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ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

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Date of Hearing – June 25, 2001  
Date of Report and Recommendations – July 18, 2001

**IN THE MATTER OF** Sections 84, 85, 86, 87 and 91 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, and section 115 of the *Water Act*, S.A. 1996, c. W-3.5;

**-and-**

**IN THE MATTER OF** appeals filed by Mr. Louis and Ms. Verna Schafer, Mr. David Hausauer, Mr. Roy Hausauer, Ms. Chryle Bascom, Mr. Ken Benson, Mr. Ivan Hausauer, Mr. Donald Elhart, Mr. Tracy Elhart, Ms. Bernice Bonneau, Mr. Aaron Elhart, Mr. Brian Franz, Mr. Edward Aberle, Mr. Bill Hoff, Mr. Merlen Brost, Mr. Neil Hoff, and Mr. Darcy Geigle with respect to the decision of the Director, Prairie Region, Natural Resources Service, Alberta Environment to issue Preliminary Certificate No. 00139098-00-00, under the *Water Act*, to B & J Schneider Ranching.

Cite as: *Schafer et al. v. Director, Prairie Region, Natural Resources Service, Alberta Environment, re: B & J Schneider Ranching.*

## HEARING BEFORE

William A. Tilleman, Q.C., Chair  
Ron V. Peiluck  
Roy A. Crowther

## APPEARANCES

Appellants: Mr. Louis and Ms. Verna Schafer, Mr. David Hausauer, Mr. Roy Hausauer, Ms. Chryle Bascom, Mr. Ken Benson, Mr. Ivan Hausauer, Mr. Donald Elhart, Ms. Bernice Bonneau, Mr. Aaron Elhart, Franz, Mr. Edward Aberle, Mr. Bill Hoff, Mr. Merlen Brost, Mr. Neil Hoff, and Mr. Darcy Geigle represented by Mr. Cameron MacLennan, Andreachuk Harvie MacLennan Maxwell.

Director: Mr. Dave McGee, Director, Prairie Region, Natural Resources Service, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Certificate Holder: B & J Schneider Ranching, represented by Mr. Keith Wilson, Wilson Hurlburt.

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer; and Ms. Valerie Higgins, Hearing Officer.

## NOT ATTENDING

Appellants: Mr. Tracy Elhart and Mr. Brian Franz.

## WITNESSES

Appellants: Ms. Bernice Bonneau, Mr. Ivan Hausauer, Mr. David Thomson, and Mr. Stanley Weiss.

Director : Mr. Dave McGee and Mr. Claude Eckert.

Certificate Holder: Mr. Brent Moen and Dr. Robert Nowak.

## EXECUTIVE SUMMARY

B & J Schneider Ranching was granted a preliminary certificate under the *Water Act*. The preliminary certificate provides that if certain conditions are met, B & J Schneider Ranching will be granted a water licence to divert up to 21,600 cubic metres per year of water from two wells located at SE 30-12-03-W4M, near Medicine Hat, Alberta. The purpose of the water licence is to supply a feeder hog barn operation.

The Appellants live in the vicinity of B & J Schneider Ranching and use groundwater to provide for household and stock watering purposes. The Appellants have requested that the Board reverse the decision of the Director to issue the preliminary certificate on the basis that the proposed diversion of water will reduce the amount of water available to them. The Appellants are also concerned that the proposed diversion of water will have a negative impact on the flow of water in Ross Creek. Alternatively, the Appellants have requested amendments to the preliminary certificate to provide for greater protection of the groundwater supply.

Three main issues had to be overcome by the Appellants to successfully reverse the Director's decision. The first was the "directly affected" status of the Appellants. On this issue, the Board held that, for the purposes of these appeals, it was prepared to accept that at least one of the Appellants was directly affected. The second issue was whether the Director had enough information on which to base his decision to issue the preliminary certificate. Four specific areas of concern were put forward by the Appellants. After reviewing each of these four areas, the Board decided to confirm the Director's decision to issue the preliminary certificate. The final issue was additional monitoring requirements. Upon reviewing the request of the Appellants for additional monitoring requirements, the Board recommended that some additional monitoring requirements should be added to the preliminary certificate and to the licence. The Board also recommended some other amendments to the preliminary certificate and to the licence to promote clarity.

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## **I. BACKGROUND**

[1] On December 20, 2000, the Director, Prairie Region, Natural Resources Service, Alberta Environment (the “Director”) issued Preliminary Certificate 00139098-00-00 (the “Certificate”) under the *Water Act*, S.A. 1996, c. W-3.5 to B & J Schneider Ranching (the “Certificate Holder”). The Certificate provides that if certain conditions are met, the Director will issue a licence (the “Licence”), having priority number 2000-08-29-002, to the Certificate Holder, to divert up to 21,600 cubic metres of water annually from two wells (the “Schneider Wells”) located at SE 30-012-03-W4M near Medicine Hat, Alberta. The purpose of the Licence is to supply a feeder hog barn operation.

[2] By letters dated December 28, 2000, the Director informed individuals, who had previously filed Statements of Concern in relation to this matter, of his decision to issue the Certificate.

[3] On January 31, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Mr. Louis and Ms Verna Schafer. On February 2, 2001, the Board received Notices of Appeal from Mr. David Hausauer, Mr. Roy Hausauer, Ms. Chryle Bascom, Mr. Ken Benson, Mr. Ivan Hausauer, Mr. Donald Elhart, Mr. Tracy Elhart, Ms. Bernice Bonneau, Mr. Aaron Elhart, Mr. Brian Franz, Mr. Edward Aberle, Mr. Bill Hoff, Mr. Merlen Brost, Mr. Neil Hoff, and Mr. Darcy Geigle. All of these parties, except Mr. Tracy Elhart and Mr. Brian Franz, are collectively referred to as the Appellants. The Appellants subsequently formed an organization called the Clearwater Clean Air Advocates.

[4] On April 24, 2001 the Board received a further Notice of Appeal from Mr. Stanley Weiss. Mr. Weiss had not previously submitted a Statement of Concern and the Board did not receive Mr. Weiss’ Notice of Appeal within the period prescribed under the *Water Act*. The filing of a Statement of Concern is generally a statutory prerequisite to the filing a Notice of Appeal. Further, with respect to Mr. Weiss, the Board decided that the circumstances did not warrant an extension of the time prescribed under the *Water Act* for filing a Notice of Appeal. Accordingly, the Board dismissed Mr. Weiss’ Notice of Appeal.<sup>1</sup> The Board did, however, let

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<sup>1</sup> *Weiss v. Director, Prairie Region, Alberta Environment re: B and J Schneider Ranching* (May 14, 2001), E.A.B. Appeal No. 01-042.

Mr. Weiss participate in the hearing via written submissions in response to his intervenor request.<sup>2</sup> Mr. Tracy Elhart and Mr. Brian Franz did not provide written submissions to the Board and did not attend the hearing.

[5] The Appellants' properties are located generally east of Medicine Hat, Alberta. The Appellants use water for household and stock watering purposes from wells and dugouts that are located in the general vicinity of the Schneider Wells. The Appellants are concerned that the diversion of water from the Schneider Wells will reduce the amount of water available to them from their wells and dugouts. The Appellants are also concerned that the diversion of water from the Schneider Wells will affect the flow of water in Ross Creek. The Appellants submit that the withdrawal authorized by the Licence:

“...will harm the natural resource (the groundwater) in that it will be depleted and in becoming so depleted it will harm the hydrogeology of their area and each of their individual uses for domestic and agricultural purposes.”<sup>3</sup>

[6] The Appellants request that the Board overturn the decision of the Director to issue the Certificate in respect of the Schneider Wells.<sup>4</sup> Alternatively, the Appellants request that the Board amend the Certificate to require the Certificate Holder to conduct additional monitoring of the Schneider Wells and additional monitoring of other wells in the area.

