# ALBERTA
# ENVIRONMENTAL APPEALS BOARD

# Decision

**Date of Decision – November 4, 2004**

**IN THE MATTER OF** sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** an appeal filed by Klaus Jericho on behalf of himself and the Southern Alberta Environmental Group, and an appeal filed by Cheryl Bradley, with respect to *Water Act* Licence Amendment No. 00044590-00-01 issued to the St. Mary River Irrigation District, by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Jericho et al.* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.).

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| **PRELIMINARY MEETING BEFORE:** | Dr. Frederick C. Fisher, Chair;<br>Mr. Al Schulz, Board Member; and<br>Dr. James Howell, Board Member. |
| **APPEARANCES:** | |
| **Appellants:** | Mr. Klaus Jericho, Ms. Cheryl Bradley, and the Southern Alberta Environmental Group represented by Mr. Cameron MacLennan, Huckvale Wilde Harvie MacLennan. |
| **Director**: | Mr. Dave McGee, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice. |
| **Approval Holder:** | St. Mary River Irrigation District, represented by Mr. Thomas MacLachlan, MacLachlan McNab Hembroff. |

## EXECUTIVE SUMMARY

Alberta Environment issued an amendment to the existing water licence of the St. Mary River Irrigation District to allow the Irrigation District to provide water for purposes other than irrigation.

The Board received a Notice of Appeal from Mr. Klaus Jericho on behalf of himself and the Southern Alberta Environmental Group, and a Notice of Appeal from Ms. Cheryl Bradley.

The Board held a preliminary meeting to address the following issues:

- the directly affected status of Mr. Jericho, the Southern Alberta Environmental Group, the Southern Alberta Environmental Group's members, and Ms. Bradley;
- Ms. Bradley's late filed appeal;
- any further preliminary issues raised by the parties;
- the issues to be heard at a future hearing of the appeals, should one be held; and
- a Stay of the amendment to the water licence, as requested by the Appellants.

After hearing the legal arguments and evidence from the parties at the preliminary meeting, the Board determined that the Southern Alberta Environmental Group, its members, and Mr. Jericho were not directly affected by the amendment to the water licence and their appeal was dismissed. Further, Ms. Bradley's appeal was also dismissed as she was found not to be directly affected by the amendment to the water licence, she did not file a Statement of Concern, her Notice of Appeal was filed late, and no extenuating circumstances existed to warrant extending the appeal period.

As none of the appeals were properly before it, the Board did not address the issues to be considered at a potential hearing and did not address the Stay application.

## TABLE OF CONTENTS

# I. INTRODUCTION

[1] The appeals before the Board in this case are in relation to an amendment to an existing water licence held by an irrigation district in southern Alberta. The amendment changes the purposes for which the irrigation district may use its water and allows the irrigation district to provide water to users for purposes other than traditional irrigation. The people who have filed the appeals, represented principally by an environmental group, object to this amendment because, in their view, the Oldman River system is over allocated and the amendment allows the irrigation district to "by-pass" provisions in the *Water Act*, R.S.A. 2000, c. W-3, that would provide for the conservation of water.

[2] This decision addresses the preliminary issue of whether the Board should accept these appeals, which the Board has determined it should not. While the decision addresses a number of jurisdictional prerequisites to accepting the appeals, the main challenge to the standing of the people who have filed the appeals is whether they are directly affected. The Board has determined that the people that have filed the appeals are not directly affected. Among other things, the impacts they are concerned about are too remote to directly affect them within the meaning of the *Water Act,* and the interests they are asserting are not sufficient to demonstrate that they are directly affected.

# II. BACKGROUND

[3] On October 30, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the "Director") issued Licence Amendment No. 00044590-00-01 (the "Licence Amendment") under the *Water Act*, to the St. Mary River Irrigation District (the "Licence Holder" or the "SMRID") with respect to water use in the St. Mary River Irrigation District, near Lethbridge, Alberta.

[4] The Licence Amendment changes the purpose section of Licence No. 00044590-00-00 (the "Licence") from "Irrigation" to "Irrigation District". Further, the Licence Amendment adds a number of clause to the Licence to define Irrigation District purposes so as to allow the Licence Holder to deliver water for municipal, agricultural, irrigation, commercial,

industrial, management of fish, management of wildlife, habitat enhancement, and recreational purposes.[1]

[5] On November 25, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Klaus Jericho, on behalf of himself and the Southern Alberta Environmental Group ("SAEG"), and on January 6, 2004, the Board received a Notice of Appeal from Ms. Cheryl Bradley (collectively the "Appellants") appealing the Licence Amendment.

[6] On November 26, 2003, and January 9, 2004, the Board wrote to the Appellants, the Licence Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The Board requested that the Director provide the Board with a copy of the records (the "Record") relating to these appeals.[2] The Board also requested that Ms. Bradley provide reasons as to why her Notice of Appeal was filed outside the timelines prescribed in the *Water Act* and to advise if she wished to request an extension of time to file her appeal.

[7] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had

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[1] The Licence Amendment provides:

"This licence is amended as follows:

1. Change the purpose from Irrigation purposes to Irrigation District purposes.
2. Add the following condition(s):
   12. 'Irrigation District Purposes' means the allocation and delivery of water through the works of an Irrigation District for the irrigation of crops and for any other purpose(s) identified in a licence.
   13. The licensee may deliver water for the following purposes:
      a) municipal
      b) agricultural
      c) irrigation
      d) commercial
      e) industrial
      f) management of fish
      g) management of wildlife
      h) habitat enhancement
      i) recreation
   14. The licensee shall not deliver water under this licence for the purposes of injecting water into the ground to enhance oil or gas production."

[2] On December 9, 2003, the Board received a copy of the Record from the Director and on December 11, 2003, the Board forwarded a copy of the Record to the Appellants and the Licence Holder.

been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[8] In the Director's letter of December 9, 2004, the Director advised that he was attempting to schedule a meeting with the Appellants to discuss the matter of the appeals, and he was hopeful the meeting would take place during December or early January. The Board responded in its letter of December 11, 2004, that it always encourages settlement discussions between the parties to an appeal and requested that a status report with respect to the discussions be provided by January 7, 2004.

[9] On January 6, 2004, the Board received status reports from the Parties advising that the meeting had taken place, however discussions did not result in a resolution of the appeals. The Appellants requested a mediation meeting.

[10] The Board acknowledged the Parties' status reports on January 9, 2004, and stated:

> "...the Board is of the view that mediation would not be appropriate in this case. The Board would like to proceed to process this appeal and in this regard has decided to schedule a Preliminary Meeting to determine the directly affected status of the appellants, any further preliminary issues raised by the parties, and the issues to be heard at a future hearing of this appeal, should one be held…."

On February 17, 2004, in consultation with the Parties, the Board scheduled the Preliminary Meeting for March 31, 2004, in Lethbridge, Alberta.

[11] On March 17, 2004, the Board wrote to the Parties, acknowledging a telephone call from the Appellants advising that they may request an adjournment of the Preliminary Meeting depending on the timeline for submissions set by the Board. The Board's letter also advised:

> "The Board has also had an opportunity to review the file in this matter, and notes in particular a letter dated January 15, 2004 from Ms. Bradley, where she indicates that the Notice of Appeal by Mr. Jericho '...was intended to be filed on behalf of himself and the members of the Southern Alberta Environmental Group.' The Board infers, without deciding whether to accept the appeals in that regard, that this means that the apparent intent of Mr. Jericho was to file the appeal on behalf of the members of the Southern Alberta Environmental Group as individuals."

The Board went on to advise that at the Preliminary Meeting the issues would be whether to accept the Notice of Appeal on behalf of Mr. Jericho and the individual members of SAEG, to determine their directly affected status, and to decide whether to accept Ms. Bradley's late filed appeal and determine her directly affected status. In preparation for the Preliminary Meeting, the Board requested the Appellants file affidavits from each individual member of SAEG with respect to their directly affected status. The Board also requested that the Licence Holder and the Director file affidavits. The Board postponed the Preliminary Meeting until April 20, 2004, to allow the Parties the necessary time to prepare the requested affidavits.

