdivision that results in 6 or more parcels of land in a quarter-section or in a river lot.
- (2) If a subdivision referred to in subsection (1) occurs and the requirements of section 21(3) or 23(3) of the Act or of both sections 21(3) and 23(3) of the Act have not been met, a person who
- (a) resided prior to that subdivision on a parcel of land that was part of the subdivided land,
 - (b) has continuously resided on that parcel of land since that subdivision and continues to reside on that parcel, and
 - (c) meets the requirements of section 21(1) and (2) of the Act
- has the right to commence and continue the diversion of water under section 21 of the Act."

impact on existing water licences is not a concern with municipal planning authorities if there is sufficient water for the subdivision itself. The Appellant explained the subdivision process does not require a hearing, and if one is held, licensees under the *Water Act* are not entitled to appear and be heard if they are not adjacent landowners. She stated she was entitled to a limited appearance at the subdivision hearing but was not given status to question the reports. The Appellant stated that although the subdivision authority may have considered soil characteristics, storm water collection and disposal, availability and adequacy of the water supply, sewage disposal, and proximity to water sources, it did not properly consider these issues in relation to the priority of her Licence. She stated her environmental concerns arising from the impact of the subdivision have not been taken into consideration by either the subdivision authority or the Director. She stated the technical reports support that there is a connection between the household users and her Licence.

[30] The Appellant stated her water is of a very high quality and should be protected from the subdivision by having the subdivision use alternate water sources and managing surface activity, run off, and waste. She argued that, since no terms and conditions were imposed on the subdivision, her Licence is at risk.

[31] The Appellant explained the quarter section upstream from her property has been approved for subdivision into more than 30 lots, which is in excess of the number of parcels contemplated by section 23(3) of the *Water Act*.⁹ She argued the cumulative impact must be considered when there are more than six parcels, and by "...subdividing the land in at least three

⁹ Section 23(3) of the *Water Act* states:

"If, on or after January 1, 1999, a subdivision of land of a type or class of subdivision specified in the regulations is approved under the *Municipal Government Act*, a person residing within that subdivision on a parcel of land that adjoins or is above a source of water described in section 21 has the right to commence and continue the diversion of water under section 21 only if

- (a) a report certified by a professional engineer, professional geologist or professional geophysicist, as defined in the *Engineering, Geological and Geophysicist Professions Act*, was submitted to the subdivision authority as part of the application for the subdivision under the *Municipal Government Act*, and the report states that the diversion of 1250 cubic metres of water per year for household purposes under section 21 for each of the households within the subdivision will not interfere with any household users, licensees or traditional agriculture users who exist when the subdivision is approved, and
- (b) the diversion of water for each of the households within the subdivision under section 21 is not inconsistent with an applicable approved water management plan."

phases, the owner developer has not been required to account for the cumulative effects of the entire subdivision on the Wasson Licensee.”¹⁰

[32] The Appellant stated the Director can impose terms in a licence to monitor the impact of the licence on household users, other licensees, and agricultural users, but without a water management order, there are no similar terms that can be imposed on a household user to protect an existing licensee.

[33] The Appellant submitted the Board is “...a de novo forum which is the most qualified forum in Alberta to interpret and apply the Water Act and to protect the priority of the existing licensee.”¹¹ She noted the Board has the jurisdiction to hear all matters relevant to the priority of a water licence and to make any decision the Director has the authority to make under the *Water Act* and EPEA.

[34] The Appellant argued a water management order can protect the priority of the Licence by terms that “...modify, suspend, or stop any of the actions related to the drilling of a water well and to prevent, minimize or remedy any adverse effects on the environment, human health, property or public safety and is therefore an appropriate remedy to protect the Licensee.”¹² The Appellant argued her Licence is property, and in the absence of a water management order to protect it from the impact of household users, the transferability and the value of the Licence are questionable.

[35] The Appellant submitted the Board should consider the appeal and impose terms on any future household use in order to protect the priority of the Licence.

[36] In her rebuttal submission, the Appellant stated the Proponents did not attempt to determine with any degree of certainty the degree of hydraulic conductivity between the use of the water by the subdivision and the water source for the Licence. According to the Appellant, the Proponents did not observe the springs during or after the draw down testing and no information was gathered from downstream sources.

¹⁰ Appellant’s submission, dated March 10, 2005, at page 7.

¹¹ Appellant’s submission, dated March 10, 2005, at page 8.

¹² Appellant’s submission, dated March 10, 2005, at page 8.

[37] The Appellant submitted the Licensee's priority right would be lost in a water mastering situation where household users have priority to the Licence, and this is inconsistent with the scheme of the *Water Act*.