## II. AGREED FACTS

[7] At a technical meeting held between the parties and the Board on May 24, 2001, the parties agreed to provide the Board with an Agreed Statement of Facts. The facts, agreed to by the parties and provided to the Board, are:

- “1. Alberta Environment received an Application under the *Water Act* from B & J Schneider Ranching on June 22, 1999. The application was for a diversion up to a maximum of 28,700 cubic metres a year from proposed groundwater well(s) for livestock watering purposes. In addition to this application, Alberta Environment received an application for an approval to explore for ground water (an exploration permit). The well locations

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<sup>2</sup> Intervenor Requests: *Schafer et al. v. Director, Prairie Region, Natural Resources Service, Alberta Environment*, re: *B and J Schneider Ranching* (June 27, 2001), E.A.B. Appeal Nos. 01-017-032-D.

<sup>3</sup> Addendum to the Written Submission by the Appellants (June 25, 2001), paragraph 1.

<sup>4</sup> *Ibid.*, paragraph 13. The Addendum to the Written Submission states: “A lack of clear and convincing evidence in support of the application for the Preliminary Certificate must make it unsuccessful.”

for the diversion are at SE 30-012-03-W4, which is in an area southeast of Medicine Hat, Alberta....

2. Public notice of the two applications was published in the Cypress Courier Section, 40-Mile County Commentator on November 23, 1999.
3. In response to the public notice, Alberta Environment received various Statements of Concern.... [In the Agreed Statement of Facts, the parties attached the land locations and, where available, the drilling record for each person who submitted a Statement of Concern.]
4. Mr. Dave McGee (the 'Director') accepted the public letters as Statements of Concern under the *Water Act*.
5. As part of the processing of the Licence application, the matter was referred to Mr. Claude Eckert, P. Geol, Groundwater Licensing Coordinator, Bow Region. Mr. Eckert recommended that the Department proceed with an Approval to explore for groundwater (an exploration permit).
6. An Approval to explore for groundwater (an exploration permit) was granted on February 23, 2000 to B & J Schneider Ranching. B & J Schneider Ranching was provided with copies of the Statements of Concern by the Director. In addition, the Director advised that *'I must consider the effects of your project on water supply within the land locations referred to in the statements of concern, therefore they should be considered when conducting the exploration program authorized by this approval.'*
7. The consulting firm of Groundwater Exploration and Research [Ltd.] designed and interpreted the results of the exploration program. A copy of their report was received by Alberta Environment on August 29, 2000 (the 'Nowak Report').
8. Following the completion of the exploration program, the Nowak Report was forwarded to Mr. Eckert for his review and recommendations in respect of the licence application.
9. Mr. Eckert's review and recommendations were:

*'I have no concerns regarding the exploration program, initiated by the applicant and their consultant (Groundwater Exploration and Research Ltd.). The conclusions, presented in the report are reasonable and the technical calculations and aquifer evaluation are in accordance with industry/department standards.'*

The report concludes that the existing wells and aquifers cannot support the amount of water required for this proposed operation...

*'...it is recommended that we proceed with a licence for the diversion and use of ground water, up to the amount of 21,600 cubic metres per year. It is also recommended that the applicant be made aware of the water supply deficiency ... careful monitoring of his use is imperative to ensure*

*protection of aquifer.'*

10. The Director issued the Preliminary Certificate No. 00139098-00-00 on December 20, 2000. The Preliminary Certificate was issued with specific conditions that must be complied with prior to a licence being issued. In addition, the licence to be issued will only receive an allocation of 21,600 cubic metres per year for wells in SE 30-012-03-W4 (based on capabilities determined in the groundwater investigation).
11. Once the Preliminary Certificate was issued, a copy of the Preliminary Certificate and the groundwater supply evaluation report was provided to those who had filed Statements of Concern.”<sup>5</sup>

[8] Paragraph 1 of the Agreed Statement of Facts filed with the Board referred to the proximity between the Schneider Wells and Ross Creek but did not specify the distance. The Written Submission of the Director stated that the “...wells are approximately 1½ miles from Ross Creek.”<sup>6</sup>

[9] In its Written Submission to the Board, the Certificate Holder provided the following additional facts :

- “2. The water wells that are the subject of this appeal are located on the SE 30-12-3-W4 and are more precisely located in a regional site plan in the Nowak Report at Enclosure 1....
3. The Schneiders are the only water users in the SE 30-12-3-W4: there are no other water users within this quarter section.
4. The nearest Appellants are approximately 2500 metres from the Schneider Wells, while other Appellants’ water sources are located several kilometers from the Schneider Wells.”<sup>7</sup>

[10] Other relevant undisputed facts were raised by the parties at the hearing. These include that the Approval for groundwater exploration – Approval 00080386-00-00 (the “Approval”) - issued by the Director to the Certificate Holder on February 23, 2000, included conditions for the groundwater exploration program. Section 6 of the Approval included the following requirements:

“During the pumping test, the approval holder shall...

- (b) provide an appropriate number of observation well(s) which shall be

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<sup>5</sup> Agreed Statement of Facts (June 8, 2001).

<sup>6</sup> Written Submission of the Director (June 19, 2001), paragraph 1.

<sup>7</sup> Written Submission of the Certificate Holder (June 18, 2001), paragraphs 1 to 4. The Board notes, however, that Mr. Weiss has two wells located within approximately 1600 metres of the Schneider Wells.

located within an appropriate distance and shall be measured on the same schedule as the pumping test[, and]

- (c) obtain water level readings in all neighboring wells located within an appropriate distance...”

During the pumping test, no observation wells were monitored and no water level readings in any neighboring wells were obtained.<sup>8</sup>

[11] Further, it is also an undisputed fact that on June 8, 2000, the Director gave notice of his decision to establish the Ross Creek Basin Water Management Area pursuant to section 164 of the *Water Act*.<sup>9</sup> The notice states that the Ross Creek Basin Water Management Area includes all naturally flowing water from below the ground to Ross Creek and its tributaries. The notice also states that no new applications for groundwater diversion licences will be accepted unless it can be shown that the proposed production interval of the water well is not hydraulically connected to Ross Creek and its tributaries. (The Certificate Holder applied for the Approval and Licence *before* the Director established the Ross Creek Basin Water Management Area.<sup>10</sup>)

### III. ISSUES

[12] At the technical meeting held on May 24, 2001, the parties agreed upon the relevant issues for the Board to consider in these appeals. In accordance with sections 87(2) and 87(4) of the *Environmental Protection and Enhancement Act* S.A. 1992, c. E-13.3 (“EPEA”) the Board decided that the following issues are the only matters to be included in the hearing of these appeals:

- “1. The directly affected status of the Appellants, based on the position of the Preliminary Certificate Holder that the Preliminary Certificate and proposed Licence will have no impact on the Appellants.
2. The Appellants lack confidence in the available data and are of the view that there is insufficient data upon which to base the decision to issue the Preliminary Certificate and proposed Licence. Specifically, the

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<sup>8</sup> Evidence of Dr. Nowak during cross-examination.

<sup>9</sup> See Written Submission of the Director (June 19, 2001), tab A, “Ross Creek Basin Water Management Area”.

<sup>10</sup> The Ross Creek Basin Water Management Area was established on June 8, 2000. The application for the Approval and Certificate/Licence was submitted by the Certificate Holder on June 22, 1999. (See Written Submission of the Director (June 19, 2001) tab A. See Director’s Record, tab 27.)