[12] On March 25, 2004, the Board received a letter from the Appellants advising that they were having difficulty obtaining affidavits from the individual members of SAEG. The Appellants also requested a Stay of the Licence Amendment and suggested this be added to the list of issues for the Preliminary Meeting.

[13] On March 25, 2004, the Board wrote to the Parties granting an extension of time to submit affidavits and written submissions for the Preliminary Meeting, advising that affidavits would be accepted by the Board by the new filing deadline in letter form and unsworn, provided that any unsworn affidavits were filed in sworn form prior to the start of the Preliminary Meeting on April 20, 2004.

[14] On March 31, 2004, the Board received both sworn and unsworn affidavits from the Appellants.

[15] On April 2, 2004, the Board received further unsworn affidavits from the Appellants. On April 5, 2004, the Board received an affidavit from the Licence Holder. On April 6, 2004, the Board received a letter from the Director advising that he would not be filing an affidavit, but would be relying upon the Record previously filed with the Board.

[16] On April 6, 2004, the Board acknowledged the Parties' April 2, 5, and 6, 2004 letters, confirming its understanding that any unsworn affidavits would be sworn prior to the start of the Preliminary Meeting on April 20, 2004, and that any affidavits left unsworn at the start of the Preliminary Meeting would not be admissible.

[17] On April 7, 2004, the Board received a letter from the Appellants attaching a supplemental affidavit regarding additional SAEG member letters. On April 8, 2004, the Board

acknowledged the Appellants' letter, noting that three of the attached letters were not previously provided to the Board.[3] The Board subsequently received a copy of a letter sent to the Appellants from the Director stating:

> "…This is the second time your office has filed additional evidence past the 'extended' deadline that the Board has already granted to your client. Is your client planning on submitting any further evidence in addition to this? I note your letter does not contain a note of explanation for the late filing or even a request if this new evidence can be filed late. Without a reasonable explanation, I will object to this new evidence being accepted by the Board."

On April 14, 2004, the Board received a copy of a letter from the Licence Holder to the Appellants also objecting to the filing of affidavits after the deadline.

[18] On April 17, 2004, the Board wrote to the Parties and advised that any preliminary motions regarding the admissibility of affidavits or other matters would be addressed at the start of the Preliminary Meeting.

[19] On April 20, 2004, the Board held the Preliminary Meeting in Lethbridge, Alberta.

## III. PRELIMINARY MOTION

[20] At the start of the Preliminary Meeting the Director and the Licence Holder objected to the admissibility of the letters and affidavits submitted by the Appellants. As part of the Appellants' submission, Ms. Bradley swore an affidavit and included a number of letters from individual members of SAEG. On April 7, 2004, Ms. Bradley submitted a Supplemental Affidavit, again with a number of letters from individual members attached. As was authorized by the Board, at the start of the Preliminary Meeting, the Appellants provided sworn copies of some, but not all, of these letters. The Appellants also provided a number of new affidavits.[4] The Director and the SMRID objected to the late filed affidavits and the unsworn letters.

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[3] See: Board's letter, dated April 8, 2004. The three letters referred to were from Mr. Reg Ernst, Ms. Irena Woss, and Mr. Ralph Cartar.

[4] Sworn affidavits were provided for: Mr. Bob Anderson, Ms. Shirley Anderson, Ms. Dana Blouin, Mr. Francois Blouin, Mr. William Brown, Mr. Edward Buchanan, Ms. Geraldine Buchanan, Mr. Robert Campbell, Ms. Sylvia Campbell, Mr. Dean Cofell, Ms. F.L. Cofell, Mr. Reg Ernst, Ms. Debby Gregorash, Ms. Judy Huntley, Mr. Klaus Jericho, Ms. Susan Lingle, Mr. Ron McNeil, Ms. Nicola Miller, Dr. Claudia Notzke, Ms. Joan Rodvang, Mr. David H. Sheppard, Ms. Cecily Smith, Mr. Ken Walker, Ms. A.R.F. Williams, Mr. Gerald Wright, Ms. Marion S.

[21] Part of the reason the Board requests that it receive affidavits prior to the start of a preliminary meeting or hearing is to allow the parties to a proceeding to prepare arguments and questions for cross-examination in an effort to expedite the Board's process. It has been the Board's practice, as detailed in Rule 21 of the Board's Rules of Practice, that for evidence that is submitted to have any weight, it must be affirmed or sworn.[5]

[22] As was decided at the Preliminary Meeting, only those letters that were submitted on or prior to April 7, 2004, and that were subsequently sworn, will be accepted. Procedural fairness applies to all parties to an appeal. The Board notes that the Appellants made an effort to submit sworn documents within the time limits, and the contents of the sworn affidavits that were eventually filed were the same as the previously submitted letters. As a result, neither the Licence Holder nor the Director should have been set off guard as a result of these sworn affidavits not being submitted until the Preliminary Meeting. Therefore, the Board accepted the sworn affidavits that attached previously submitted letters.

[23] In its letters to the Parties, the Board explained the process of providing sworn affidavits from individual members of a group as discussed in previous decisions. This process included allowing the Appellants to provide the sworn affidavit versions of the letters at a later date and extensions to the filing deadline. The Appellants were notified, in writing, that individual affidavits must be provided before the Preliminary Meeting, and only those sworn and presented prior to the Preliminary Meeting would be considered. Therefore, the Board did not accept the letters that were provided but were not sworn or affirmed.[6]

[24] At the start of the Preliminary Meeting, the Appellants also provided three sworn letters not previously submitted. These affidavits were provided by Dr. Claudia Notzke, Ms. Dana Blouin, and Mr. Francois Blouin. It would bring the Board's process into disrepute if we allowed these affidavits to be brought in at the last moment. It is a cornerstone of administrative law that a party has the right to know the case against them. Based on the process established in

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Wright, and Ms. Cheryl Wyn-Evans Fujikawa.

[5] Rule 21 of the Board's Rules of Practice states:

> "All parties proffering evidence shall do so under oath or affirmation, to be administered by a Board or staff member authorized to swear oaths."

[6] The unsworn letters that were not accepted by the Board were submitted by Mr. Ralph Cartar, Ms. Jean Rae Firth, Mr. Peter Harris, Mr. Douglas Miller, Ms. Ann Miller, Ms. Sheila Petherbridge, Mr. D.L. Petherbridge, Ms.

this case, the Board will not allow parties to introduce new information at the last moment, and therefore, the affidavits of Dr. Claudia Notzke, Ms. Dana Blouin, and Mr. Francois Blouin were not accepted as evidence in the Preliminary Meeting. (The Board notes the affidavits from Dr. Notzke and the Blouins raised similar concerns to the affidavits from the other Appellants.)

## IV. SUBMISSIONS

### A. Appellants

1. Standing of the Southern Alberta Environmental Group

[25] The Appellants stated the Director accepted the Statement of Concern filed by SAEG as an official Statement of Concern. They confirmed that Ms. Cheryl Bradley was the primary contact person between SAEG and Alberta Environment and the SMRID regarding the Licence Amendment process. They explained that Mr. Klaus Jericho, President of SAEG, filed the Notice of Appeal on his own behalf and on behalf of SAEG. According to the Appellants, SAEG is a "…local interest group having been recognized through its past performance as having a membership limited to the Chinook Country area of Southern Alberta with a majority of its membership located in and about Lethbridge."[7] They explained that SAEG was engaged by its membership to specifically participate in the regulatory process, and the membership of SAEG have a "…genuine and material interest…" in the Licence Amendment as it allows private interests to allocate water for uses not contemplated within the existing Licence.