[38] The Appellant argued the conditions required to issue a water management order have been met, and therefore, it should be issued. She stated that by not issuing the water Management order, the Director supported the new household users and established their priority over the Licensee.

[39] The Appellant explained septic systems were originally designed to keep effluent from the surface of the land, and the provincial regulations are not site specific and are not designed to protect groundwater. The Appellant acknowledged the Proponents have taken steps to upgrade the system, but she stated "... there is no evidence that the effluent will not get into the groundwater. If the Licensee is forced to wait until the water is contaminated, it will be too late."¹³

[40] The Appellant stated the Proponents were aware of her Licence and the vulnerability of the water prior to purchasing the land for subdivision. She argued the Licensee will suffer irreparable harm to its spring water source due to changes in the hydrogeology and hydrology and water quality arising from the subdivision, and no one is willing or considers itself able to protect the Licensee's priority as to that of a subdivision as contemplated by sections 23(1) and (3) of the *Water Act*.¹⁴

¹³ Appellant's submission, dated April 21, 2005, at page 5.

¹⁴ Sections 23(1) and (3) of the *Water Act* state:

- "(1) If the Director is of the opinion that there is or may be a significant adverse effect on the aquatic environment or on a licensee or traditional agriculture user resulting from a diversion of water pursuant to section 21, the Director may, subject to the regulations,
- (a) issue a water management order under section 97, and
 - (b) declare that a person described in section 21 who did not divert water as described in section 21 prior to the date of the declaration may not, as of the date of the declaration, divert water as described in section 21 from a source of water specified in the declaration or from any sources of water within the water management area specified in the declaration....
- (3) If, on or after January 1, 1999, a subdivision of land of a type or class of subdivision specified in the regulations is approved under the *Municipal Government Act*, a person residing within that subdivision on a parcel of land that adjoins or is above a source of water described in section 21 has the right to commence and continue the diversion of water under section 21 only if

B. Director

[41] The Director stated the Appellant was unsuccessful in becoming formally involved in the municipal process authorizing the subdivision, and the Appellant sought to have Alberta Environment appeal the municipal authorizations. The Director explained that when that did not occur, the Appellant requested the Director exercise her discretion pursuant to section 23 of the *Water Act*. The Director stated she declined to exercise her discretion and did not issue a water management order, and it is this decision the Appellant is appealing based on an alleged interference with the priority of the Appellant's Licence. The Director explained there was no evidence "...that there is or may be a significant adverse effect on this licensee due to the future diversion by the household users in the subdivision (currently under construction) and declined to issue a [water management order]."¹⁵

[42] The Director argued there is no right of appeal for a refusal to issue a water management order in section 115 of the *Water Act*. She submitted the wording of sections 115(1)(m) and (n) are neither unclear nor ambiguous. She stated the "...legislative intent is very clear and it must not be circumvented or frustrated in an attempt to create appeal rights for the Appellant. Those sections do not include the words 'refusal to issue.'"¹⁶ (Emphasis in original.) She stated the section clearly allows an appeal only when the Director issues or amends a water management order, and the legislation does not create appeal rights for a refusal to issue a water management order.

[43] The Director explained that had a water management order been issued, the Appellant would not have the right to appeal, as only those named in the order could have filed

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- (a) a report certified by a professional engineer, professional geologist or professional geophysicist, as defined in the *Engineering, Geological and Geophysical Professions Act*, was submitted to the subdivision authority as part of the application for the subdivision under the *Municipal Government Act*, and the report states that the diversion of 1250 cubic metres of water per year for household purposes under section 21 for each of the households within the subdivision will not interfere with any household users, licensees or traditional agriculture users who exist when the subdivision is approved, and
 - (b) the diversion of water for each of the households within the subdivision under section 21 is not inconsistent with an applicable approved water management plan...."

¹⁵ Director's letter, dated February 24, 2005, at page 2.

¹⁶ Director's submission, dated March 29, 2005, at page 1.

an appeal pursuant to section 115(1)(m) of the *Water Act*. She stated section 115(1)(n) is not even potentially applicable in this case, as it only deals with water mastering in times of water shortage and a senior water right calls its priority.

[44] The Director pointed out certain cases where section 115 allows for appeals for the issuance of a decision and other cases allow appeals for the issuance, amendment, or refusal to make a decision. The Director submitted the exclusion of the words “refuse to issue” is not an oversight on the Legislature’s part, and it is clear the Legislature’s intent is to have appeal rights only when there is a decision to issue a water management order. She stated the legislation would have to be amended in order to give an appeal right for not issuing a water management order.