Appellants have concerns that:

- (a) the pump test was too short,
  - (b) there was no testing of observation wells,
  - (c) there is insufficient information regarding the existence of a hydraulic barrier between the till material and the bedrock, and
  - (d) there is insufficient information to demonstrate that there is no connection with Ross Creek.
3. The Appellants would like to see expanded monitoring. The Appellants would like to see:
- (a) a frequency of four times per year specified in section 6(c) of the Preliminary Certificate;
  - (b) monitoring of other wells in the area, including the establishment of an ‘early warning system’ on the Preliminary Certificate Holder’s lands and the monitoring of other existing wells in the area.”<sup>11</sup>

#### **IV. INTERVENOR REQUESTS**

[13] On May 31, 2001, the Board published notice of this hearing in the Medicine Hat News. The notice indicated that anyone wishing to make a representation before the Board at the hearing could submit a request to the Board. The Board received intervenor requests from a number of people, including Mr. Weiss, who lived in the general vicinity of the Schneider Wells and who use water for household and stock purposes from wells, dugouts, and Ross Creek. The intervenor requests each stated, “...my position is substantially the same as the Clearwater Clean Air Advocates [- the Appellants].” Mr. Weiss’ request also indicated that he has a well located within 1600 metres of the Schneider Wells and that his well was not monitored during the groundwater exploration program carried out under the Approval.

[14] The Board permitted the parties to provide written comment to the Board in response to these intervenor requests.

[15] For the most part, the Board was not satisfied that the individuals requesting intervenor status would provide any new evidence to the Board or raise any additional matters that would assist the Board in deciding the issues before it. The Board denied all the intervenor

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<sup>11</sup> Board’s letter (June 4, 2001).

requests except that of Mr. Weiss.<sup>12</sup> The Board permitted Mr. Weiss to participate in the appeals as an intervenor by written submission only and requested that he be available at the hearing for cross-examination.

## V. ANALYSIS

### A. “Directly Affected” Status of the Appellants

[16] The preliminary issue for the Board is whether the Appellants are “directly affected”, as required by section 115(1)(b)(i) of the *Water Act* by the Director’s decision to issue the Certificate.<sup>13</sup> The *Water Act* does not define the term “directly affected.” However, the Board has previously considered the meaning of the term “directly affected” in the context of appeals under EPEA.

[17] For example, the Board previously stated in *Wessley*<sup>14</sup> that standing must be determined on a case by case basis, taking into account the particular facts and circumstances of each appeal. Further, in *Hazeldean*,<sup>15</sup> the Board said the term “directly affected” is not an absolute principle of law because the determination must be flexible. The Board has “...not found a universal, simple and easy test to determine when a person is ‘directly affected’ which can be applied automatically in all cases.”<sup>16</sup> However, in *Kostuch*, the Board also indicated that

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<sup>12</sup> Intervenor Requests: *Schafer et al. v. Director, Prairie Region, Natural Resources Service, Alberta Environment*, re: *B and J Schneider Ranching* (June 27, 2001), E.A.B. Appeal Nos. 01-017-032-D.

<sup>13</sup> Section 115(1)(b)(i) of the *Water Act* provides:  
“115(1) A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:...

(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....”

<sup>14</sup> *Fred J. Wessley v. Director, Alberta Environmental Protection* (February 2, 1994), E.A.B. Appeal No. 94-001.

<sup>15</sup> *Hazeldean Community League v. Director, Air & Water Approvals Division, Alberta Environmental Protection* (May 11, 1995), E.A.B. Appeal No. 95-002.

<sup>16</sup> *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 2 (“*Kostuch*”).

a determination of whether a person is “directly affected” by a decision under the EPEA comprises questions of fact and of law. Specifically, the Board held:

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

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question.”<sup>17</sup>

[18] Although these previous Board decisions related to the meaning of “directly affected” for the purposes of the EPEA, they are also relevant to the same question for the purposes of appeals under the *Water Act*.

[19] The Appellants live in the general vicinity of the Schneider Wells and each have a statutory right under the *Water Act* to divert water for household and stock watering purposes.<sup>18</sup> The Board heard evidence from two hydrogeologists on the question of a possible hydraulic connection between the Schneider Wells and the water sources used by the Appellants for their household and stock watering purposes.

[20] In accordance with the Approval, Dr. Nowak prepared a report<sup>19</sup> (the “Nowak Report”) for the Certificate Holder in support of the application for the Licence. Dr. Nowak supports the position of the Director and the Certificate Holder that the diversion of water from the Schneider Wells will not affect the Appellants. Dr. Nowak notes that the Schneider Wells

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<sup>17</sup> *Ibid.*, at paragraphs 34 to 35. This passage was affirmed by the Alberta Court of Queen’s Bench in *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraphs 25 to 26.

<sup>18</sup> See sections 19, 21, and 24 of the *Water Act*, which are discussed below.

<sup>19</sup> *Groundwater Supply Evaluation B & J Schneider Ranching, near Medicine Hat, AB SE-30-12-03-W4M* prepared by Dr. Robert Nowak of Groundwater Exploration & Research Ltd. (July 2001). Director’s Records at tab 2.

would be completed in sandstone bedrock and the Appellants' wells are all located in the overlying till material. Dr. Nowak said it was unlikely that the Schneider Wells would impact the Appellants' wells because:

“The two flow systems are interpreted to be separate. Even if a hydraulic connection does exist between the bedrock and the till deposits, the impact is expected to be minimal because of the anticipated low hydraulic conductivity of the till material. Operation of the Water Wells will utilize water in storage. Recharge to the wells will occur laterally because of the hydraulic conductivity contrast between the till and sandstone.”<sup>20</sup>

Dr. Nowak also showed that there was little correlation between the chemistry of the water from the Schneider Wells and previous chemical analysis of the water from the closest Appellants' wells.<sup>21</sup>

[21] Mr. Thomson supported the Appellants' position of a possible hydraulic connection between the Schneider Wells and the Appellants' water sources. He said: “When groundwater is pumped from the wells, the source of that water will be a combination of intercepted flow in the bedrock aquifer and increased leakage from overlying sediments.”<sup>22</sup>

[22] Mr. Thomson explained that, like all aquifers, the aquifer intended to source the Schneider Wells currently exists in a state of equilibrium where the groundwater recharge is balanced by the natural discharge of water. Mr. Thomson reasoned that if water is pumped through the Schneider Wells, groundwater recharge of the aquifer will increase, natural discharge will decrease, a loss of storage in the aquifer will occur, or a combination of these results will occur.<sup>23</sup> The Board accepts Mr. Thomson's reasoning: generally, Le Chatelier's principle instructs us that if a stress is made on a system at equilibrium the system will adjust to overcome the effect of this stress in order to achieve a new state of equilibrium. However, Mr. Thomson could not satisfactorily predict which of the possible effects he identified would occur. Further, even if recharge were to increase, Mr. Thomson could not predict from where the recharge would occur or what the likely rate of recharge would be.

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<sup>20</sup> Affidavit of Dr. Robert Nowak (June 11, 2001), paragraph 8.

<sup>21</sup> Exhibit No. 7, pages 12 to 13.

<sup>22</sup> Affidavit of Mr. David G. Thomson (June 14, 2001), paragraph 4.

<sup>23</sup> Exhibit No. 6, page 1, “Groundwater does not only come from storage.”

[23] The Board is of the view that the complexities of hydrogeology generally and the lack of hydrogeological data applicable to the relevant area preclude a *definitive* finding of whether the diversion of water by the Certificate Holder will affect any of the Appellants' current water sources and, if so, when any such impacts would occur. However, two features of Mr. Weiss' wells demand attention.

[24] First, Mr. Weiss' stock watering well is the only well located within a 1600 metre radius of the Schneider Wells. Under section 4 of the Approval, the Certificate Holder was required to undertake a field-verified survey of wells, springs and dugouts within an "appropriate radius" of the proposed activity to assess the impact on neighbouring water resources.<sup>24</sup> The Nowak Report selected 1600 metres as an appropriate radius for such a survey. Secondly, Mr. Weiss' other well is the only well relevant to these appeals which is completed in bedrock, like the Schneider Wells, rather than in the overlying till material. The Nowak Report indicates that this second well is located approximately 1605 metres from the Schneider Wells.