[26] SAEG argued the Licence Amendment equates to an "…inappropriate subdelegation of authority from Alberta Environment to the SMRID."[8] They argued that the SMRID is not subject to the obligations contained in the *Water Act*, including the consideration of factors in an approved water management plan, water guideline or water conservation objective, as well as effects on the aquatic environment, hydrology, other users, and public safety. They argued that the SMRID is not accountable for its use of water.

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Janet Walker, Mr. Cliff Wallis, and Ms. Irena Woss.

7 Appellants' submission, dated April 13, 2004, at paragraph 14.

8 Appellants' submission, dated April 13, 2004, at paragraph 16.

[27] The Appellants argued that the SMRID would be able to deliver 12,000 acre feet of water without being subject to the moratorium that is in place on southern tributaries of the Oldman River and without being subject to the conservation holdback contemplated by the *Water Act*, all without having the legality of changing the nature of the uses identified in the Licence addressed.

[28] The Appellants submitted that the project directly affects all those individuals who reside within the "footprint" of the SMRID, since the impact is not confined to a defined location but includes the network of canals, ditches, works, and delivery systems. They argued those who live "…adjacent to the Waterton, Belly or St. Mary rivers are no more directly affected than…" those who live within the SMRID "…geographic base and who then rely on the rivers and riparian landscape for their economic, social and environmental wellbeing."[9] They submitted that, under section 2 of the *Water Act*,[10] all Albertans have a responsibility to respond to water management planning and decision-making, and if communities are only to be notified of proposed changes and not able to respond, the real purpose of section 108 is undermined.[11]

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9 Appellants' submission, dated April13, 2004, at paragraph 19.

10 Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

(b) the need for Alberta's economic growth and prosperity;

(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;

(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;

(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;

(f) the important role of comprehensive and responsive action in administering this Act."

11 Section 108(1) of the *Water Act* provides:

"An applicant

(a) for an approval,

(b) for a licence,

(c) for a renewal of a licence if the Director has decided to conduct a public review of the licence renewal,

(d) for an amendment of

(i) an approval,

[29] The Appellants argued the Licence Amendment "…displaces Alberta Environment's stewardship responsibility concerning this natural resource and moves the SMRID into the role of a water broker."[12] They argued that if the allocation of this water were done by the Director, it would be subject to all of the various requirements under the *Water Act*.

[30] The Appellants argued they are directly affected and have demonstrated a genuine interest, as individuals and as a group, since they have been involved in the Oldman River Basin Advisory Committee, the Oldman River Basin Water Quality initiative, in water management consultations, and in their review of the Licence Amendment application.

[31] The Appellants argued the terms and conditions of the original Licence did not allow for the delivery of water to non-irrigation users for non-irrigation purposes, and therefore the Licence was not in good standing and the Licence Amendment should not have been processed. They submitted the impacts and legality of the Licence Amendment distinguishes the cases heard by the Board under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA") and this *Water Act* Licence Amendment appeal. They argued projects under EPEA have more defined impacts and those directly affected are more easily determined. They stated the impact of the low flows in the rivers has a real, direct, and personal affect on those within the discernible influence of the rivers.

[32] The Appellants stated the overwhelming majority of the SAEG membership lives and uses the riparian areas within the area of the SMRID, and SAEG was engaged by the individual members to address the regulatory process regarding the Licence Amendment. They stated SAEG was acting in a representative capacity for its individual members.

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(ii) a preliminary certificate, or

(iii) a licence,

or

(e) for a transfer of an allocation of water under a licence,

shall provide notice of the application in accordance with the regulations."

[12] Appellants' submission, dated April13, 2004, at paragraph 20.

[33] The Appellants submitted that SAEG had a purpose similar to that of the Lake Wabamum Enhancement and Protection Association ("LWEPA"), which was recognized by the Board.[13] They stated the project has a regional impact.

2. Standing of Ms. Cheryl Bradley

[34] Ms. Bradley stated that, prior to leaving on vacation, she was unaware the Licence Amendment would be granted during her absence. She explained she did not return until after the 30-day appeal period had expired, but that Alberta Environment and the SMRID were aware that she was away at the time the Licence Amendment was issued. Ms. Bradley stated that, upon her return, she advised the Board that she was filing an appeal as an individual and that she was directly affected by the Licence Amendment. She argued these circumstances warrant the Board extending the period to file a Notice of Appeal, since she was materially involved throughout the process and was unaware the decision was pending when she left the country.

[35] Ms. Bradley argued she was directly affected "…as a professional biologist, as a Lethbridge, Alberta community member and active riparian area user and as a devoted volunteer participant in the Alberta Government's Oldman River Basin Advisory Committee, …" and that she "…has a very real connection, economically, socially, physically and spiritually to the riparian environment…" along the Oldman River and its tributaries.[14]

[36] Ms. Bradley stated she did not submit an individual Statement of Concern but did prepare SAEG's Statement of Concern. She argued, "…in these circumstances it is appropriate to deem the SAEG's submitted Statement of Concern as having been for itself and in its representative capacity for each of its members."[15]

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[13] See: Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 53, (*sub nom. Bailey et al*. v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation)* Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID ("*Bailey*").

[14] Appellants' submission, dated April13, 2004, at paragraph 21.

[15] Appellants' submission, dated April13, 2004, at paragraph 23.

3. Standing of Mr. Klaus Jericho

[37] Mr. Klaus Jericho stated he is President of SAEG and filed the Notice of Appeal on behalf of himself and SAEG. He stated he has a personal interest in the Waterton, Belly, St. Mary, and Oldman Rivers as he regularly accesses the "…river valleys and riparian areas for recreational activities including hiking, canoeing, bird watching and flora and fauna observation and identification."[16]

4. Standing of Individual Members of SAEG

[38] The Appellants filed 27 affidavits from members of SAEG; 24 of the affidavits were accepted into evidence by the Board.[17] The Individual Members expressed a number of common themes. All of the Individual Members indicated that they lived in the Lethbridge area (most have municipal Lethbridge addresses) and used the Waterton, Belly, St. Mary and Oldman rivers, and surrounding riparian areas for various forms of recreation, including walking, hiking, canoeing and boating, fishing, swimming, nature appreciation, photography, artistic inspiration, viewing wildlife, and other aesthetic purposes. Further, all of the Individual Members expressed concerns about low water levels in these rivers, particularly the Waterton, Belly and St. Mary rivers, and the impact this is having on the aquatic ecosystem and riparian areas. Finally, all of the Individual Members oppose the policy of allowing an irrigation district to supply water for uses other than traditional irrigation, and many expressed concern about water being allocated to a "special interest group" (referring to the SMRID).

[39] A number of the Individual Members also expressed concerns relating to the volunteer and professional involvement in the Waterton, Belly, St. Mary and Oldman rivers. Mr. Brown, Ms. Lingle, and Ms. Wyn-Evans Fujikawa, all advanced concerns similar to Ms. Bradley, arguing that they were professionally involved in these rivers, and on that basis they should be granted standing.

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[16] Appellants' submission, dated April13, 2004, at paragraph 25.

[17] The affidavits that were accepted by the Board were: Mr. Bob Anderson, Ms. Shirley Anderson, Mr. William Brown, Mr. Edward Buchanan, Ms. Geraldine Buchanan, Mr. Robert Campbell, Ms. Sylvia Campbell, Mr. Dean Cofell, Ms. F.L. Cofell, Mr. Reg Ernst, Ms. Debby Gregorash, Ms. Judy Huntley, Mr. Klaus Jericho, Ms. Susan Lingle, Mr. Ron McNeil, Ms. Nicola Miller, Ms. Joan Rodvang, Mr. David H. Sheppard, Ms. Cecily Smith, Mr. Ken Walker, Ms. A.R.F. Williams, Mr. Gerald Wright, Ms. Marion S. Wright, and Ms. Cheryl Wyn-Evans

[40] Ms. Huntley, who lives in Lundbreck, indicated that her household water supply comes from the Oldman River. (The Board notes that Lundbreck is located west of Pincher Creek, considerably upstream of the influence of the SMRID.) Ms. Wyn-Evans Fujikawa indicated that as a resident of Lethbridge, her drinking water also comes from the river system. The Board notes that a number of the Individual Members are residents of Lethbridge, and as a result, their drinking water supply would also come from the river system. Finally, Mr. Walker indicated that he is an irrigator with a licence to divert water from the Oldman River, upstream from Fort MacLeod. (The Board again notes that this location puts Mr. Walker considerably upstream of the influence of the SMRID.)

