Appeal No. 02-077-D

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – June 6, 2003

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 Beverly R. Smith with respect to Licence No. 00187391-00-00 issued by the Director, Northern Region, Regional Services, Alberta Environment, to CCS Energy Services Inc.

Cite as: *Smith* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *CCS Energy Services Inc*. (6 June 2003), Appeal No. 02-077-D (A.E.A.B.).

PRELIMINARY MEETING BEFORE:		Dr. M. Anne Naeth, Panel Chair; Mr. Ron V. Peiluck, Board Member; and Dr. James M. Howell, Board Member.
APPEARANCES:	**Appellant**:	Ms. Beverly R. Smith.
	Director:	Mr. Park Powell, Director, Northern Region, Regional Services, Alberta Environment, represented by Ms. Heather Veale, Alberta Justice.
	Approval Holder:	CCS Energy Services Inc., represented by Mr. Greg Dickie and Mr. David Engel.
	Board Staff:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Valerie Higgins, Registrar of Appeals.

EXECUTIVE SUMMARY

Alberta Environment issued a Licence under the *Water Act* to CCS Energy Services Inc. for the purpose of diverting up to 2,990,400 cubic metres of water annually from the North Saskatchewan River on the NE 22-56-5-W4M near Lindbergh in the County of St. Paul, Alberta, for commercial purposes.

The Board received a Notice of Appeal from Ms. Beverly R. Smith appealing the Licence.

The Board held a Preliminary Meeting to deal with the Stay request of Ms. Smith and the question of whether she is directly affected by the Licence.

After reviewing the submissions of the parties and hearing arguments, the Board determined that Ms. Smith was not directly affected by the withdrawal of the water under the Licence. The Board also determined that the appeal is without merit as the issues Ms. Smith presented were general in nature and not specific environmental concerns. Therefore, the Board dismissed the appeal.

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I. BACKGROUND

[1] On November 1, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Licence No. 00187391-00-00 (the "Licence") under the *Water Act,* R.S.A. 2000, c. W-3, to CCS Energy Services Inc. (the "Licence Holder"), authorizing the diversion of up to 2,990,400 cubic metres of water annually from the North Saskatchewan River on the NE 22-56-5-W4M near Lindbergh in the County of St. Paul, Alberta, for commercial purposes. The Licence Holder uses the water to develop underground caverns for extracting additional usable oil out of oilfield wastes.[1]

[2] On November 7, 2002, the Environmental Appeal Board (the "Board") received a Notice of Appeal from Ms. Beverly Smith (the "Appellant") appealing the Licence. On November 8, 2002, the Board wrote to the Appellant, the Licence Holder and the Director (the "Parties") acknowledging receipt of the appeal and notifying the Licence Holder and the Director of the appeal. In the same letter, the Board requested available dates from the Parties for a mediation meeting or hearing and also requested that the Director provide the Board with a copy of the records (the "Record") relating to the Licence.[2]

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board (the "AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.[3]

[4] On November 22, 2002, the Director, in a letter to the Board, raised a preliminary jurisdictional issue. The Director argued that the Appellant does not have standing before the Board because she was not directly affected by the Licence. According to the Director, the Board does not have jurisdiction to proceed with this appeal and, therefore requested that the Board dismiss the appeal.

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1 See: Licence Holder's letter, dated December 23, 2002.

2 On November 22, 2002, the Board received the Record from the Director, and copies of the Record were forwarded to the Appellant and the Licence Holder.

3 The AEUB provided copies of the approvals it had issued to the Licence Holder for projects in 59-5-W4M. According to the AEUB, no public hearings or reviews were held with respect to these approvals. See: AEUB letter dated December 6, 2002.

[5] On November 26, 2002, the Appellant wrote to the Board requesting "interim funding" to assist her in participating in the appeal process and a Stay with respect to the Licence.[4]

[6] On November 27, 2002, the Board wrote to the Parties and set a schedule for written submissions to determine if the Appellant is directly affected and whether the Board has the jurisdiction to hear this appeal. The Board also asked the Appellant to respond to the following four questions regarding her Stay request:

> "1. What is the serious concern that Mrs. Smith has that should be heard by the Board?
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> 2. Would Mrs. Smith suffer irreparable harm if the Stay is refused?
>
> 3. Would Mrs. Smith suffer greater harm for the refusal of a Stay pending a decision of the Board on the appeal than CCS Energy Services Inc. would suffer from the granting of a Stay; and
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> 4. Would the overall public interest warrant a Stay?"[5]

[7] The Board received submissions from the Parties on these issues between December 12, 2002 and January 6, 2003.