[25] The Board finds that if any impacts on other water sources occur, they are most likely to first occur in respect of Mr. Weiss' wells or, otherwise, in groundwater proximate to, from the same strata as, and of similar chemical composition to the Schneider Wells. If Mr. Weiss were an appellant in this matter (and he is certainly an Intervenor), the Board would consider him to be "directly affected" by the Director's decision to issue the Certificate.

[26] Further, the second element of the *Kostuch* test asks whether the person's interest is supported by the statute in question. The *Water Act* not only supports the Appellants' interests, it creates these interests. Each of the Appellants has a right under section 21(2) of the *Water Act* to commence and continue the diversion of up to 1250 cubic metres of water annually

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<sup>24</sup> Section 4 of the Approval provides:

"The approval holder shall carry out a field-verified survey of all the wells, springs, and dugouts within an appropriate radius of the proposed activity to properly assess impact on neighbouring water resources and shall include a

- (a) plan (showing quarter section and section lines) noting location and ownership of existing water sources
- (b) list noting details of well construction such as: depth of well; depth to water (water levels); screened, open or slotted intervals; and, pump intake depth for all wells identified in the survey, and where applicable dugout size(s) and rate of flow from springs
- (c) table summarizing the purpose and quantity of water used from all wells, dugouts, and springs."

for household purposes.<sup>25</sup> The *Water Act* also creates certain rights to use water for the purposes of raising animals or applying pesticides to crops as part of a farm unit.<sup>26</sup> Section 51(4)(b)(iii) of the *Water Act* specifically lists the effects on household users as one of the matters that the Director may take into account in deciding whether to issue the Certificate.<sup>27</sup>

[27] 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.<sup>28</sup> Further, although the Director may issue a Water Management Order to prevent

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<sup>25</sup> Section 21(2)(a) of the *Water Act* provides:

“21(2) Subject to subsection (3) and section 23 and any exemptions specified in the regulations, a person who owns or occupies land under which groundwater exists

(a) has the right to commence and continue the diversion of the groundwater for household purposes....”

<sup>26</sup> Section 19(1) of the *Water Act* provides:

“19(1) A person who

(a) on the date this Act comes into force, owns or occupies land that adjoins a river, stream, lake, natural water course or other natural water body or land under which groundwater exists, and

(b) on or before the date this Act comes into force, diverts water from a source referred to in clause (a) for the purposes of raising animals or applying pesticides to crops, as part of a farm unit,

may continue to divert up to 6250 cubic metres per year or the maximum specified in an approved water management plan, whichever is greater, from the sources described in clause (a) for the purposes described in clause (b) without an approval, licence or registration for the diversion of the water as long as the person owns or occupies the land, but the person has no priority under this Act unless an approval or licence has been issued or a registration effected with respect to that diversion.”

Section 24(1) of the *Water Act* provides:

“24(1) A person who owns or occupies land

(a) to which a registration is appurtenant, and

(b) that adjoins a river, stream, lake, natural water course or other natural water body, or under which groundwater exists,

has the right to commence and continue the diversion of water from the sources authorized in the registration for the purposes of raising animals or applying pesticides to crops, as part of a farm unit, as authorized by the registration.”

<sup>27</sup> Section 51(4)(b)(iii) of the *Water Act* provides:

“51(4) In making a decision under this section, the Director ...

(b) may consider any existing, potential or cumulative ...

(iii) effects on household users, other licensees and traditional agriculture users....”

<sup>28</sup> Section 27 of the *Water Act* provides:

future diversions of water for household purposes from a specific source, the Director does not have the power to limit existing household users.<sup>29</sup> Another significant feature of the household user's right is that it is not tied to a specific source of water. A person, who owns or occupies land adjoining surface water or under which groundwater exists, may divert water for household purposes.<sup>30</sup> Therefore, if the Schneider Wells are hydraulically connected to any water found on or under the Appellants' land (even in bedrock), then the Appellants' right to divert water for household purposes may be affected. The Appellants' statutory right may be affected regardless of whether the Appellants actually draw water from the hydraulically connected source. This supports a finding of "directly affected" in respect of those Appellants who occupy land in the vicinity of the Schneider Wells.

[28] The Board also heard evidence that, despite a provision in the Approval requiring the Certificate Holder to obtain water level readings in all neighbouring wells located within an

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- "27 A person who diverts water pursuant to section 21
- (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."

<sup>29</sup> Section 23(1) of the *Water Act* provides:

"23(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."

<sup>30</sup> Section 21(1) of the *Water Act* provides:

"21(1) 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."

appropriate distance during pump testing, no monitoring of other wells in fact occurred.<sup>31</sup> Further, the Director sent a letter dated February 17, 2000 to individuals who submitted a Statement of Concern in response to the Approval and Licence applications of the Certificate Holder. The letter stated:

“I have decided to issue an exploration approval to B & J Schneider Ranching. The conditions of the approval require the applicant to test proposed water sources while monitoring the effects of the testing on surrounding wells. The applicant has been advised to provide information on the potential impacts on all wells within the land locations specified in statements of concerns that have been accepted.”<sup>32</sup>

[29] The Board is satisfied that at least some of the Appellants were neighbours of the Certificate Holder and had an expectation that at least some wells in the vicinity of the Schneider Wells would be monitored during the pumping test. At minimum, the Director should have explained to the Appellants, before issuing the Certificate, why he did not deem it necessary for the Certificate Holder to monitor any other wells. Even if the appeal process prescribed by the *Water Act* did not specifically contemplate that any of the Appellants were “directly affected” by the Director’s decision, the decision-making process adopted by the Director affects those Appellants who submitted a Statement of Concern and operate wells in the vicinity of the Schneider Wells. Therefore, for the purposes of these appeals, and in the light of its specific facts, the Board is prepared to say that at the very least, Ms. Bonneau (who, after Mr. Weiss, operates the next closest well to the Schneider Wells) is directly affected by the Director’s decision.

[30] In the circumstances of the Director’s decision and in the light of the complex hydrogeology in the relevant location, and in light of the reasons above, the Board is of the view that it is appropriate to move beyond the preliminary standing issue and decide the remaining issues in these appeals.

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<sup>31</sup> Ms. Bonneau and Mr. Weiss gave evidence that prior to the day of the appeal no one had asked to monitor any of their wells. The Director confirmed during cross-examination that he was not aware of any monitoring of other wells in the area.

<sup>32</sup> Director’s Record, tabs 13, 14, and 15. See also the Agreed Statement of Facts (June 8, 2001), paragraph 6.

**B. Is the Director's Decision Based on Sufficient Information?**

[31] In essence, the Appellants claim that the Director did not adequately consider relevant information in making his decision to issue the Certificate and, therefore, the Board should overturn the Director's decision. The Appellants' submission states:

“Alberta Environment's review of the data and application for a preliminary certificate failed to take into consideration all the necessary factors that must be considered in issuing a preliminary certificate, particularly given the parameters of the arid area, the drought conditions, the Ross Creek Water Basin Management Area moratorium and the hydrogeology of the area.”<sup>33</sup>

[32] Section 66(3) of the *Water Act* lists those matters that a Director must consider in deciding whether to issue a preliminary certificate and those he *may* consider. The only matters and factors the Director is required to consider are those specified in an applicable Approved Water Management Plan established under the *Water Act*. In this case, there is currently no Approved Water Management Plan applicable to the region. Section 66(3)(b) of the *Water Act* prescribes that:

“(3) In considering whether to issue a preliminary certificate, the Director...