5. Stay Application

[41] The Appellants argued there is a serious issue to be heard given the 1991 Licence was not in good standing since the SMRID delivered water to non-irrigators and was in contravention of the terms and conditions of the 1991 Licence. They also argued that amending the purpose and nature of the uses in the 1991 Licence was not contemplated by section 54 of the *Water Act*.[18] They argued the rights created by the amendment ensure "…water that could have otherwise been given back to the rivers will have been committed for other users."[19]

[42] The Appellants submitted they would suffer irreparable harm in three basic areas if the Stay was not granted, including "(a) Degradation of the riparian aquatic ecosystem; (b) Reduced water flows in Oldman River Basin; and (c) Quality of life."[20] They stated they could not be compensated in damages, and they did not seek monetary recourse but sought the lawful application of the *Water Act*.

[43] With respect to the balance of convenience, the Appellants stated, "…if the stay of proceedings is granted, the status quo of the SMRID should not change at all. It has a licence and can continue to deliver water pursuant to the terms and conditions of that licence."[21] The

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Fujikawa (collectively the "Individual Members").

[18] See: Appellants' submission, dated April 13, 2004, at paragraph 45.

[19] Appellants' submission, dated April 13, 2004, at paragraph 47.

[20] Appellants' submission, dated April 13, 2004, at paragraph 50.

[21] Appellants' submission, dated April 13, 2004, at paragraph 55.

Appellants acknowledged the SMRID has demonstrated the technical and engineering capacity and the will to manage water allocated to it by sharing water among its users.

[44] The Appellants argued the public interest requires the lawful application of the *Water Act* since the southern tributaries of the Oldman River are currently closed to *Water Act* applications; there is an over allocation of water in the Oldman River Basin; the South Saskatchewan River Basin Water Management Plan has not been determined; and there are reaches in the Waterton, Belly, and St. Mary Rivers where there is serious concern for the ecological condition and sustainability.[22]

**B. Licence Holder**

[45] The Licence Holder explained the Licence it was granted in 1991 under the *Irrigation Act*, R.S.A. 1980, c. I-11, and the *Water Resources Act*, R.S.A. 1980, c. W-5, permitted the SMRID to allocate water to users within the SMRID. According to the Licence Holder, under these acts, the uses of the allocated water allowed for domestic purposes included municipal, residential, and industrial uses. It stated it has entered into agreements with municipal governments, businesses, rural homeowners, and environmental groups. It explained the water allocated to these other uses came from the 220,000 acre feet allocated under the 1991 Licence.

[46] The SMRID stated the *Irrigation Districts Act*, R.S.A. 2000, c. I-11, and the *Water Act* changed the definitions of domestic purposes, resulting in some of the purposes previously allowed under the *Irrigation Act* and the *Water Resources Act* no longer meeting the definition of domestic purposes. The Licence Holder explained it applied for the amendment in order to bring its uses of water within the new legislation.

[47] The Licence Holder explained the amendment does not alter the amount of water allocated nor the volume or rate of diversion of water from the rivers. It stated the 12,000 acre feet that it purposes to use under the Licence Amendment comes from the original 220,000 acre feet allotted in the 1991 Licence. The Licence Holder stressed that if the Licence is not amended, it would still be allocated 220,000 acre feet of water, but it would be restricted to using

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[22] See: Appellants' submission, dated April 13, 2004, at paragraph 58.

all of the water for irrigation purposes and "…approximately 290 hamlets, villages, towns, rural residences and other users will be forced to go without the SMRID water."[23]

1. Standing of the Southern Alberta Environmental Group

[48] The Licence Holder stated its General Manager wrote to the Director as he disagreed with the decision allowing SAEG to file a Statement of Concern.[24] The Licence Holder argued the Director should not have permitted SAEG to file a Statement of Concern, and it should not be permitted to file a Notice of Appeal as none of the members are directly affected by the decision of the Director.

[49] The Licence Holder submitted the Board is not bound by the decisions of the Director, and the Director erred in granting SAEG standing to file a Statement of Concern.

[50] The Licence Holder submitted the Appellants, as environmental activists or living within the region, do not meet the test for directly affected. It argued the Appellants did not provide any proof of potential harm and simply stating water levels will decrease and Henderson Lake water levels will decrease is not proof. The Licence Holder stated the river flows are managed by Alberta Environment before any water is allocated to the SMRID, and the flow will not be altered by the Licence Amendment. According to the Licence Holder, the Appellants had not shown proof there is harm to anyone or anything by allowing the Licence Amendment.[25]

[51] The Licence Holder submitted that the *Irrigation Districts Act* provides that the SMRID:

> "…is to help sustain and grow the economy within the district. The uses of the water to other users is for the growth of industry, the use of drinking water by municipalities and rural residences, and the protection of environmental areas. If the SMRID is not able to provide this service the area would suffer irreparable harm both economically and environmentally."[26]

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23 Licence Holder's submission, dated April 14, 2004, at paragraph 7.

24 See: Director's Record at Tab 28.

25 See: Licence Holder's submission, dated April 14, 2004, at paragraph 41.

26 Licence Holder's submission, dated April 14, 2004, at paragraph 43.

[52] The Licence Holder submitted the Appellants did not provide any proof the Licence Amendment would damage the environment, and therefore the Appellants failed to prove any harm compared to the economic and environmental well being of the region.

[53] The Licence Holder argued SAEG is not directly affected, as neither the majority of members nor any individual member is directly affected. It submitted that none of the affidavits or letters provided state the nature or extent of any harm that was alleged.

2. Standing of Ms. Cheryl Bradley

[54] The SMRID submitted that Ms. Cheryl Bradley's appeal should be dismissed "…due to the fact she missed the filing period and did not file a Statement of Concern, and is not directly affected by the decision of the Director."[27]

[55] The Licence Holder argued it would be prejudicial to the other parties in an appeal if a group files a Notice of Appeal and then have individuals step into the process after the appeal period has expired. On this basis, the SMRID submitted the individual members of SAEG who failed to provide notice or affidavit evidence within the specified time period should be dismissed.

3. Stay Application

[56] The Licence Holder objected to the granting of a Stay.

[57] The SMRID argued the Appellants did not have serious concerns since it was not getting more water and the distribution of water allowed under the Licence Amendment is the type it previously provided. The Licence Holder submitted the Appellants would not suffer irreparable harm if the Stay was refused as the water distribution allowed under the Licence Amendment is no different than the 1991 Licence.

[58] The Licence Holder stated there would be irreparable harm to the public and geographic area of southern Alberta if the Stay was granted. According to the Licence Holder, the "…municipalities, commercial operators, businesses, parks, wildlife and fish management

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[27] Licence Holder's submission, dated April 14, 2004, at paragraph 17.

would be destroyed if the amended licence is not put in place or its effect stayed. Lakes and parks similar to Henderson Lake would be destroyed along with the wildlife, fish, and their wet lands habitat…."[28]

## C. Director

### 1. Standing of the Southern Alberta Environmental Group

[59] The Director explained the application was to amend the SMRID's 1991 Licence to allow for purposes other than irrigation by changing the purpose of the Licence from "irrigation" to "irrigation district purposes."

[60] The Director stated he was not taking a position on the directly affected status of SAEG, "…as the Director accepted the Statement of Concern filed by the SAEG during the public notice period."[29] The Director explained that he accepted the Statement of Concern filed by SAEG, despite the fact it was not in compliance with Alberta Environment's policy on accepting Statements of Concern from groups because he wanted to ensure that there was a discussion on the Licence Amendment.