[8] On January 13, 2003, the Board wrote to the Parties advising that a Preliminary Meeting would be scheduled in Edmonton, Alberta, to hear further arguments from the Parties on the Appellant's request for a Stay and whether the Appellant is directly affected.

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[4] In response to the Appellant's request for interim costs, the Board stated in a letter dated November 27, 2002:

> "Further to Ms. Smith's request for costs, please note that section 88 of the *Environmental Protection and Enhancement Act* provides for the consideration of final or interim costs at the discretion of the Board. The awarding of costs is therefore a matter to be decided by the Board and is not awarded to parties merely upon request. You must file a request for interim costs at the appropriate point in the Board's process. Specifically, section 19(1) of the Environmental Appeal Board Regulation provides:
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> > 'An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board has determined all parties to the appeal.'
>
> As a result, Ms. Smith, assuming she is directly affected, may submit a request for interim costs after the Board has determined all parties to these appeals. This generally occurs once a hearing date has been set and the Board has published notice of the hearing pursuant to section 7(1)(a) of the Regulation. In this particular case, the Board is currently dealing with a motion from Alberta Environment to dismiss this appeal, and that motion, as well as a decision whether or not to proceed to a hearing must be dealt with in order for the Board to determine the parties to this appeal. In short, if the Board determines that Ms. Smith is directly affected by Alberta Environment's decision to issue the Licence, and if the Board schedules a hearing in this matter, Ms. Smith can then submit an application for interim costs to the Board."

[9] A Preliminary Meeting was held at the Board's office in Edmonton, Alberta, on February 12, 2003.

II. SUBMISSIONS

A. Directly Affected

[10] In her submission, the Appellant argued that she was directly affected by the issuance of the Licence for the following reasons:

> "- I am a concerned member of the public, living in Alberta.
>
> - The land I live on and the lake I reside by have been drastically affected by the present drought.
>
> - I consider it improper for the Alberta government to give business access to fresh/potable water without having other possibilities explored."[6]

[11] The Licence Holder stated that these concerns do not demonstrate how the Appellant is directly affected and that the Appellant does not draw water from the North Saskatchewan River.[7] The Licence Holder stated that it would re-evaluate the amount of water required at the end of the first year, and that the project is to be completed in approximately three years.[8] The Licence Holder agreed with the Director that the general concerns expressed by the Appellant do not satisfy the directly affected test.[9]

[12] The Director argued that the concerns raised by the Appellant were general in nature and insufficient to demonstrate that she was directly affected.[10] He further submitted that the Appellant did not provide evidence to demonstrate she has an "…interest above and beyond that of the general public."[11]

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5 Board's letter, dated November 27, 2002.

6 Appellant's submission, dated December 14, 2002.

7 See: Licence Holder's submission, dated December 12, 2002.

8 The Board notes that at the Preliminary Meeting, the Licence Holder stated that it would be withdrawing water for a period of three to four years, still a relatively short period of time. (Preliminary Meeting Tape.)

9 See: Licence Holder's submission, dated December 23, 2002.

10 See: Director's letter, dated November 22, 2002.

11 Director's submission, dated December 23, 2002.

B. Stay Application

[13] The Appellant requested a Stay to "…stop any further construction on the pipeline to the river until the hearing goes forward."[12] She argued the Stay should be granted because construction of the pipeline and the pump house had started, and "…if the stay is not granted the pipeline and pump house will be working, water will be removed from the river and underground caverns will be being [*sic*] washed before the complaint is heard."[13]

[14] The Appellant mentioned concerns regarding the Licence Holder's failure to research the possibility of using deep well brackish water and the Appellant's understanding that the first cavern was "failing." The Appellant also stated she did not understand why the Licence Holder was not required to hold open houses to explain its operations to the public and that a section of the Ironhorse Recreation Trail had been disturbed.