[45] The Director stated there is no general appeal right of a licence priority being affected, and only when the Director issues an order is there an appeal right. The Director stated her decision not to issue a water management order will not affect the priority of the Appellant’s Licence.

[46] The Director stated section 23 of the *Water Act* is an exception to the super priority afforded household users, and there is clear legislative intent as to the exception. She explained this section can apply before the water is diverted for household use “...if the Director is of the opinion that there is or is a potential to have a ‘significant adverse impact’ on existing licencees, traditional agricultural user or the aquatic environment. This is not a priority determination...”¹⁷ She stated it has the possibility of preventing the creation of a household right, and it is based on the “...presence of technical information suggesting the highest level of interference (significant adverse impact).”¹⁸ The Director stated that once the household right has come into effect, section 27 of the *Water Act* applies.¹⁹

¹⁷ Director’s submission, dated March 22, 2005.

¹⁸ Director’s submission, dated March 22, 2005.

¹⁹ Section 27 of the *Water Act* states:

“A person who diverts water pursuant to section 21 [(the household right)]

- (a) does not have priority with respect to another person who is diverting water pursuant to section 21, but
- (b) has priority over a person who is entitled to divert water
 - (i) pursuant to an approval, licence or registration, or
 - (ii) that is authorized under this Act other than pursuant to section 21.”

[47] The Director explained that if the household user's diversion does not meet the definition of household use, then a licence would be required, and if water is diverted contrary to the *Water Act*, compliance action can be taken.

[48] The Director argued the relief requested by the Appellant indicates the appeal is not properly before the Board, as it deals with matters that are not within the Board's jurisdiction.²⁰ In particular, she stated the Board has no statutory authority to confirm the priority of the Appellant's Licence, as the priority is determined by the terms of the Licence and the provisions of the *Water Act*. The Director stated the technical reports were part of the municipal land development process and are not properly matters for the Board to deal with.

[49] The Director submitted the Board does not have jurisdiction to consider an appeal dealing with a decision not to issue a water management order.

C. Proponents

[50] The Proponents explained they are the owners of the lands in question and are the applicants for the subdivision approved by the Municipal District. The Proponents adopted and supported the Director in these matters.

[51] The Proponents argued the appeal is, "...in pith and substance, an attempt by the Wassons to appeal a subdivision approval."²¹ They explained as adjacent landowners, the Appellant does not have the legal right to appeal a subdivision approval, and the appeal is an attempt to do indirectly what they could not do directly.

²⁰ In her Notice of Appeal, the Appellant's relief requested from the Board included: confirm the priority of the Licence and direct that any interference with the Licence by the subdivision be managed by a water management order; direct that technical reports in support of the subdivision be completed to confirm the source of the Licence, the springs, will not be interfered with by the subdivision by including testing and monitoring of the springs; direct that monitoring on the southern boundary of the subdivision start immediately and continue throughout the duration of the Licence and impose conditions which would require the subdivision use the water and the land in such a manner that would not interfere with or adversely impact the Licence; provide a water management order directed to present and future owners of the lots which ensure the Licensee is not adversely impacted; and impose monitoring and management conditions on the use of the water and the discharge of effluent that will protect and preserve the priority of the Licence.

²¹ Proponents' submission, dated March 29, 2005, at page 1.

[52] The Proponents disagreed with some of the facts asserted by the Appellant. They stated the Appellant was allowed to actively participate in the subdivision process, including making her point and expressing her concerns to the subdivision approving authority.

[53] The Proponents stated that, in response to the Appellant's claim that her water had been affected by the draw down test, they obtained a letter from their consultants in which it concluded there was no evidence the water shortage on the Appellant's property on or about September 27, 2004, had any relation to the aquifer pump test conducted on August 27 and 28, 2004, at the Proponents' property.

[54] The Proponents explained the subdivision is for five lots only, and when they purchased the land, it was identified in the Municipal District planning documents as suitable and intended for residential development. They stated the residential use designation was in place before the Licence was issued to the Appellant.

[55] The Proponents stated the Appellant has been unable to establish that her aquifer is linked to the aquifer underlying the Proponents' lands, and the Appellant did not provide any authority that requires that her water supply be monitored during the collection of data related to the application.

[56] The Proponents submitted the subdivision approving authority "...had due and proper regard for the requirements of Section 23 of the *Water Act* in approving our clients' subdivision application."²²

[57] With respect to the reference to wastewater treatment, the Proponents argued the submission is inappropriate, as there is no operating wastewater treatment plant within the subdivision, and the proposed septic systems meet the legal requirements.

[58] The Proponents submitted the appeal be dismissed and asked costs be awarded to them.

D. Municipal District of Bighorn No. 8

²² Proponents' submission, dated March 29, 2005, at page 2.