### 2. Standing of Ms. Cheryl Bradley

[61] The Director did not object to Ms. Cheryl Bradley's involvement in the appeal process as a member and representative of SAEG. However, he objected to the Notice of Appeal filed in her individual capacity as she did not submit a Statement of Concern as an individual, the Notice of Appeal was filed late, and the Licence Amendment does not directly affect her.[30]

[62] The Director stated the only Statement of Concern was clearly filed on behalf of SAEG, and there was no indication the Statement of Concern was filed on Ms. Bradley's behalf as an individual. He explained Ms. Bradley was involved in the process as a representative of

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[28] Licence Holder's submission, dated April 14, 2004, at paragraph 56.

[29] Director's submission, dated April 14, 2004, at paragraph 27.

[30] See: Director's submission, dated April 14, 2004, at paragraphs 29 and 30.

SAEG, but at "…no time during the application process, did Ms. Bradley indicate she was submitting any concerns in her personal capacity."[31]

[63] The Director submitted the legislation is clear, and in order to file a Notice of Appeal, a Statement of Concern had to be submitted previously. He argued the Board has directed that if no Statement of Concern has been filed, there is no appeal right unless there are extraordinary circumstances.

[64] The Director submitted there are no extraordinary circumstances in this case. The Director stated Ms. Bradley was in the country at the time Statements of Concern were to be submitted, and she participated extensively in the application process as a representative of SAEG. The Director submitted, there "…are no reasons why Ms. Bradley could not have filed a letter of concern in her own capacity if she wished to do so during the statutory deadlines."[32] He stated neither himself nor the Licence Holder were aware that Ms. Bradley had concerns she wanted to raise in her personal capacity. The Director argued raising individual issues almost 10 months after the public notice of the amendment application "…undermines the legislative public consultation process and the need for certainty in such a regulatory regime."[33]

[65] The Director stated Ms. Bradley's Notice of Appeal was filed more than 30 days after the statutory deadline and should be dismissed for failing to comply with the legislative requirements. The Director submitted: "Given Ms. Bradley's extensive involvement in this application prior to her departure, it is not unreasonable to suggest that Ms. Bradley could have left standing instructions to others if anything happened in her absence, or left a contact number."[34]

[66] The Director submitted that Ms. Bradley is not directly affected by the amendment "…as there is no 'harm or impairment' to the natural resource by this amendment. This licence amendment is 'neutral' in its impact to the water body."[35]

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31 Director's submission, dated April 14, 2004, at paragraph 32.

32 Director's submission, dated April 14, 2004, at paragraph 37.

33 Director's submission, dated April 14, 2004, at paragraph 39.

34 Director's submission, dated April 14, 2004, at paragraph 43.

35 Director's submission, dated April 14, 2004, at paragraph 49.

[67] The Director stressed the amendment is not a new allocation of water, and the SMRID has had a Licence to divert 220,000 acre-feet from the river for irrigation purposes since 1991. The Director explained the Licence Amendment does not change the amount of water that is being diverted from the river by the SMRID, nor the time period in which water is diverted, nor the rate is can be diverted. According to the Director, the impact on the river and other users does not change from that authorized in the 1991 Licence.[36] He explained the only change allows for a restricted quantity of water (12,000 acre-feet) to be used for a different purpose.

[68] The Director submitted that Ms. Bradley's argument that she may be affected by his decision to allow the application and the theoretical decision to somehow require the SMRID to enter the transfer market to deliver the water, "…is all too remote to meet the Board's direct effect test."[37] He further submitted an appeal cannot appeal theoretical future decisions. Therefore, according to the Director, Ms. Bradley cannot obtain standing based on a decision not made.

3. Stay Application

[69] The Director stated that if a Stay is granted, approximately 290 persons could possibly not have water this spring or not be able to get water this season. The Director stated that if the Stay was granted, there would be no impact on the river as the SMRID would still be able to take its full allocation under the 1991 Licence. The Director submitted, "…the urgency or prevention of irreversible damage does not seem to weigh in favour of the Appellants."[38]

## V. STANDING

### A. Status of the Notices of Appeal

[70] The Board received two Notices of Appeal in this matter. The first was filed by Mr. Klaus Jericho "…on behalf of myself and the Southern Alberta Environmental Group…." The second was filed by Ms. Cheryl Bradley. It is clear that the intent in these Notices of Appeal

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36 See: Director's submission, dated April 14, 2004, at paragraph 52.

37 Director's submission, dated April 14, 2004, at paragraph 58.

38 Director's submission, dated April 14, 2004, at paragraph 100.

was for Mr. Jericho and Ms. Bradley to file their appeals as individuals. However, there is a question as to whether the Notice of Appeal filed by Mr. Jericho was filed on behalf of the Southern Alberta Environmental Group as an organization, or whether Mr. Jericho was filing in a representative capacity on behalf of the individual members of the organization (the Individual Members). The Board notes in particular that attached to the Notice of Appeal filed by Mr. Jericho was a membership list of the organization and a "petition" signed by some of the members of the organization indicating that they "…support the 'Notice of Appeal' filed by the Southern Alberta Environmental Group…."

[71] One of the concerns that the Board has with "group" Notices of Appeal is that the in determining whether an appellant is directly affected, the Board looks at the individual and personal impact of the activity that is being appealed on the person filing the appeal. Generally, an organization, in that it is without physicality, cannot itself be directly affected by a change in the environment. A single Notice of Appeal filed by a group usually does not contain sufficient information for the Board to make a determination as to whether the members of the group are directly affected. As a result, the Board has a practice of encouraging groups who contact the Board to file both as an organization and as individual members.[39]

[72] With this in mind, the Board asked for clarification with respect to this matter, and the Appellants argued that it was their intent to file in a representative capacity on behalf of the individual members of the organization. For the completeness of its decision, the Board will

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[39] In the *Bailey* case, following a review of a number of cases involving groups filing an appeal, the Board stated:

> "The cornerstone of all of the cases is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 84 [(now section 91)] of the Act [(EPEA and the comparable provisions of the *Water Act*)], individual members of the organization should also file - either jointly with the organization or separately. There will be cases, such as *Hazeldean*, where an organization can proceed with an appeal on its own. However, in these cases, the *Board will need to be clearly convinced that the majority of the individual members of the organization are individually and personally impacted by the project*." (Emphasis added.)

Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 53, (*sub nom. Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation)* Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID. *Hazeldean Community League et al.* v. *Director of Air and Water Approvals, Alberta Environment* (11 May 1995), Appeal No. 95-002 (A.E.A.B) ("*Hazeldean*"). See also: Re: *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (A.E.A.B.) at paragraphs 59 to 69, (*sub nom. Metis Nation of Alberta Zone II Regional Council* v. *Director, Bow Region, Environmental Service, Alberta Environment* re: *AEC Pipelines Ltd.)* Appeal No. 00-073.

examine the directly affected status of both SAEG as an organization and the Individual Members. (Regardless of whether the Board looks at the directly affected status of SAEG as an organization or the Individual Member of SAEG, the Board has reached the same conclusion that they are not directly affected.) However, with respect, the Board does not accept the argument that the Notice of Appeal was filed on behalf of the Individual Members of SAEG.

[73] A plain reading of the Notice of Appeal clearly indicates that the intent was to file on behalf of SAEG as an organization and Mr. Jericho only. If there was enough foresight to list Mr. Jericho, it certainly would have been easy enough to list the other members as well. Instead, SAEG attached a list of signatures "supporting the appeal," similar to a petition.

[74] There is a significant difference between filing an appeal and supporting an appeal filed by someone else. Filing an appeal requires an active role in the process. If a person files an appeal, he has the responsibility of responding to the Board and preparing submissions and documentation for any proceeding. A list with no additional information explaining how the signatories are directly affected does not assist the Board and, generally, will not assist the group in obtaining standing.