[15] In response to the Appellant's concerns, the Licence Holder stated that it would have preferred to use brackish water, but two studies completed for the Licence Holder did not find a sufficient source of brackish water in the area of the cavern development.[14]

[16] The Licence Holder stated that work has begun on the pipeline, but that the Ironhorse Recreational Trail has not been disturbed by its activities. The Licence Holder clarified that the first caverns drilled were "filling," not "failing," due to the previous owners improperly washing the caverns.

[17] The Licence Holder also stated that it has become a member of the Lakeland Industry and Community Association as suggested by the Appellant in a previous letter to the Licence Holder.[15]

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12 Appellant's letter, dated November 26, 2002.

13 Appellant's submission, dated December 14, 2002. Specifically, the Appellant submitted the Stay should be granted for the following reasons:

> "- These new water requirements, such a short time after the opening of the facility, represent major geological misunderstandings on the company's part. The water needs need to be explained in a more through (*sic*) manner.
> - The construction of the pipeline has begun. The soil in the area had been disrupted.
> - A section of the Ironhorse Recreation Trail has been disturbed.
> - The pump house is going ahead with its construction…."

14 See: Licence Holder's submission, dated December 23, 2002.

15 See: Licence Holder's letter, dated November 19, 2002.

III. ANALYSIS

A. Stay Application

[18] Filing an appeal with the Board does not automatically stay the decision being appealed. Sections 97(1) and (2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") provide:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[19] Before the Board can determine whether a Stay should be granted, it must determine who the parties are in the appeal as only a party can make an application for a Stay. As discussed below, the Board has concluded that the Appellant is without jurisdiction to file an appeal, and therefore is not entitled to a Stay. As a result, the Board need not consider this issue further.

B. Directly Affected

[20] Under section 115 of the *Water Act*, an individual who is directly affected by the decision of the Director – here the issuance of the Licence - has the right to file a notice of appeal with the Board.[16] Therefore, before the Board can accept a notice of appeal as being valid, the individual must show that he or she is directly affected. The Board has examined the term "directly affected" in a number of previous appeals, providing a framework to determine if appellants should be given standing to appear before this Board, and the test is the same whether the appeal is filed under the *Water Act* or EPEA. Although this framework is in place, the Board

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[16] Section 115(1) of the *Water Act* provides:

> "A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances: …
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> (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
>
> (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108…."

recognizes that there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.[17]

[21] The requisite test for determining a person's directly affected status has two elements; the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,[18] the Board stated "…that the word 'directly' requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval [or licence] in question."[19]

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

> "Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' means the person claiming to be 'affected' must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.
>
> Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[20]

[23] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "…must have a substantial interest in the outcome of the approval [or licence] that surpasses the common interest of all residents who are affected by the approval [or

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[17] See: *Fred J. Wessley* v. *Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

[18] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246, Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*").

[19] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28, Appeal No. 94-017 (A.E.A.B.).

[20] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35, Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

licence]."[21] In *Kostuch*, the Board considered its previous decision in *Ross*,[22] saying directly affected "…depends upon the chain of causality between the specific activity approved…and the environmental effect upon the person who seeks to appeal the decision."[23]

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

> "…multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act."[24]

The Board further stated that:

> "If the person meets the first test, then they must go on to show that the action by the Director will cause a direct effect on the interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified."[25]

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

> "…Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision."[26]

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[21] *Ross* v. *Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) ("*Ross*").

[22] *Ross* v. *Director, Environmental Protection* (May 24, 1994), Appeal No. 94-003 (A.E.A.B.).

[23] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33, Appeal No. 94-017 (A.E.A.B.).

[24] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38, Appeal No. 94-017 (A.E.A.B.).

[25] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39, Appeal No. 94-017 (A.E.A.B.).

[26] *Paron et al.* v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) ("*Paron"*).

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

> "Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected."[27]

The Board's Rules of Practice also make it clear that the onus is on the Appellant to prove that she is directly affected.[28]

[27] The Board still adheres to the two-step approach in determining a person's directly affected status, and the individual must pass both parts of the test. It is not enough to show that an individual is affected by an activity, as arguments can be presented to show that for populated areas or areas of high use, countless individuals are affected by the Director's decision. In reality, normally only a few can show they are *directly* affected.