[59] The Municipal District stated it had reviewed the Proponents' experts report, entitled "September 2004 Groundwater Supply for Proposed Rural Subdivision Expansion," and as the report was "...submitted under professional seal, neither the [Municipal Planning Commission] nor the Director should have any reservations in accepting that the findings and conclusions of AMEC are final, complete and satisfactory, for the purposes of considering the subdivision application."²³

[60] The Municipal District submitted that section 9 of the Regulation does not mention that the cumulative quarter section requirements or effluent discharge considerations need to be considered in the technical reports supporting an application.

[61] The Municipal District explained the impact on the Appellant was certainly a concern and was part of the basis for the requirement of a second water study and a study to determine potential impacts of the sewage disposal systems. It further explained the Appellant was provided with a copy of the application at the start of the process, and she was notified of meeting dates, given copies of reports in advance of the meetings, and was allowed to speak at meetings where the Municipal Planning Commission discussed the application. The Municipal District explained this type of interaction was beyond the usual practices of the Municipal Planning Commission, but was nonetheless granted to the Appellant. It stated the Appellant was given the opportunity to question the reports and did so.

[62] The Municipal District stated that even though the legislation does not provide for adjacent landowners to appeal a subdivision decision, the Appellant exercised her right to provide comments prior to the decision being made.

[63] The Municipal District explained that "...in order to be especially diligent in protection of the Wasson springs, the Landowners voluntarily intend to place a Restrictive Covenant on the new lots to ensure that pristine sewage treatment systems, which comply with Provincial regulations, are installed."²⁴

²³ Municipal District's submission, dated March 29, 2005, at page 2.

²⁴ Municipal District's submission, dated March 29, 2005, at page 3.

[64] The Municipal District stated the Ghost River Country Residential Area Structure Plan, approved in 1990 through a public process and involving the Licensee, allowed for 27 residential lots, and this particular subdivision approval for the final stage was for six lots.

IV. ANALYSIS

[65] It appears that one of the Appellant's concerns relates to the municipal development of the area adjacent to her property, but that it is not an issue this Board has jurisdiction over. The approval of such a development is exclusively a municipal planning issue and a separate appeal process exists under the *Municipal Government Act*, R.S.A. 2000, c. M-26.

[66] Her other concern, which is within the Board's jurisdiction generally, is the effect the development will have on the water supply for which she holds a valid Licence with a 1989 priority. The Board recognizes the importance of having a reliable water source not only for the Appellant's business, but also for household users in the area, including the Appellant and those who intend to live in the subdivision.

[67] The present system of water allocation is based on the first in time, first in right principle. The priority of a water licence determines who has the first right to the allocation of water in times of water shortage. When the draft of the *Water Act* was presented to the public, it became clear to the review committee that having access to a secure water supply for basic needs, such as household use, was a fundamental requirement. As a result of the public concern, the legislators provided for a protected right to divert water for household purposes. When the *Water Act* was introduced, the legislature codified household use of water as having essentially a "super priority" in that it supercedes all licences and all other uses in priority. This was a policy decision to ensure that household users would get water in times of shortage.

[68] The Appellant argued that since household users cannot obtain a licence for their limited use of water, the Director should impose a water management order on the subdivision owners proactively. This would defeat one of the purposes of the *Water Act* – to protect the fundamental right to a secure water supply for household use. Household use was given priority over all other users, even those who hold valid water licences. It is this household use that has raised concerns for the Appellant. Recognizing the new residences will have first right to

household use of water over and above her water Licence, the Appellant argued that if all of the residences used all of their entitled allotment of water, there may not be enough water for her to exercise her full right under her Licence.

[69] The Board's jurisdiction is clearly stated within the statute. It can confirm, reverse, or vary only certain decisions made by the Director. Section 115 of the *Water Act* specifies who may file an appeal, and when the section is read in its entirety, the legislators had turned their minds as to when certain decisions can or cannot be appealed.²⁵ For example,

²⁵ Section 115 of the *Water Act* provides:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
 - (i) by the approval holder 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, or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;
- (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted
 - (i) by the preliminary certificate holder 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, or
 - (ii) by the preliminary certificate holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;
- (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, or
 - (ii) by the licensee or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application or proposed changes was not provided;
- (d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence;
- (e) the Director issues or refuses to issue a licence to the Government under section 51(2), the applicant for the licence and any directly affected person;
- (f) the applicant, if the Director refuses to amend an approval, preliminary certificate or licence;
- (g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate;
- (h) the licensee, if the Director refuses to renew a licence;

sections 115(a) and (b) allow appeals when the Director issues or amends an approval or preliminary certificate. However, sections 115(d), (f), and (h) allow for appeals when the Director refuses to issue an approval, preliminary certificate, or licence or refuses to renew a licence. This indicates to the Board that different scenarios were clearly considered by the legislators, and they specifically chose not to allow appeals when a water management order was not issued.