**B. Status of the Statement of Concern**

[75] The Board notes that there is a similar concern with the Statement of Concern filed by the Appellants. A single Statement of Concern was filed. The Statement of Concern is on "Southern Alberta Environmental Group" letterhead and states: "Members of the Southern Alberta Environmental Group (SAEG) are submitting this statement of concern…." The Statement of Concern was written and signed by Ms. Bradley on behalf of SAEG.

[76] The Board has the same concerns with "group" Statements of Concern that it has with "group" Notices of Appeal. As provided in section 109 of the *Water Act,*[40] a Statement of

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[40] Section 109 of the *Water Act* provides:

"If notice is provided

(a) under section 108(1), any person who is directly affected by the application or proposed amendment, and

(b) under section 108(2), the approval holder, preliminary certificate holder or licensee,

may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment."

Concern may be submitted by anyone who is directly affected. Again, it is difficult for the Board to determine whether the individual members of a group are directly affected when they file a single Statement of Concern, and this in turn makes it difficult to determine whether a valid Statement of Concern has been filed. A single Statement of Concern filed by a group, like a single Notice of Appeal filed by a group, rarely contains enough information to determine whether the individual members of the group are directly affected.

[77] With respect to this case, in his testimony, the Director explained that the Statement of Concern did not comply with the department policy on group-filed Statements of Concern. Nonetheless, he stated he accepted the Statement of Concern because it was a significant issue in the community, and he wanted to give the residents in the area every opportunity to provide input into the decision. The Director explained he accepted the Statement of Concern filed on behalf of SAEG on the basis that:

> "The Southern tributaries of the Oldman River Basin, St. Mary, Belly and Waterton River Sub-basins, are closed to further allocations due to concerns about water supply and river flows. The Southern Alberta Environmental Group is a local interest group who has expressed concerns about river flows and the application for amendment has regional implications related to water supply in the basin."[41]

[78] The Director discussed the matter of accepting the Statement of Concern filed by SAEG with the Regional Approvals Manager. The Approvals Manager clearly indicated it was an exception to the regular practice regarding environmental organizations to accept the Statement of Concern, but he concurred it should be allowed in this case.[42] The Director explained he was aware of the activities of SAEG and hoped by accepting the Statement of Concern, there would be an open dialogue between the Appellants and the SMRID.

[79] The Appellants advanced an argument that because the Director found them to be directly affected and accepted the Statement of Concern, the Board should be required to make similar findings. The Board does not accept this argument. As the Board discussed in *Ouimet*,[43]

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41 See: Director's Record Tab 30.

42 See: Director's Record Tab 30.

43 *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re*: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D ("*Ouimet*").

the Board is not bound by the decision of the Director with respect to whether to accept a Statement of Concern or whether a person is directly affected. In *Ouimet,* the Board stated:

> "The Board notes that the Director accepted Ms. Ouimet's Statement of Concern on the basis that in his view she was directly affected. As will be discussed shortly, the Board does not share the Director's view that Ms. Ouimet is directly affected – the Director's decision does not bind the Board. In making this determination, the Board is *not* of the view that the Director's decision to accept Ms. Ouimet's Statement of Concern, at that stage of the process, was incorrect. We believe the Director's more inclusive approach to directly affected, for the purposes of his decision, is entirely appropriate. In fact, it is to be encouraged and is in keeping with section 2(d) of the *Water Act*.
>
> The Board notes that the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision. This purpose is properly reflected in the 'Policy on Acceptance of Statements of Concern (1997).' This policy, established by then Assistant Deputy Minister Al Schulz, states: '… considerable judgment will have to be exercised in determining what constitutes a valid Statement of Concern and where there is any doubt the concern should be considered a Statement of Concern.'
>
> The purpose of the directly affected test *vis-a-vis* the Board is somewhat different. While still promoting good decision-making, the Board's decision respecting directly affected determines whether the person (or in this case, a person and an organization) has a right to appeal. The Board is more strictly focused on the burden of proof and involves a more adversarial process. As a result, the Board's determination respecting an appellant's standing, must, by its very nature be more specific. We must also follow several Court of Queen's Bench precedents on standing that review the decisions of the Board, not the Director."[44] (Emphasis in the original.)

[80] In saying that the Board has concerns with the Statement of Concern, the Board wishes to be clear that it believes that it was appropriate for the Director to accept the Statement of Concern on behalf of SAEG (as an organization) for the purpose of making his decision in this

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[44] *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re*: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D at paragraphs 23 to 25. See: *Graham* v. *Alberta (Director*, *Chemicals Assessment and Management, Environmental Protection)* (1997), 22 C.E.L.R. (N.S.) 141 (Alta.Q.B.) and (1997), 23 C.E.L.R. (N.S.) 165 (Alta.C.A.); and *Kostuch* v. *Alberta (Director,*

case. The Director testified that the application for the Licence Amendment was a controversial matter in the community, and despite the fact the Statement of Concern did not conform with Alberta Environment's guidelines for accepting Statements of Concern, he accepted it anyway because he believed it was important for him to consider the concerns expressed by members of the community. As discussed in *Ouimet,*[45] the Board is of the view that the Director's decision-making process should be more inclusive than the Board's process of determining legal rights of appeal. The Board believes it was appropriate for the Director to encourage public involvement in the decision-making process as stated in the purpose of the *Water Act*.[46] The Board considers it invaluable to have the Director receive as much input as possible at the Statement of Concern level. It is better to err on the side of inclusion, and the concerns expressed in the Statements of Concern should be considered whenever possible, as the Director did in this case. A Statement of Concern provides the Director with additional information upon which he can make a better decision. However, the Director's acceptance of a Statement of Concern does not guarantee the Board will come to same conclusion about a filers directly affected status.

[81] The purpose of filing a Statement of Concern is twofold. First, it provides the Director with the filer's input into the decision that the Director must make. Second, the filing of a Statement of Concern preserves the filers right to appeal. Both of these rights are contingent on a Statement of Concern being filed and being filed on time.

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*Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

[45] *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D.

[46] Section 2 of the *Water Act* states:

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

[82] It was clear in his testimony that the Director considered the Statement of Concern as being filed by SAEG as a group and not on behalf of the individuals. This view remained even after the Director met with representatives of SAEG in the Statement of Concern process. If groups want to file Statements of Concern on behalf of individuals, it must be clearly stated that is their intent, and the Statement of Concern must provide information on who the Statement of Concern is being filed for and how they are directly affected by the application. A better approach is to have the individuals file their own Statements of Concern (and Notices of Appeal) and explain how they are personally directly affected by the decision being appealed.

[83] SAEG submitted a Statement of Concern, but with respect, the Board agrees with the Director and believes that it was submitted on behalf of the SAEG as an organization and not on behalf of the Individual Members. The Board comes to this conclusion taking into account the evidence of the Director and because there is no indication in the Statement of Concern as to who the members are. Further, the Board notes that the only statement in to the Statement of Concern on which to base a finding of directly affected (a prerequisite to accepting a Statement of Concern) is:

> "The Southern Alberta Environmental Group has a long-standing interest in water management in the Oldman River Basin. We currently are representing environmental interests on the Advisory Committee for the Oldman River Basin Water Management Plan. We believe the decision regarding this application has significant implications for that plan."

In the Board's view, this indicates that the intent of the Statement of Concern is that it is to be filed on behalf of SAEG as an organization and not on behalf of the Individual Members.

## C. Legal Background to Directly Affected

[84] Before the Board can accept a notice of appeal as being valid, the individual must show that he or she is directly affected by the Director's decision. Under section 115 of the *Water Act*, a person who is directly affected by the decision of the Director – here the issuance of the Licence Amendment - has the right to file a notice of appeal with the Board.[47] The Board has

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

"A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances: … (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may

examined the term "directly affected" in a number of previous appeals and has developed a framework to determine if appellants should be given standing to appear before this Board. The test is the same whether the appeal is filed under the *Water Act* or EPEA. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.[48]

[85] The 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*,[49] the Board stated "…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 in question."[50]

[86] 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

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> 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…."