[28] The Appellant in this case stated that she is directly affected because:

> "- I am a concerned member of the public, living in Alberta.
>
> - The land I live on and the lake I reside by have been drastically affected by the present drought.
>
> - I consider it improper for the Alberta government to give business access to fresh/potable water without having other possibilities explored."[29]

[29] The Appellant presented issues that are of a great concern to her. She has demonstrated this concern through her involvement not only in this appeal process, but also through her participation in the Lakeland Industry and Community Association. The Board is pleased to see Alberta citizens are willing to take the initiative to make their concerns known.

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

[28] Section 29 of the Board's Rules of Practice provide:

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

[29] Appellant's submission, dated December 14, 2002.

[30] However, as will be discussed later, the first and third concerns raised by the Appellant, being a concerned citizen of Alberta and objecting to the use of potable water for industrial purposes, are too general in nature to form the basis for an argument that the Appellant is directly affected. Further, the Board cannot accept jurisdiction on the second issue raised by the Appellant, the impact of the drought, as it is well beyond the scope of this Board. The Board notes all of the Parties unanimously accepted that the ongoing drought conditions have caused many of the existing problems in the area. This Board has little doubt that the existing drought conditions are the principle reason for the Appellant's complaints regarding the drop in water level in her well and the cause of the receding lake levels that in turn affect her ability to launch her boat. Although the Board could assume that the Appellant was trying to argue that the activities allowed under the Licence would exacerbate the situation caused by the drought, the Appellant failed to provide any evidence to support such an assertion.

[31] The Appellant argued that there was a direct connection between Laurier Lake and the North Saskatchewan River, and if water was withdrawn from the North Saskatchewan River, it would affect water levels at Laurier Lake. However, the Appellant did not present sufficient evidence to demonstrate a hydrological connection between Laurier Lake and the North Saskatchewan River. Although the Board accepts that it is possible that the link exists, the likelihood of this connection is small.

[32] Even if the connection does exist, the Board does not believe there would be a sufficient and direct causal effect to establish that the Appellant is directly affected. The information given by the Director is that the water diversion allowed under the Licence amounts to approximately one-tenth of one percent of the amount of water available in the North Saskatchewan River when it is at its lowest flow rate. Therefore, the effect on total river levels is relatively small. Although the "size" of the effect is not determinative as to whether an individual will be directly affected, it is a factor the Board can consider in assessing the effect of the Director's decision.

[33] Another factor the Board can consider is the proximity of the Appellant to the activity that is being appealed. In this case, the Appellant lives at the west side of Laurier Lake, approximately 10 kilometres from the Licence Holder's intake source at the North Saskatchewan

River. In this particular circumstance, the Board has not seen evidence that indicates she would be affected.

[34] The Appellant also argued that the amount of water withdrawn from the North Saskatchewan River under this Licence would affect lake levels, as, according to the Appellant, Laurier Lake is a recharge area for the North Saskatchewan River. Therefore, according to the Appellant, if the water level in the river decreased, additional water from the lake would be drawn into the river to recharge the levels. Laurier Lake is approximately five kilometres from the North Saskatchewan River. The North Saskatchewan River receives recharge water from a watershed basin significant in size, and as the Director noted, groundwater sources amount to a small fraction of the total recharge received by the North Saskatchewan River.

[35] Returning to the first and third concerns raised by the Appellant, the Board believes that being a "concerned member of the public" and having concerns with the use of potable water by industry are general concerns that may be shared by many Albertans. The onus was on the Appellant to prove to the Board that she would be directly affected in a manner beyond that of the ordinary Alberta citizen. Unfortunately, the Appellant failed to meet this requirement. The Board believes many of the residents in the area where the Appellant resides, likely share the concerns she expressed. The Board believes that the Appellant has not presented an interest over and above that of any citizen in this province to show she is directly affected within the meaning of the *Water Act*. The Appellant did not provide evidence that would have been useful in distinguishing her interest above that of the general residents in Alberta.

[36] The Board notes that even though the Appellant's concerns did not extend beyond that of other Alberta citizens, she did bring genuine concerns to the Preliminary Meeting. The Board believes the Appellant presented her genuine concerns regarding the environment very well, and she is meeting her obligation as an Albertan to help support the wise use of water in this province. Section 2(d) of the *Water Act* states that:

> "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 … 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…."

The Appellant has stepped forward to raise her concerns as is her right, but unfortunately, this does not mean she is entitled to use her general concerns to appeal a specific decision.