(b) may consider any existing, potential or cumulative

(i) effects on the aquatic environment,

(ii) hydraulic, hydrological and hydrogeological effects, and

(iii) effects on household users, licensees and traditional agriculture users,

that result or may result from the potential diversion of water, operation of a works or provision or maintenance of a rate of flow of water or water level requirements.”

Section 66(3)(c)(iii) of the *Water Act* provides that the Director may also consider any other matter that, in his opinion, is relevant.<sup>34</sup> The question for the Board is whether the Director failed to take into account relevant matters or took into account irrelevant matters in making his

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<sup>33</sup> Written Submission of the Appellants (June 18, 2001), paragraph 19.

<sup>34</sup> Section 66(3)(c)(iii) of the *Water Act* provides:

“66(3) In considering whether to issue a preliminary certificate, the Director ...

(c) may consider ...

(iii) any other matters applicable to the preliminary certificate or licence that in the opinion of the Director are relevant, including any water guideline, water conservation objective and water management plan.”

decision.

[33] The Director's written submission to the Board states that in making his decision he considered:

“... the information that was provided by the applicant, the information and recommendations of Alberta Environment technical staff, his own understanding and understanding of the local area and the provisions of the *Water Act*.”<sup>35</sup>

[34] The following four sub-issues each relate to a matter which the Appellants claim the Director failed to take into account in making his decision or where the Director did not obtain sufficient information upon which to base his decision.

1. Length of the Pump Test

[35] The Approval required the Certificate Holder to ensure that the pumping during the test continued for a sufficient period of time in order identify any limiting boundary conditions of the Schneider Wells.<sup>36</sup> The Nowak Report indicated that a 2100 minute pump and 2100 minute recovery test was conducted on one of the Schneider Wells (PW1-99) and a 1440 minute pump and 1440 minute recovery test was conducted on the other Schneider Well (PW2-00). Thus, a 24 hour pumping test was conducted on PW2-00 and a 35 hour pumping test was conducted on PW1-99.

[36] With respect to the pumping test of PW1-99, the Nowak Report stated:

“The drawdown curve for the pump well PW1-99 indicates the development of an initial curved response followed by the development of a single straight line after about 25 minutes of pumping. The recovery curve is a mirror image and neither curve shows the presence of any boundary conditions”.<sup>37</sup>

With respect to the pumping test of PW2-00, the Nowak report stated:

“The drawdown curve for the pump well PW2-00 indicates a gently curved

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<sup>35</sup> Written Submission of the Director (June 19, 2001), paragraph 15.

<sup>36</sup> Section 5 of the Approval states:

“The approval holder shall design an exploration program to include, but not limited to, a pumping test of appropriate length to demonstrate that sufficient groundwater of a suitable quality is available for the intended purpose which will not

(a) unreasonably interfere with other water users, and

(b) negatively impact the source aquifer or other aquifers.”

<sup>37</sup> Nowak Report, page 18.

response pattern that terminates in an essentially straight line segment characteristic of radial flow conditions.”<sup>38</sup>

[37] Dr. Nowak gave evidence that the length and results of the pumping tests were sufficient to determine whether there were any limiting boundary conditions in the relevant aquifers. Dr. Nowak said that, generally, once the data from a pumping test is analyzed he would determine from the results whether it was necessary to repeat pumping tests. In response to Board questions, Dr. Nowak said that, based on his 23 years of experience, longer pumping tests are not required to support a licence application. By contrast, Mr. Thomson gave evidence that a longer pump test would have allowed a higher confidence that the impact of pumping on the aquifer and other water users would be negligible.

[38] Mr. Claude Eckert, a hydrogeologist for Alberta Environment, gave evidence that:

“The Department considers a 24 hour pumping +24 hour recovery test to be an acceptable or ‘standard’ test. The Department recognizes that, in most cases, a 24 hour pumping test period is a sufficient length of time to identify any localized boundary conditions or other aquifer limitations.”<sup>39</sup>

[39] Further, the Director stated in his submission that he was satisfied that the pump test information provided in the Nowak Report was done in accordance with industry and government standards.<sup>40</sup>

[40] The Board is satisfied that a 24 hour pumping test represents the industry standard in the relevant circumstances and an appropriate period in the view of Alberta Environment. The Board is not satisfied that any special circumstances existed which should have required the Director to ask for longer pumping tests before making his decision.

## 2. Lack of Observation Wells

[41] The Approval required the Certificate Holder to, during the pumping test, “...provide an appropriate number of observation well(s) which shall be located within an

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<sup>38</sup> *Ibid.*, page 27.

<sup>39</sup> Affidavit of Mr. Claude Eckert (June 11, 2001), paragraph 8.

<sup>40</sup> Written Submission of the Director (June 19, 2001), paragraph 17.

appropriate distance and shall be measured on the same schedule as the pumping test.”<sup>41</sup> The Nowak Report did not explain why no observation wells were, in fact, used.

[42] Dr. Nowak gave evidence that the suggested observation wells were too far away and were in different aquifers. He, therefore, doubted the usefulness of these observation wells. In the Nowak Report, the transmissivity was calculated from the results of the pumping tests conducted in the Schneider Wells. The report applied an accepted estimate of the storage coefficient.

[43] The Appellants submitted:

“... [W]hile the Proponent’s hydrogeologist has used a storage coefficient it is desirable to also have a measured value as the storage coefficient value exerts a dominant control on the calculated drawdown cone. A measured value for the storage coefficient would allow predictions on well interference to be more reliable and certain as well as determining interference on the Appellants’ wells and on Ross Creek.”<sup>42</sup>

[44] However, Dr. Nowak gave evidence that calculations of the storage coefficient do not always produce a value any better than generally accepted estimates. Dr. Nowak stated that the calculations are highly variable to the extent that the additional expense of installing observation wells is not warranted. On the question of using observation wells to monitor effects on other users, Dr. Nowak indicated that he would not expect to see a response in an observation well during the length of the pumping test. Mr. Eckert also indicated that an observation well would only provide information of value if the person conducting the tests was lucky enough to sink the observation well into the same aquifer as the proposed diversion wells and saw a drawdown effect.

[45] The Board is of the view that the Approval required the Certificate Holder to use observation wells during the pumping test or explain why “an appropriate number” of observation wells was, in these circumstances, zero. If Alberta Environment does not intend to require the use of observation wells, it should make this clear in its Approval. However, the Board accepts Dr. Nowak’s evidence that increased observation wells, while clearly preferable, would not guarantee a better calculation of the storage coefficient of the relevant aquifer. Thus,

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<sup>41</sup> Approval, section 6(b).

<sup>42</sup> Written Submission of the Appellants (June 18, 2001), paragraph 17.

we are not satisfied that the Director's decision in the present circumstances would be better informed if observation wells were used.

3. Hydraulic Barrier Between the Till Material and the Bedrock

[46] The Nowak Report considered the potential impacts of the Schneider Wells on the wells of those individuals who filed Statements of Concern in relation to the Approval and various other wells in the general vicinity. The Nowak Report concludes it is unlikely that other wells in the area are hydraulically connected to the Schneider Wells because they are completed in various units of the overlying till material rather than the sandstone bedrock.<sup>43</sup>

[47] In his evidence, Mr. Thomson discussed the likelihood of leakage of water from the overlying till material into the sandstone bedrock and the aquifer to which the Certificate applies. Mr. Thomson was of the view that there was insufficient evidence to establish that recharge of the aquifer from leakage would not occur if the Certificate Holder diverted the licenced volume of water. During cross-examination, Mr. Thomson said that although the bedrock, shale and till found in the local lithology were "aquatards" they were not impermeable and that the rate of leakage could only be determined with more testing.