(Note that the filing of a Statement of Concern is also a requirement.)

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

[49] *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*").

[50] *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.).

> statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[51]

[87] 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."[52] In *Kostuch*, the Board considered its previous decision in *Ross*,[53] 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."[54]

[88] Further, in *Kostuch* the Board stated 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."[55]

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."[56]

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

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51 *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.).

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

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

54 *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.).

55 *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.).

56 *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.).

> 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."[57]

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

> "Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected."[58]

The Board's Rules of Practice also make it clear the onus is on the Appellants to prove they are directly affected.[59] The onus or burden of proof issue, in a slightly different context, was upheld in the Court of Queen's Bench.[60]

[91] Under the two-step approach to determining a person's directly affected status, 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, but in reality, normally only a few can show they are *directly* affected.

[92] In the recent *Court*[61] decision, Justice McIntyre summarized the following principles regarding standing before the Board.

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[57] *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"*).

[58] *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 24 (A.E.A.B.).

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

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

[60] See: *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services,*

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

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

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

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

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

> [T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson

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*Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta.Q.B.).

[61] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

> uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

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

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated."[62]

[93] Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted…."[63]

[94] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The

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

[63] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q. B.).

closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the Appellant to present a *prima facie* case that he is directly affected.[64]

[95] The Court of Queen's Bench in *Court*[65] stated an appellant only needs to show there is a potential for an effect on their interests. This potential effect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[96] The effect does not have to be unique in kind or magnitude.[66] However, the affect the Board is looking for needs to be more than an affect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.[67] Under the *Water Act* and EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class.

## D. Proximity

[97] As identified, one of the key factors in determining whether a person is directly affected is the proximity between the activity being appealed and the alleged impact on the person filing the appeal. In the Board's view, this is a significant factor in this case. The Board is of the view that the impacts put forward by the Appellants are too remote from the activities authorized by the Licence Amendment to give these Appellants standing.

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

65 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

66 See: *Bildson* v. *Acting Director of North Eastern Slopes Region, Alberta Environmental Protection* re: *Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

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

[98] At the Preliminary Meeting, the Director provided a map of the area entitled "Map of Alberta Environment's Oldman River Basin Water Management Infrastructure"[68] and explained that, with respect to supplying the SMRID, the Oldman River system has three tributaries: the Waterton River, the Belly River, and the St. Mary River. The Waterton River joins with the Belly River and eventually enters the Oldman River some distance west of Lethbridge. The St. Mary River enters the Oldman River immediately before it enters Lethbridge. There is a reservoir (the Waterton Reservoir) on the Waterton River, upstream of where it joins the Belly River, and there is reservoir (the St. Mary Reservoir) on the St. Mary River, upstream of where it enters the Oldman River.

[99] The Waterton Reservoir and St. Mary Reservoir are connected by a canal (made up of the Waterton-Belly and Belly-St. Mary canals) that crosses the Belly River. The canal draws water from the Waterton River, the Belly River, and the St. Mary River. All of this water flows into the St. Mary Reservoir. From the St. Mary Reservoir, the water flows east through a canal (made up of the St. Mary-Jensen canal and the Jensen Ridge canal), and is stored in the Milk River Ridge Reservoir, which is located to the south of the western portion of SMRID. *All of these facilities are owned and operated by Alberta Environment* since they were acquired from the Federal government in 1950.

[100] According to the Director, the SMRID's, the Taber Irrigation District's, and the Raymond Irrigation District's licences all start from the Milk River Ridge Reservoir. *The districts do not own or operates any works upstream from the Milk River Ridge Reservoir.*

[101] The lands serviced by the SMRID are located between Lethbridge and Medicine Hat, immediately south of the Oldman and South Saskatchewan Rivers. (The Oldman River joins with the Bow River to form the South Saskatchewan River approximately half way between Lethbridge and Medicine Hat.) The SMRID's water supply is taken from the Milk River Ridge Reservoir, passing through the Raymond Irrigation District into the SMRID system. The SMRID system then distributes the water eastward through a series of canals and reservoirs (including at one point through the Taber Irrigation District).

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[68] See: Exhibit 1. This map is attached to this Report and Recommendation as Appendix 1.

[102] The original Federal licences that previously existed allowing for water withdrawals from the Waterton, Belly, and St. Mary Rivers that ultimately supply the Milk River Ridge Reservoir, were split in half. The allocation portions of these Federal licences were "written into" the licences for the Irrigation Districts, and the diversion portion and diversion rates were "written into" the licences for Alberta Environment. The Director testified that Alberta Environment is required to carry out the terms of its licences pursuant to a Federal-Provincial agreement, regardless of the licences of the various irrigation districts, and according to the Director, *it is pursuant to the Alberta Environment licences that the actually diversion from the rivers takes place*.

[103] Taking this factual basis into account, arguments of the Appellants fails to make the required proximate connection between the decision under appeal (the Licence Amendment) and the impact on the environment that is of concern. First, the Appellants are concerned with low water level in these rivers, particularly the Waterton, Belly, and St. Mary rivers, and the impact that this is having on the aquatic ecosystem and riparian areas. The Board accepts that these impacts are caused, at least in part, by the diversion of water from these rivers. (It is important to note that another cause of the impacts that the Appellants are concerned about is low precipitation conditions that have been occurring over the last number of years.) However, the diversion of water from these rivers is the result of the licences held by Alberta Environment, not the Licence Amendment issued to the SMRID. As has been discussed, there are a considerable number of steps between the diverting of water from the rivers pursuant to the Alberta Environment licences and the taking of the water from the Milk River Ridge Reservoir by the SMRID pursuant to its licence.

[104] Second, the taking of water by the SMRID from the Milk River Ridge Reservoir is not changed by the Licence Amendment. The Licence Amendment does not change the volume of water allocated the SMRID, nor does it change the amount of the water the SMRID will actually take. In response to this point, the Appellants argue that but for the Licence Amendment, the use of water for non-traditional irrigation would have to be accomplished by the sale or transfer of portions of the SMRID's licence, which would be subject to water conservation requirement found in the *Water Act*. However, the SMRID indicated that if the Licence Amendment had not been granted, such that it could not supply water users with water

for purposes other than traditional irrigation, it would still take its entire allocation and use this allocation for traditional irrigation. As a result, the Appellants view that the Licence Amendment can affect the volume of water taken is without foundation.

[105] Third, the change that is effected by the Licence Amendment is that some of the water granted to the SMRID under the Licence will now be used for purposes other than traditional irrigation. This will not change the volume of water taken from the river. The only thing that this could possibly change is the amount of water returned to the environment because of the change in use. (Different uses of water result in different amounts of water being returned to the environment.)

[106] While this concept was discussed at the hearing, the Board has no specific evidence before it as to what such an impact would be. The Board notes that most of the alternate uses specified in the Licence Amendment (i.e. municipal, agricultural, irrigation, management of fish, management of wildlife, habitat enhancement, and recreation) could have similar or greater return rates than traditional agriculture. The Board also notes that if there was an impact, whether it be an increase or decrease in the return rate, this impact would be spread over the length of the Oldman and South Saskatchewan rivers from Medicine Hat to Lethbridge. No impact would occur in the Waterton, Belly and St. Mary rivers, or in Lethbridge where most of the Appellants live. In the end, the Board believes that based on the information that it has before it, such an impact is speculative.

[107] Finally, the Appellants also advanced the argument that they are opposed to the policy of allowing an irrigation district to provide water to users for purposes other than irrigation. They argue that the Licence Amendment is an "inappropriate subdelegation of authority from Alberta Environment to the SMRID" and that it "displaces Alberta Environment's stewardship responsibilities concerning this natural resource and moves the SMRID into the role of a water broker." They also argue that the SMRID's Licence is not in good standing (the Appellants say that the SMRID was providing water for non-irrigation purposes prior to the Licence Amendment being issued) and that this should prevent the SMRID from obtaining a Licence Amendment. While these matters may possibly have been valid concerns to present at a substantive hearing of these appeals, none of these arguments provide a basis upon which to finding that the Appellants are directly affected.