[70] Of particular relevance to this appeal are sections 115(1)(m) and (n), which provide:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

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- (i) if the Director renews a licence where there has been a public review, any person who previously submitted a statement of concern in accordance with section 109;
 - (j) if the Minister takes over any works or undertaking, the approval holder, preliminary certificate holder or licensee or the owner of the works or undertaking;
 - (k) if the Director provides notice that no further applications for licences are to be accepted, a person who wishes to apply for a licence for any water that was the subject of the notice;
 - (l) the owner of the works, if the Minister issues an order with respect to the use of another person’s works under section 52(3);
 - (m) if an inspector or the Director issues a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;
 - (n) if an inspector or the Director issues a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority;
 - (o) a person who is entitled to divert water pursuant to section 21 and who is affected by a declaration by the Director that a diversion of water must cease;
 - (p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing
 - (i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,
 - (ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,
 - (iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking, if the works or undertaking is the subject of an approval, or
 - (iv) the removal or otherwise rendering ineffective of any works or obstruction;
 - (q) if the Director requires a person to pay an administrative penalty, the person to whom the notice of the administrative penalty is directed;
 - (r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision.”

- (m) if an inspector or the Director *issues* a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;
- (n) if an inspector or the Director *issues* a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority....” (Emphasis added.)

[71] These are the only sections that relate to the issuance of a water management order, and these sections clearly state there is a right of appeal only when a water management order is *issued*, and only those persons affected by the decision can appeal. The Board cannot read into the section that there is a right to appeal a refusal to issue a water management order. As stated in *Principles of Administrative Law* by D. P. Jones and A.S. deVillars: “The delegate must be able to demonstrate that his actions fall squarely with the power granted to him by the ... provincial legislatures. If they do not, his actions are *ultra vires*, that is, beyond the delegate’s jurisdiction.”²⁶

[72] The Appellant argued the “first in time, first in right principle” should supercede household use. The legislators did not agree, and the legislation clearly provides household use as the “super-priority.” The Board cannot override the legislation and assign a licence holder a higher priority. In the Board’s view, the legislature anticipated circumstances like that facing the Appellant and decided that household use should prevail without recourse to an appeal.

[73] In a 2004 Board decision,²⁷ the Board discussed the first in time, first in right principle:

“The *Water Act* establishes the principle that all water is the property of the Provincial Crown,²⁸ and then establishes a system of granting water rights by way of water licences. These water licences may be issued for any or all of the following purposes: ‘(a) municipal; (b) agricultural; (c) irrigation; (d) commercial; (e) industrial; (f) water power; (g) dewatering; (h) management of fish; (i) management of wildlife; (j) implementation of a water conservation

²⁶ D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 2nd ed. (Toronto: Thompson, 1994) at page 6.

²⁷ See: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.).

²⁸ See: Section 3 of the *Water Act*.

objective; (k) habitat enhancement; (l) recreation; (m) water management; (n) any other purpose specified by the Director.’²⁹ Subject to the discussion below, there is no distinction or ranking between these purposes.

The granting of these water licences is based on the ‘first in time, first in right’ principle, as detailed in sections 28 to 31 of the *Water Act*. Under the first in time, first in right principle, water licences are assigned a ‘priority’ or order of seniority, generally based on the date on which the application for the water licence was received. The earlier the date in time that the licence was issued the higher the priority and the more senior the licence. Conversely, the more recent the date in time the licence was issued the lower the priority and the more junior the licence. The first in time, first in right principle ensures that within a water source (e.g. a reach of a river), licence holders with senior priorities get their allocation of water in preference to licence holders with junior priorities. Ensuring this preference is done through a process known as ‘water mastering,’ which requires licence holders with the junior priorities to cease withdrawals from the water source if it is necessary to make the water available to the licence holders with the senior priorities.³⁰

The *Water Act* establishes two main exceptions to this priority scheme: household users and traditional agricultural users. The household user³¹ classification replaces the common law riparian right with respect to the diversion of water,³² and allows a person that is adjacent to a water source to take up to 1250 m³/year for ‘...human consumption, sanitation, fire prevention and watering of animals, gardens, lawns and trees...’³³ No licence is required to exercises [*sic*] this water right; it exists automatically as a result of having a household on land adjacent to a water source. (Note that a person who receives or is entitled to receive water from a municipal water supply, is not entitled to be a household user.)³⁴ The household user is also automatically assigned the highest priority in the system, and household users are equal in priority between each other.³⁵ Inherent in this

²⁹ *Water (Ministerial) Regulation*, A.R. 205/98, section 11.