[48] In his evidence, Dr. Nowak agreed that:

"The existence of a hydraulic barrier at the till/bedrock contact has not been identified nor is it possible given the limited subsurface data available. It is not possible to assess whether the concept of an hydraulic barrier is continuous across the till/bedrock contact."<sup>44</sup>

[49] However, Dr. Nowak also submitted:

"Given the water well descriptions of blue clay, blue till and unoxidized till, even if an hydraulic connection was present, it is anticipated that the induced flow from the till, if such were to occur, would be minimal".<sup>45</sup>

[50] The Director submitted that in considering the likelihood of impact by use of the Schneider Wells on surrounding users he noted it was clear from the well drilling reports that, "...with the exception of the Weiss stock well none of the other surrounding users were in the

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<sup>43</sup> Nowak Report, page 36.

<sup>44</sup> Exhibit No. 7, page 6, paragraph P1.

<sup>45</sup> *Ibid.*, page 6, paragraph P3.

same geologic unit.”<sup>46</sup> The Director also noted that the Nowak Report indicated that the theoretical draw down from diversion of water from the Schneider Wells was in a 1600 metre radius and that none of the filed Statements of Concern related to wells located within this radius. Finally, the Director submitted that in making his decision, he noted that the Nowak Report completed a theoretical calculation of impact on a regional basis but that the result was not determined to be a significant issue by Alberta Environment.<sup>47</sup>

[51] The Board accepts that the likelihood of a significant hydraulic connection between the Appellants’ water sources and the Schneider Wells cannot be predicted with any degree of certainty. However, the Board accepts Dr. Nowak’s evidence that, given that the lithology of the area generally displays low rates of hydraulic conductivity, the rate of flow of any leakage would be minimal. The Board is satisfied that sufficient information existed on this issue for the Director to reasonably infer that impacts, from the Schneider Wells on the Appellants would be minimal and would only occur after a *significant* period had passed. No evidence was raised before the Board that would indicate that the Director should have required further analysis of the hydrogeology in the area before making his decision.

#### 4. Connection Between the Schneider Wells and Ross Creek

[52] The Appellants submitted that:

“Alberta Environment failed to take into consideration the hydrogeology of the Ross Creek Basin Water Management Area considering it too complex to determine.”<sup>48</sup>

[53] While the evidence certainly indicates that the hydrogeology of the area is complex, the Director submitted that, rather than not consider Ross Creek Basin, he did not consider the moratorium to apply to his decision. The Director said that he did not consider the moratorium to apply because he received the Certificate Holder’s applications before the moratorium commenced.<sup>49</sup> In other words, it was grandfathered. The Director also gave

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<sup>46</sup> Written Submission of the Director (June 19, 2001), paragraph 21.

<sup>47</sup> Written Submission of the Director (June 19, 2001), paragraph 21.

<sup>48</sup> Written Submission of the Appellants (June 18, 2001), paragraph 12.

<sup>49</sup> The Ross Creek Basin Water Management Area was established on June 8, 2000. The application for the Approval and Certificate/Licence was submitted by the Certificate Holder on June 22, 1999. (See Written Submission of the Director (June 19, 2001) tab A. See Director’s Record, tab 27.)

evidence that he did not consider the Schneider Wells and Ross Creek to be hydraulically connected.

[54] The hydrogeologists agreed that the flow of groundwater in the area is in a southwest direction, towards Ross Creek. However, in respect of the hydraulic connection between the Schneider Wells and Ross Creek, there was little else they agreed upon. Both expert hydrogeologists calculated a different hydraulic gradient between the location of the Schneider Wells and the Ross Creek. Mr. Thomson was of the view that the bedrock aquifer flowed towards Ross Creek on both sides of the creek. Mr. Thomson contended that the aquifers met beneath Ross Creek and that water flowed to a lower energy state at the surface in Ross Creek. Dr. Nowak suggested that the bedrock aquifer flowed under Ross Creek at a depth that did not induce the water to flow to the surface in Ross Creek. Dr. Nowak supported his theory with aerial photographs showing intermittent periods during which the Ross Creek at the relevant location was dry. Dr. Nowak claimed that if Ross Creek were recharged by groundwater rather than surface runoff, it would be expected to show some evidence of a constant surface flow. It does not.

[55] In the Board's view, the evidence does not establish with any degree of certainty whether there is any hydraulic connection between Ross Creek and the Schneider Wells. In this respect, we cannot conclude whether the Schneider Wells will have any impact on the Ross Creek and, if so, the extent or timing of any such impact. However, the Board does not have an overall lack of confidence in the available information of a sufficient level to justify overturning the Director's decision to issue the Certificate.

##### 5. Confidence Level Generally

[56] The Board also questioned Dr. Nowak and the Director with respect to their confidence level that the diversion proposed under the Licence would not impact the Appellants' wells. Dr. Nowak indicated that based on his 20 years of experience with water wells generally, his confidence level that the proposed diversion would not impact the Appellants' wells was over 90 percent.<sup>50</sup>

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<sup>50</sup> Cross-examination of Dr. Nowak by the Chairman (Tape 3, 2065 to 2089).

The Chairman: Let me take this to this permit that is before us right now, or the certificate that is

[57] The Director's initial position was that he was also 90 percent certain that the proposed diversion would not impact the Appellants' wells and indicated that if he had thought otherwise, he would have made taken that into account in making his decision. However, when pressed, the Director indicated that in his experience, with the type of diversion authorized here, he had never seen an adverse impact on wells such as the Appellants.<sup>51</sup>

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before us. On a scale of 1 to 100, what is your confidence level that there will not be an impact in the wells, even though they are in a different substrate than the Schneider Wells? Is it 99 percent?

Dr. Nowak: No. It would be in excess of 90 percent.

The Chairman: So, over 90 percent?

Dr. Nowak: Yes.

The Chairman: Between 90 percent and 100 percent that there will not be. And is that over one year, ten years, twenty years, or thirty years?

Dr. Nowak: I am suggesting that would be over twenty years based on our own experiences in water wells in general.

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Cross-examination of Mr. Dave McGee by the Chairman (Tape5, 3020 to 3232)

The Chairman: At the end of all of this what you heard me asking Dr. Nowak was I wanted to know his confidence level, and I am now going to ask for that of both of you, that there would be no effect on the Appellants' wells from the Schneider Wells. He stated that he was "90 percent or over confident that there would be no effect." How do both of you feel about that?

Mr. Eckert: I would go with 80 percent.

The Chairman: Mr. McGee, and I appreciate that this is not an exact science, and I am not expecting to hold you, but you have to convince us.

Mr. McGee: I have some difficulty putting a number on it. I don't think a number gives a lot to it.

The Chairman: We do.

Mr. McGee: Ok. I respect that. I fall in the 90s with it. I have never had a complaint that has, on the part of a well owner, that has been substantiated against another well owner. We have had a number of complaints that we have had to look into, and each one was resolved in some way. This is not out of character with all of the bedrock aquifers that I have considered since I have been in this position. Nor is it out of character with the ones that I have seen in my former role as a field type person. So I don't have any expectation that there is any unresolvable problem here, or I would have done something different with it before making this decision.

The Chairman: In other words, you have a 90 percent expectation that there won't be a problem, with the effect on these Appellants' wells.

Mr. McGee: 90 percent. Sure. 90 percent or higher.

The Chairman: It is your evidence, not mine.

Mr. McGee: Yes. I guess 90 percent suggests 9 out of 10. I have seen more than 10 wells and I have never seen any of this character that have created a problem. So, I have some trouble putting that type of numerical feel to it. If it makes anyone feel more confident in what I am saying – in the 90 type of range.

The Chairman: You have worked for 20 years, now you are relying on your history, you are qualified, you have looked at these files, you have looked at the information within Alberta

[58] The Board views this as significant evidence supporting the decision of the Board not to reverse the Director's decision to issue the Certificate.

**C. Should Additional Monitoring Requirements Be Prescribed?**

[59] Given that the Board is not satisfied that the evidence justifies overturning the Director's decision to issue the Certificate, the Board will consider the Appellants' alternative request to prescribe additional monitoring requirements under the Certificate.