[37] The Board notes the comments made by the Licence Holder regarding the comparisons made by the Appellant between Muriel Lake and Laurier Lake and the information provided in the Komex Report. The Board understands the Komex Report was a draft, and its purpose was to assess the Muriel Lake area. Although the Appellant made comparisons between Muriel Lake and Laurier Lake, in particular the similarity of the lake sizes, and both having sand bottoms, the Board does not believe there is a sufficient basis on which to draw the types of comparisons made by the Appellant.

[38] Therefore, based on the arguments presented by all of the Parties and for the reasons outlined in this decision, the Board has determined that the Appellant is not directly affected under the meaning of the *Water Act*.

[39] For similar reasons, the Board also finds the Appellant's appeal to be without merit. Her concerns are of a general environmental nature. She did not present evidence of any specific effect on her as a result of the use of water by the Licence Holder, but rather, much of her discussion focused on speculation that the use of water by the Licence Holder was not "wise" and that the decision to allocate the water for the Licence Holder's purpose was inappropriate.[30] At the Preliminary Meeting, the Appellant made a number of statements that demonstrate the general nature of her concerns:

> "I believe the Alberta general public has become extremely aware of the percentage of Alberta water that is going into industry, and I believe that the accepted form, or the accepted group of people that are allowed to appeal to water use is growing. …
>
> I have a real general concern in terms of industry use of water overall in Alberta, and I think that if individual Albertans are not strongly aware of what's happening, then we're going to be, very soon, in a very big problem. And the media are beginning to recognize that. …
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> I am asking this Board to direct the water branch of Alberta Environment to require an open house or information session be required for every water

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[30] At the Preliminary Meeting, the Appellant stated:

> "… I have grave concerns about what industry in general is doing in Alberta. I have major concerns about this, what I only understand by rumour, industry fight between the two local industries in Lindbergh, where they could have supported each other and ended up having to duplicate facilities because they couldn't come to any agreement. Whether this is true or not I don't know…. The fact that the Windsor salt plant water is not being used to wash out this cavern to me seems ridiculous. I don't know enough about salinity or what's happening from one company to the other, but all this duplication, all this water being stored somewhere is a grave concern to me." (Preliminary Meeting Tape.)

> application they consider approving. This will ensure local communities are informed about events affecting their surrounding areas."[31]

In the end, the Appellant failed to provide evidence that would link her environmental concerns in a cause and effect way to any activities of the Licence Holder.

IV. Other Matters

[40] During the Preliminary Meeting, a few issues arose that the Board considers important to discuss. At the beginning of the Preliminary Meeting, the Appellant expressed concerns regarding her inability to obtain legal counsel and the Board's refusal to provide funding for her to appear before the Board. The Board reiterates that a person does not require legal counsel to appear before it. The Board assesses the content of a presentation and submission and not its form. In this case, the Board has no concerns in the manner in which the Appellant presented her arguments.

[41] However, appellants who file an appeal must be aware that the legislation limits who can be awarded costs. The Board has recognized in previous decisions that the starting point in awarding costs is that a party should pay their own way unless there are sufficient and compelling reasons to award interim or final costs. It is not sufficient for a party to claim it is entitled to costs merely because it asks for and wants costs. This approach would not be consistent with the intent of the Act. The *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, and the Board's Rules of Practice list the factors the Board must, and can, consider when awarding costs.[32] The legislation also requires that costs be awarded only to a "party" to an

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[31] Preliminary Meeting Tape.

[32] Sections 18 and 19 of the *Environmental Appeal Board Regulation* specify the requirements of applying for interim costs. These sections state:

> "18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
>
> (b) the preparations and presentation of the party's submission.
>
> 19(1) An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board had determined all parties to the appeal.
>
> (2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission,

appeal. Before an individual can generally be a party, it must be shown that they are directly affected by the Director's decision. In this case, the Appellant did not show the Board that she was directly affected, and therefore, she is not a party to an appeal. As a result, the Board is not in a position to award costs to the Appellant.