³⁰ The first in time, first in right system, and the priority that it assigns, ensures that during times of water shortage, within a water source, water is first given to those holding a water licence with the most senior priority, regardless of their geographical location in the water system. For example, in times of water shortage, the holder of a licence with a senior priority at the bottom of a river system (the mouth or confluence) would get water in preference to the holder of a licence with a more junior priority, even though the holder of the licence with the junior priority may be in the headwaters or in the middle of the river system. The first in time, first in right system is in contrast to the “law of capture” system that existed under common law, where whoever could capture the water first was entitled to take it.

³¹ See: Section 21 of the *Water Act*.

³² See: Section 22(3) of the *Water Act*.

³³ See: Section 1(x) of the *Water Act*.

³⁴ Section 8 of the Regulation provides that: “A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 [(the household right)] of the Act.”

³⁵ Section 27 of the *Water Act* provides:

exception appears to be recognition of the importance of the use of water for direct human requirements in preference to all other uses.”³⁶

[74] The Appellant argued the Director should have used her discretion and implemented section 23 of the *Water Act*. Section 23 allows the Director to issue a water management order that would effectively suspend future household rights if she determines the household use will have a significant adverse effect on the aquatic environment, a licensee, or a traditional agriculture user.³⁷ It appears the legislators intended this section to be implemented

“A person who diverts water pursuant to section 21 [(the household right)]

- (a) does not have priority with respect to another person who is diverting water pursuant to section 21, but
- (b) has priority over a person who is entitled to divert water
 - (iii) pursuant to an approval, licence or registration, or
 - (iv) that is authorized under this Act other than pursuant to section 21.”

Between householder users the common law “right of capture” appears to prevail: whoever can capture the water first is entitled to it.

³⁶ *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.) at paragraphs 155 to 158.

³⁷ Section 23 of the *Water Act* states:

- “(1) If the Director is of the opinion that there is or may be a significant adverse effect on the aquatic environment or on a licensee or traditional agriculture user resulting from a diversion of water pursuant to section 21, the Director may, subject to the regulations, ...
 - (c) issue a water management order under section 97, and
 - (d) declare that a person described in section 21 who did not divert water as described in section 21 prior to the date of the declaration may not, as of the date of the declaration, divert water as described in section 21 from a source of water specified in the declaration or from any sources of water within the water management area specified in the declaration.
- (2) The Director must provide notice of a declaration in a form and manner satisfactory to the Director.
- (3) If, on or after January 1, 1999, a subdivision of land of a type or class of subdivision specified in the regulations is approved under the *Municipal Government Act*, a person residing within that subdivision on a parcel of land that adjoins or is above a source of water described in section 21 has the right to commence and continue the diversion of water under section 21 only if
 - (a) a report certified by a professional engineer, professional geologist or professional geophysicist, as defined in the *Engineering, Geological and Geophysical Professions Act*, was submitted to the subdivision authority as part of the application for the subdivision under the *Municipal Government Act*, and the report states that the diversion of 1250 cubic metres of water per year for household purposes under section 21 for each of the households within the subdivision will not interfere with any household users, licensees or traditional agriculture users who exist when the subdivision is approved, and
 - (b) the diversion of water for each of the households within the subdivision under section 21 is not inconsistent with an applicable approved water management plan.

only in extreme circumstances when the water is fully allocated. That situation does not exist in these circumstances.

[75] In the Director's January 11, 2005 letter, it appears the Director reviewed the application and the supporting documents, including the pump test information, and determined that, based on the information provided, aquifer transmissivity, and long-term safe yields, there is sufficient groundwater available for the subdivision development without causing a significant adverse impact on existing users, including the Appellant. There is a limit on household use of water of 1,250 m³ per year. It is this maximum amount of water that is assumed used in its entirety when determining whether there is adequate water in an aquifer and whether a licensee will be affected to such an extent that a water management order would be required. Based on the information provided, the Director did not consider it necessary to issue a water management order.

[76] For a water management order to be issued, the Director must be convinced there would be a significant adverse effect on the aquatic environment, licencees, and traditional agricultural users.³⁸ From the information provided, the Director determined the Appellant would not be affected by the household water use by residents of the subdivision development and her ability to use her Licence would not be affected.