1. Expanded Monitoring of Chemical Characteristics

[60] The Appellants request amendments to condition 6(c) of the Licence under the Certificate to increase monitoring to a frequency of four times per year. Condition 6(c) of the Licence states that:

“The licensee shall...

- (c) obtain water samples and report the following information:
  - (i) Total Dissolved Solids, Hardness, Alkalinity, pH, Ca, Mg, Na<sup>+</sup>, K, CO<sub>3</sub>, HCO<sub>3</sub>, SO<sub>4</sub>, Cl, NO<sub>3</sub>, Fe
  - (ii) water temperature, date, and time of sampling
  - (iii) date the analyses were performed
  - (iv) results of the analyses.”

[61] The Board assumes that the Appellants seek increased monitoring of the Schneider Wells to provide more information to allow the parties to better predict any effects of the Schneider Wells on the availability of water in the Appellants' water sources. No evidence was raised before the Board to the effect that diversion of water by the Certificate Holder would alter the quality of water available to the Appellants. The Board cannot see how changes in the

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Environment, you have been in the field, you have looked at wells, you have responded to complaints, you have looked at data, and now you can look back and say on the basis of all of these experiences, which you could codify, which you could put in a diary, and you read your comments and you could add it up and divide, x divided by y, that's where you come in my judgement in 20 years. I am capable of stating that based on the number of times that I have seen there be a problem, compare that with the facts, these regions, these wells, the differences in the substrates between the wells and now I am going to make my best judgement. That is what I am asking you to do.

Mr. McGee: Based on 20 years of working in this, in these types of things, I have seen 100 percent successful.

chemical composition of the Schneider Wells will provide any information about potential impacts on the quantity of water available to the Appellants. The Board, therefore, denies the request to amend the Licence in the manner contemplated by the Appellants.

2. Monitoring Other Wells in the Area

[62] On the *morning* of the hearing, the Certificate Holder offered to monitor Mr. Weiss' stock watering well and proposed an additional condition for inclusion in the Certificate Holder's Licence. The additional provision proposed by the Certificate Holder states:

“The Weiss Well located at NE 25-12-4-W4M (known as the stock watering well) is designated as an observation well. Water levels in the Weiss Well will be monitored by B & J Schneider Ranching every month commencing July 31 2001 and ending on December 1 2002. Thereafter, the water level and water chemistry of the Weiss Well shall be monitored annually until such time as the Director directs that the monitoring shall cease. All results of the monitoring and chemistry testing shall be kept by B & J Schneider Ranching and made available to Mr. Weiss and/or the Director upon request from Mr. Weiss or the Director.”<sup>52</sup>

[63] The Board is of the view that if the Schneider Wells are likely to affect any wells in the area, those effects may be first observed in Mr. Weiss' wells because of the proximity of the wells to the Schneider Wells and the completion of one of the wells in bedrock. Therefore, the Board agrees that the additional condition should be included in the Licence, with some further amendments as identified below.

[64] First, both of Mr. Weiss' wells should be monitored. The well located within 1600 metres of the Schneider Wells is completed in the till substrate but is the most proximate to the Schneider Wells. Mr. Weiss' second well is located just over 1600 metres from the Schneider Wells and, like the Schneider Wells, is completed in bedrock. Therefore, both Mr. Weiss' wells have features that, in the Board's view, make them appropriate monitoring wells.

[65] Second, the results of the monitoring should be provided to Alberta Environment at the same time as monitoring and analyses of the Schneider Wells are provided under the Licence. Mr. Weiss can obtain the results upon request. However, the purpose of monitoring Mr. Weiss' wells is to provide an indicator of potential hydraulic connection between the Schneider Wells and Mr. Weiss' wells to enable Alberta Environment to conduct further

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<sup>52</sup> Exhibit 8.

investigations. For this reason, the monitoring data should be provided to Alberta Environment on a regular basis.

[66] Third, the monitoring condition should also be included in the Certificate with the results provided to Alberta Environment before the Licence is issued. One of the purposes of obtaining data from Mr. Weiss' wells is to establish a baseline against which changes may be compared. This baseline data must be obtained before the Certificate Holder commences diverting water pursuant to the Licence.

[67] The Board is of the view that further minor amendments should be made to the Licence conditions to promote clarity. We will call these the fourth and fifth amendment.

[68] Fourth, various provisions in the Certificate and the Licence refer to a "water body." The term "water body" is broadly defined under the *Water Act*. The Board assumes that the Director intends to use the definition provided by the Legislature for the purposes of interpreting the Certificate and Licence provisions. To promote certainty, the Certificate and Licence should be amended to include a definition of "water body" that references the definition under the *Water Act*.

[69] The fifth and final amendment relates to the complaint investigation clause of the Licence. The Appellants raised some concerns during these appeals about the complaint investigation process, specifically, whether their complaints (if any) would be heard. Section 8(1)(b) of the Licence states:

"The licensee shall investigate all written complaints accepted by the Director relating to allegations of surface water and groundwater interference as a result of the diversion site(s) operation."

[70] The Board accepts that complaints should be accepted by the Director at his discretion to avoid frivolous and vexatious attempts to initiate the complaint investigation process. However, the protection of the Certificate Holder in this manner must be balanced against the interests of affected persons to ensure that legitimate complaints are investigated. The Licence should be framed in a manner which affords potential complainants some insight into how the Director will determine whether to accept a complaint. In the Board's view the Licence should include a reasonableness requirement on the Director when determining whether to accept complaints.

## **VI. CONCLUSIONS AND RECOMMENDATIONS**

[71] The appeals filed by Mr. Tracy Elhart and Mr. Brian Franz are dismissed. The Board did not receive written submissions from these two parties and they did not attend the hearing.

[72] In the circumstances of the other appeals, the Board recommends that the Director's decision to issue the Certificate be confirmed. However, the Board recommends amendments to the Certificate and Licence that require the Certificate Holder to monitor Mr. Weiss' wells and other minor amendments to promote clarity.

[73] Specifically, in accordance with section 91 of EPEA, the Board recommends that the Minister:

1. confirm the decision of the Director to issue the Certificate, subject to the amendments outlined in this Report and Recommendations;
2. vary the decision of the Director by amending the Certificate by adding the following:

“7.

(a) The preliminary certificate holder shall monitor the two wells, known as the stock watering well and the well completed in bedrock, owned by Mr. Stanley Weiss (the “Weiss Wells”).

(b) The preliminary certificate holder shall conduct water level monitoring of the Weiss Wells on a monthly basis starting on August 1, 2001 and ending on December 1, 2002.

(c) The preliminary certificate holder will also conduct one water chemistry test of the Weiss Wells during this period.

(d) The preliminary certificate holder shall ensure that the information that it obtains from these tests is, in the opinion of the Director, sufficient to establish a baseline for comparison to the data collected under the Licence prior to commencing any diversions under the Licence.

(e) The preliminary certificate holder shall provide the results of the monitoring of the Weiss Wells to the Director within 30 days of collecting the information.”;

3. vary the decision of the Director by amending the Licence by adding the following:

“7.1

(a) The licensee shall monitor the two wells, known as the stock watering well and the well completed in bedrock, owned by Mr. Stanley Weiss (the “Weiss Wells”).

(b) The licensee shall conduct water level monitoring of the Weiss Wells on a monthly basis starting on December 1, 2002 and continuing on a monthly basis thereafter until directed otherwise in writing by the Director. Thereafter, the licensee shall conduct water level monitoring of the Weiss Wells on an annual basis.

(c) The licensee shall conduct an annual water chemistry test of the Weiss Wells.

(d) The licensee shall ensure that the information it obtains from these tests is, in the opinion of the Director, sufficient to establish a baseline for comparison to the other data collected under the Licence prior to commencing any diversions under the Licence.