[42] Further, the Board notes the concerns expressed by the Appellant at receiving two copies of the information package regarding the Board's processes. It is the Board's understanding that the Appellant received the initial package in response to the Board receiving a copy of a letter that was sent originally to the Minister.[33] This initial package acknowledged receipt of the letter, included a Notice of Appeal form if she wanted to fill it out, and provided information about the Board and its processes. The second copy was provided when the Appellant filed a Notice of Appeal.[34] It is standard practice that, when the Board acknowledges the Notice of Appeal filed by an appellant, the Board will include information regarding the Board and its procedures. The Board prefers to err on the side of caution to ensure all parties

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(3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:

(a) whether the submission of the party will contribute to the meeting or hearing of the appeal;

(b) whether the party has a clear proposal for the interim costs;

(c) whether the party has demonstrated a need for the interim costs;

(d) whether the party has made an adequate attempt to use other funding sources;

(e) whether the party has attempted to consolidate common issues or resources with other parties;

(f) any further criteria the Board considers appropriate.

(4) In an award of interim costs the Board may order the costs to be paid by either or both of

(a) any other party to the appeal that the Board may direct;

(b) the Board.

(5) An award of interim costs is subject to redetermination in an award of final costs under section 20."

Section 33 of the Board's Rules of Practice states:

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

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

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

[33] See: Board's letter, dated November 5, 2002, and the Appellant's letters, dated November 4 and 6, 2002.

[34] See: Board's letter, dated November 8, 2002.

receive all of the information pertaining to an appeal and the Board's processes. While the Board believes it is important that all parties receive this information, it will attempt to avoid duplication in the future.

[43] The Board also believes much of the reason this appeal was brought forward was due to ineffective communication between the Parties. The Board notes the Appellant filed a Statement of Concern dated August 20, 2002, and stamped received by Alberta Environment on August 27, 2002. Based on the stamp, it appears the Statement of Concern may have been received by the enforcement side of Alberta Environment instead of the regulatory side.[35] While this is purely speculation on the part of the Board, this could have contributed to the fact that the Appellant did not receive a response until November. The Appellant stated that the reply was dated October 10, 2002, stamped October 28, 2002, and was received in early November, after the decision was made. It would have been preferable if the decision as to whether to accept the Appellant's Statement of Concern had been made shortly after the Statement of Concern was received or at least an acknowledgement letter could have been sent confirming receipt of the Statement of Concern when it was received. The Appellant advised the Board that she has had discussions with Mr. Pat Marriot of Alberta Environment, and he stated that they have made changes in their processes so that this type of delay will not happen in the future. The Board encourages Alberta Environment to make such changes.

[44] Regarding discussions between the Board and the Licence Holder at the Preliminary Meeting with respect to alternative dispute resolution ("ADR"), the Board does not believe that ADR mechanisms or communicating with stakeholders should be limited to the formal regulatory scenarios. The Board has seen in the past, where a statement of concern was filed with the Director and forwarded to the licence holder, that at a bare minimum, the licence holder responded directly to the statement of concern filer and provided a copy of their response to the Director. The Board believes that in the current situation, it would not have been difficult to do this, as there was only one Statement of Concern filed.[36] Although the regulatory requirements may have been met, it would not have been an onerous task to include the Appellant on the mailing list to receive further information on the project.

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35 See: Director's Record, at Tab 7.

36 See: Director's Record and Preliminary Meeting Tape.

[45] There is no limitation in the regulatory process considered by Alberta Environment or the appeal process by this Board that prevents communication between the parties. In fact the Board encourages communication to continue, or commence, even if an appeal is filed.

[46] It appears the Licence Holder does want to be a good corporate neighbour, as it has become a member of the Lakeland Industry and Community Association.[37] However, this was only done on the suggestion of the Appellant. The Licence Holder should take the initiative to become more aware of the concerns of the residents in the area.

V. CONCLUSION

[47] Based on the arguments provided and for the reasons stated above, pursuant to section 95 of the *Environmental Protection and Enhancement Act*, the Board dismisses Appeal No. 02-077 as the Appellant is not directly affected, and in the alternative, the Board finds the appeal, according to the terms of the Act, to be without merit.

Dated on June 6, 2003, at Edmonton, Alberta.

"original signed by"
Dr. M. Anne Naeth
Panel Chair

"original signed by"
Mr. Ron V. Peiluck
Board Member

"original signed by"
Dr. James M. Howell
Board Member

[37] See: Licence Holder's letter, dated November 19, 2002.