[77] The Appellant argued the technical reports relied on by the Director were incomplete and her well was not tested to support the findings in the report. According to the Municipal District, it was very aware of the concerns of the Appellant and actually required the

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- (4) Notwithstanding subsection (3), a person residing within a subdivision as described in subsection (3) has the right to commence and continue the diversion of water under section 21 if
- (a) the written consent of the subdivision authority is provided to the Director,
 - (b) the Director is of the opinion that there are or were extenuating circumstances with respect to the submission of the report under subsection (3), and
 - (c) the Director has approved in writing the right to divert under section 21."

³⁸

Section 97(1)(c) of the *Water Act* states:

"An inspector or Director may issue a water management order... to any person responsible for

- (i) a works that does not require an approval,
- (ii) a diversion of water that does not require a licence or registration,
- (iii) and activity that does not require an approval, or
- (iv) a diversion of water for household purposes,

if, in the opinion of the inspector or Director, an adverse effect on the aquatic environment, human health, property or public safety occurred, occurs or may occur."

Proponents complete additional reports prior to it making its decision regarding the subdivision. The Director reviewed the information provided and was confident there would be no significant adverse impact on other water users. When gathering data on water sources, it is not a requirement to conduct testing on neighbouring wells. The possible effect on adjacent water sources can be extrapolated, based on the data gathered regarding draw down and the zone of influence. When determining the effect, cautious values are assumed to allow for a greater degree of confidence and safety. Based on the information provided, the Director was confident there would be no impact on neighbouring water users and, therefore, did not issue a water management order. The Director can only impose a water management order if she deems there will or may be a “significant adverse effect.” It is important to note the adverse effect must be significant, indicating an even higher degree of effect is required before a water management order can be issued. It is insufficient to rely on concerns about the possibility of an adverse effect.

[78] The Appellant argued the system is flawed if a person cannot appeal the decision of the Director not to issue a water management order. The intent of a water management order is not to control all household users or limit subdivision growth. A water management order is only issued when it is apparent from the tests conducted there is insufficient water to support the household uses without the likelihood of having a significant adverse effect. The Director allocates water that is available, but she does not place a priority between types of uses. Section 2 of the *Water Act* sets out the purpose of the Act.³⁹ Setting priority of water use is not one of the purposes of the *Water Act*; setting priority is an instrument to achieve the purposes set out in section 2.

³⁹ 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;

[79] Although the Appellant does not have a valid appeal before the Board, she does have additional recourse. If she does find there is interference with her water right or the quality of the water is being affected by the subdivision, she has the right to submit a complaint to the Director. The Director will investigate all legitimate complaints. If the Director finds the water quality is being affected, she can take the necessary steps to ensure the problem is corrected. If the Director finds individual houses are exceeding the household use allotment, she can take action to prevent over-consumption, such as requiring monitoring of the wells to determine the amount of water being withdrawn.

[80] The Appellant holds a water Licence for a business that requires a reliable water supply. As the *Water Act* currently is written, household users have the top priority when it comes to water use. A prudent businessperson must consider alternatives in the event there is an interference with the water supply, be it by household use, other licences with higher priority, or drought. These alternatives could include drilling other wells that access deeper aquifers than the household wells are located, or purchasing a higher priority licence in a different area. Water is a valuable, limited natural resource, and as the need for water continues to grow, the demand for water also grows. Alternatives need to be considered as part of good business practices in industries and businesses that require reliable water sources.

[81] The Appellant is also assuming the household wells will be drilled in the same aquifer as the one allowed under her Licence. This is speculation at this point. Although the tests were performed at the same depth as hers, the wells have not been drilled and may not end up in the same aquifer.

[82] The *Water Act* protects the rights of a household user to divert water. This statutory right prevails over the priority system created under the *Water Act* in respect of other water uses.⁴⁰ Moreover, the household user's right is not tied to a specific source of water. Finally, although the Director may issue a water management order to prevent future diversions

⁴⁰ (f) the important role of comprehensive and responsive action in administering this Act.”
Section 27 of the *Water Act* provides:
“A person who diverts water pursuant to section 21 does not have priority with respect to another person who is diverting water pursuant to section 21, but has priority over a person who is entitled to divert water
(i) pursuant to an approval, licence or registration, or
(ii) that is authorized under this Act other than pursuant to section 21.”

of water for household purposes from a specific source, the Director does not have the power to limit existing household users.⁴¹ A person who owns or occupies land adjoining surface water or under which groundwater exists, may divert water for household purposes.⁴² Household use is an acquired right that cannot easily be removed.