(e) The licensee shall provide the results of the monitoring it conducts to Alberta Environment within 30 days of collecting the information for information that it collects on a monthly basis. Information that is collected on an annual basis shall be provided to the Director on or before January 15 of the following year.”;

4. vary the decision of the Director by amending the Certificate by adding the following:

“2.1 ‘Water body’ is defined as having the same meaning as in the *Water Act*.”;

5. vary the decision of the Director by amending the Licence by adding the following to the definitions portion of the Licence:

“‘Water body’ is defined as having the same meaning as in the *Water Act*.”;

6. vary the decision of the Director by amending the Licence by adding the following:

“8. (3) In making his decision to accept complaints, the Director shall act reasonably.”.

[74] Attached for the Minister’s consideration is a draft Ministerial Order implementing these recommendations.

[75] Finally, with respect to section 92(2) and 93 of the Act, the Board recommends that copies of this Report and Recommendation and any decision of the Minister be sent to the following parties:

1. Mr. Louis and Ms. Verna Schafer, Mr. David Hausauer, Mr. Roy Hausauer, Ms. Chryle Bascom, Mr. Ken Benson, Mr. Ivan Hausauer, Mr. Donald Elhart, Ms. Bernice Bonneau, Mr. Aaron Elhart, Franz, Mr. Edward Aberle, Mr. Bill Hoff, Mr. Merlen Brost, Mr. Neil Hoff, and Mr. Darcy Geigle, represented by Mr. Cameron MacLennan, Andreachuk Harvie MacLennan Maxwell.
2. Mr. Dave McGee, Director, Prairie Region, Natural Resources Service, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
3. B & J Schneider Ranching, represented by Mr. Keith Wilson, Wilson Hurlburt.
4. Tracy Elhart.
5. Mr. Brian Franz.
6. Mr. Stanley Weiss.
7. Mr. Garth Felesky, Mr. Brian Ziegenhagel, Mr. Pat Liboiron, Mr. Edgar and Ms. Olga Hofer, Mr. Mel and Ms. Ardeth Wittke, Mr. Ed and Ms. Judy Stock, Mr. Lawrence J. Brown, Mr. Leo Pugsley, Mr. Rob and Ms. Bonnie Mather, Mr. Ken Berg, Ms. Bonnie Berg, Mr. Ron and Ms. Patty Roth, Mr. Lee Yasinski, Ms. Linda Yasinski, Mr. Ralph Roth, and Mr. Vernon Cook, represented by Mr. Cameron MacLennan, Andreachuk Harvie MacLennan Maxwell.

Dated on July 18, 2001 at Edmonton, Alberta.

- original signed by -  
William A Tilleman, Q.C.

- original signed by -  
Ron V. Peiluck

- original signed by -  
Roy A. Crowther

## VII. EXHIBITS

<b>Exhibit No.</b>	<b>Description</b>
1	Advertisement placed in the Medicine Hat News on May 31, 2001 advising of the hearing to take place on June 25, 2001. A news release was also placed on the Government web site on May 30, 2001 and distributed to 95 daily newspapers, radio stations and television stations within Alberta.
2	Notices of Appeal filed by Mr. Dave Hausauer, Mr. Roy Hausauer, Ms. Chryle Bascom, Mr. Ken Benson, Mr. Ivan Hausauer, Mr. Donald Elhart, Mr. Tracy Elhart, Ms. Bernice Bonneau, Mr. Ivan Hausauer, Mr. Aaron Hart, Mr. Brian Franz, Mr. Bill Hoff, Mr. Edward Aberle, Mr. Neil Hoff, and Mr. Darcy Geigle.
3	Large aerial photomap covering approximately a 10 x 16 mile area around the Schneider's wells. Submitted by Ms. Charlene Graham.
4	Excerpts from the Alberta Research Council Report 75-2 including the hydrogeological map. Submitted by Ms. Charlene Graham
5	Appellant and Intervenor names and land locations. Submitted by Mr. Cameron MacLennan.
6	Presentation of Mr. David Thomson. Submitted by Mr. Cameron MacLennan.
7	Groundwater Exploration and Research presentation of Dr. Robert Nowak. Submitted by Mr. Keith Wilson.

**VIII. Draft Order**

**Ministerial Order**

/2001

*Environmental Protection and Enhancement Act,*

S.A. 1992, c.E-13.3

*Water Act,*

S.A. 1996, c.W-3.5

**Order Respecting Environmental Appeal Board  
Appeal Nos. 01-017 – 01-032**

I, \_\_\_\_\_, Minister of \_\_\_\_\_, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal Nos. 01-017 – 01-032.

Dated at the City of Edmonton, in the Province of Alberta this \_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
Honourable \_\_\_\_\_  
Minister of \_\_\_\_\_

Draft Appendix

Order Respecting Environmental Appeal Board Appeal Nos. 01-017 – 01-032

With respect to the decision of Mr. Dave McGee, Director, Prairie Region, Natural Resources Service, Alberta Environment (the “Director”), to issue Preliminary Certificate No. 00139098-00-00 (the “Certificate”), which includes a proposed Licence (the “Licence”), under the *Water Act* dated December 20, 2000, to B & J Schneider Ranching, I, \_\_\_\_\_, Minister of \_\_\_\_\_ order:

1. that the decision of the Director to issue the Certificate is confirmed, subject to the amendments included in this Order;
2. that the decision of the Director is varied by amending the Certificate by adding the following:

“7.

- (a) The preliminary certificate holder shall monitor the two wells, known as the stock watering well and the well completed in bedrock, owned by Mr. Stanley Weiss (the “Weiss Wells”).
- (b) The preliminary certificate holder shall conduct water level monitoring of the Weiss Wells on a monthly basis starting on August 1, 2001 and ending on December 1, 2002.
- (c) The preliminary certificate holder will also conduct one water chemistry test of the Weiss Wells during this period.
- (d) The preliminary certificate holder shall ensure that the information that it obtains from these tests is, in the opinion of the Director, sufficient to establish a baseline for comparison to the data collected under the Licence prior to commencing any diversions under the Licence.
- (e) The preliminary certificate holder shall provide the results of the monitoring of the Weiss Wells to the Director within 30 days of collecting the information.”;

3. that the decision of the Director is varied by amending the Licence by adding the following:

“7.1

- (a) The licensee shall monitor the two wells, known as the stock watering well and the well completed in bedrock, owned by Mr. Stanley Weiss (the “Weiss Wells”).

- (b) The licensee shall conduct water level monitoring of the Weiss Wells on a monthly basis starting on December 1, 2002 and continuing on a monthly basis thereafter until directed otherwise in writing by the Director. Thereafter, the licensee shall conduct water level monitoring of the Weiss Wells on an annual basis.
  - (c) The licensee shall conduct an annual water chemistry test of the Weiss Wells.
  - (d) The licensee shall ensure that the information it obtains from these tests is, in the opinion of the Director, sufficient to establish a baseline for comparison to the other data collected under the Licence prior to commencing any diversions under the Licence.
  - (e) The licensee shall provide the results of the monitoring it conducts to Alberta Environment within 30 days of collecting the information for information that it collects on a monthly basis. Information that is collected on an annual basis shall be provided to the Director on or before January 15 of the following year.”;
4. that the decision of the Director is varied by amending the Certificate by adding the following:  
“2.1 ‘Water body’ is defined as having the same meaning as is the *Water Act*.”;
5. that the decision of the Director is varied by amending the Licence by adding the following to the definitions portion of the Licence:  
“‘Water body’ is defined as having the same meaning as in the *Water Act*.”; and
6. that the decision of the Director is varied by amending the Licence by adding the following:  
“8. (3) In making his decision to accept complaints, the Director shall act reasonably.”.