[83] Section 99 of the *Water Act* lists the conditions that can be included in a water management order.⁴³ In reviewing the various terms, it becomes apparent a water management

⁴¹ Section 23(1) of the *Water Act* provides:

“If the Director is of the opinion that there is or may be a significant adverse effect on the aquatic environment or on a licensee or traditional agriculture user resulting from a diversion of water pursuant to section 21, the Director may, subject to the regulations,

- (a) issue a water management order under section 97, and
- (b) declare that a person described in section 21 who did not divert water as described in section 21 prior to the date of the declaration may not, as of the date of the declaration, divert water as described in section 21 from a source of water specified in the declaration or from any sources of water within the water management area specified in the declaration.”

⁴² Section 21(1) of the *Water Act* provides:

“Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land that adjoins a river, stream, lake, natural watercourse or other natural water body

- (a) has the right to commence and continue the diversion of the water that adjoins that land for household purposes, whether or not that water is reserved under section 35, and
- (b) may not obtain a licence for the diversion of water that adjoins that land for household purposes.”

⁴³ Section 99(1) of the *Water Act* states:

“A water management order issued by the Director may

- (a) order the person to whom it is directed to take any measures that the Director considers necessary, including but not limited to any or all of the following:
 - (i) to make inquiries into the subject-matter of the order;
 - (ii) to submit to the Director
 - (A) any information on the subject-matter of the order, or
 - (B) a proposal or plan including but not limited to preparing an emergency preparedness plan or conducting an examination or survey of a water body, for the Director’s approval on any action that is to be undertaken with respect to the subject-matter of the order;
 - (iii) to remove or otherwise to render ineffective
 - (A) a works placed or constructed without an approval,
 - (B) a works that is no longer required or for which an approval, licence or registration has been cancelled or is no longer in effect, or
 - (C) a natural or other obstruction to the diversion or flow of water caused in any manner;
 - (iv) to maintain, repair, improve, alter, replace or remove a works;
 - (v) to operate a works for a specified result or in a specified manner;
 - (vi) to cease construction with respect to an activity, diversion of water or operation of a works for a specified period;
 - (vii) to stop, shut down or suspend an activity, diversion of water or operation of a works or thing for a specified period;

order is not intended to be in place permanently. It is a temporary measure to correct a problem. Persons to whom a water management order has been issued have not contravened any part of the *Water Act*. A water management order is not intended to be punitive in nature, and permanently removing an acquired right, in this case the use of water for household purposes, the relief sought by the Appellant, would be penalizing persons in a way that is not intended under the *Water Act*.

[84] The Appellant should take some reassurance in knowing the subdivision owners also value the high quality water in the area and will take whatever measures possible to protect this valuable resource. The Municipal District stated the subdivision owners voluntarily agreed to place restrictive covenants on the new lots to ensure “pristine” sewage treatment systems are installed. This indicates they appreciate the value of the water in the area, and if the water supply is affected in some way, it would affect them as well as the Appellant.

[85] The plain and simple reading of the legislation clearly indicates there is no right of appeal when the Director decides not to issue a water management order. Therefore, the appeal must be dismissed, as it is not properly before the Board.

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- (viii) to prevent, minimize or remedy any adverse effects on the aquatic environment, human health, property or public safety;
 - (ix) to stop wasting water and comply with the water guideline regarding wastage of water;
 - (x) to carry out any emergency measures that the inspector or the Director considers necessary;
 - (xi) to restore or reclaim the area affected to a condition satisfactory to the Director;
 - (xii) to report on any matter that the order requires to be carried out;
 - (xiii) to maintain records on any relevant matter;
 - (xiv) to report periodically to the Director;
 - (xv) with respect to a problem water well, to reclaim the water well or take any remedial action with respect to the water well and to prevent, minimize or remedy any adverse effects on the environment, human health, property or public safety;
 - (xvi) to modify, suspend or stop any of the actions related to the drilling of a water well and to prevent, minimize or remedy any adverse effects on the environment, human health, property or public safety;
 - (xvii) to take any other measure that the Director considers necessary;
- (b) contain provisions specifying
- (i) how the order is to be carried out,
 - (ii) the time within which any measure required by the order is to be commenced and the time within which the order or any part of the order is to be complied with, and
 - (iii) the apportionment of the costs of doing any of the work or carrying out any of the measures specified in the order among the persons to whom the order is directed.”

V. DECISION

[86] There is no right of appeal under the *Water Act* of the Director's decision not to issue a water management order. It is not an appealable decision listed in section 115(1) of the *Water Act* and is not an appealable decision within the Board's jurisdiction. Therefore, pursuant to section 95(5)(iii) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal.

Dated on May 30, 2008, at Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudehy, FRSC, PEng
Panel Chair

“original signed by”

Mr. Al Schulz
Board Member

“original signed by”

Mr. Dallas K. Miller, Q.C.
Board Member