[108] The Board concludes that on the factor of proximity alone, none of the Appellants - SAEG as an organization, the Individual Member of SAEG, Mr. Jericho, nor Ms. Bradley – have a sufficient connection to the Licence Amendment to be considered directly affected. As a result, both Notices of Appeal must be dismissed.

[109] The Board notes that the Appellants have advanced an argument that if they cannot appeal the decision, then no one would be able to and on this basis they should granted standing. Such an argument does not demonstrate that the parties are directly affected and the Board does not believe it is correct. If members of the SMRID filed appeals with the Board, with sufficient evidence there is a good possibility they may be directly affected as they own and farm land within the areas that could be affected by this decision and their apportionment of water could arguably be affected by the change in the purpose. The Board was very interested in hearing from Mr. Walker, who is an irrigator, and asked for him to be present at the Preliminary Meeting to determine if he fell within this group. However, he withdraws water from the Old Man River, upstream of Lethbridge. Therefore, his water supply is not affected by the Director's decision and the Licence Amendment does not directly affect him.

## E. Southern Alberta Environmental Group

### 1. Directly Affected – SAEG as an Organization

[110] There are two pivotal cases in which the issue of a group filing an appeal was addressed - *Hazeldean*[69] and *Graham*.[70] In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. Two other appeals were also received in the *Hazeldean* case, the first on behalf of an individual and an environmental association, and the second from an individual. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

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[69] *Hazeldean Community League* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.)

[70] *Graham* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection*, (1996) 20 C.E.L.R. (N.S.) 287 ("*Graham*"). This case was judicially reviewed and then taken to the Court of Appeal. See *Graham* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1997), 22 C.E.L.R. (N.S.) 141 (Alta. Q.B.) and (1997) 23 C.E.L.R. (N.S.) 165 (Alta. C.A.).

[111] In *Hazeldean*, the Board stated:

> "The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.
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> Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them."

[112] The group in *Hazeldean* showed the Board who the members were and provided the results of the survey that was taken to support their position. The major factor in accepting the *Hazeldean* group was that individual members of the group would probably have been determined directly affected since they lived in close proximity to the project.

[113] The *Graham* case involved appeals filed by three organizations. Mr. Graham filed his appeal on behalf of the Alberta Trappers Association. The other two organizations that appealed were the Lesser Slave Lake Indian Regional Council and the Toxics Watch Society (which later withdrew its appeal). The appeals related to an approval granted to the hazardous waste treatment facility located at Swan Hills. In *Graham*, the Board ruled that only one

individual represented and specifically identified by one of the organizations was directly affected. This individual, Mr. Charlie Chalifoux, was a trapper that regularly trapped adjacent to the facility. The appeal proceeded accordingly.

[114] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 115 of the *Water Act*, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced that the majority of the individual members of the organization are individually and personally impacted by the project.

[115] It is also important for appellants to realize that if they can meet the directly affected test, they can have an organization or association represent them if they wish. However, they also must be aware the evidence and arguments permitted by the Board will be limited to the issues as defined by the Board, and these are determined by the concerns expressed in the Notices of Appeal. A group, if they are representing an individual, cannot argue its own agenda.

[116] In assessing the directly affected status of the members of SAEG, the Board reviewed the membership list as well as the information provided with the Notice of Appeal, the various affidavits, and the submissions for the Preliminary Meeting.

[117] The Notice of Appeal filed by SAEG indicates it was filed on behalf of Mr. Jericho and SAEG. Specifically, the Notice of Appeal, signed by Mr. Jericho, states that is filed "…on behalf of myself and the Southern Alberta Environment[al] Group…." Attached to the Notice of Appeal was a membership list listing 72 members, and a document signed by 26 of the members that "…support the 'Notice of Appeal' filed by the Southern Alberta Environment[al] Group..."[71]

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[71] See: Notice of Appeal, Appeal No. 03-145. The members of SAEG who indicated that they supported the Notice of Appeal were: Mr. William M. Brown, Ms. Sylvia A. Campbell, Mr. Klaus Jericho, Ms. G.M. Buchanan, Mr. E.V. Buchanan, Mr. Dave Kalmring, Mr. Reg Ernst, Mr. Dean Cofell, Ms. Debby Gregorash, Ms. Shirley Anderson, Mr. Bob Anderson, Ms. Marketa McMillan, Ms. Frances Hiscocks, Ms. Cheryl Fujikawa, Mr. Don C. Ferguson, Ms. Rae Firth, Ms. F.L. Cofell, Ms. Nancy Bateman, Ms. Irena Woss, Ms. Susan Lingle, Ms. Diana Williams, Ms. Cecily M. Smith, Ms. L. Doreen Wilkie, Ms. Ann Ceasar, Mr. Gerald Wright, and Ms. Marion

[118] As part of Ms. Bradley's affidavit, filed on behalf of SAEG, a number of letters were attached from various members of SAEG.[72] She submitted a supplemental affidavit on April 7, 2004, with additional letters from SAEG members attached.[73]

[119] Based on an updated membership list provided by SAEG dated March 26, 2004, the organization has 77 members. Before the Board can accept SAEG as directly affected, it has to prove to the Board that over half of its *individual* members are directly affected. Some of the members live in Calgary and British Columbia, clearly outside of the area that could be directly affected. Thirty-three members and two non-members provided letters and affidavits, which is below the 50 percent required for the Board to even consider the group. This is without considering the directly affected status of the individuals or the admissibility of the letters submitted. Even if the Board accepted all the letters and affidavits submitted, there still was insufficient evidence to show how more than half of the members are individually directly affected. It is not enough for a group to show that more than half of its membership supports the filing of an appeal; the group has to be able to show that more than half of its membership is *directly affected* by the Director's decision.

[120] In the Board's letter dated March 17, 2004, the Board stated that it wished to receive evidence from *each* of the individual appellants with respect to their directly affected status. The Board noted the number of individual appellants and requested the evidence be submitted in affidavit format. This clearly indicates the need for each individual member of the group, in this case SAEG, to provide evidence on how they, as individuals, are directly affected by the Director's decision. The Board repeated the need for individual affidavits in its letter dated March 25, 2004, where it stated "…the Board is looking for personal information from the individual members of the Group and therefore an affidavit from each of these individuals is

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Wright.

[72] See: Appellants' submission, dated March 26, 2004, Affidavit of Ms. Cheryl Bradley. The attached letters were from: Ms. Shirley and Mr. Bob Anderson, Mr. Wm. M. Brown, Ms. F.L. Cofell, Ms. Cheryl Wyn-Evans Fujikawa, Ms. Debby Gregorash, Ms. Susan Lingle, Mr. Douglas B. Miller, Ms. Anne W. Miller, Ms. Sheila Petherbridge and Mr. D.L. Petherbridge, Ms. Joan Rodvang and Mr. Ron McNeil, Ms. Cecily Smith, Ms. Janet Walker, Mr. Ken Walker, Dr. and Ms. A.R.F. Williams, Mr. David Sheppard, Mr. Edward and Ms. Geraldine Buchanan, Mr. Klaus Jericho, Mr. Cliff Wallis, Ms. Marion S. Wright, Mr. Gerald A Wright, Ms. Judy Huntley, and Ms. Sylvia A. Campbell.

[73] See: Appellants' submission. Additional letters were submitted on April 2, 2004, from: Mr. Reg Ernst, Ms. Jean Rae Firth, Ms. Nicola Miller, Mr. Peter Harris, and Mr. Robert Campbell. Ms. Bradley included these letters as part of her Supplemental Affidavit as well as letters from Ms. Irena Woss and Mr. Ralph Cartar.

required." What the Board needed to know from SAEG, as it does from any group filing an appeal, is how each individual member is directly affected.

[121] It has been the exception rather than the general rule to have a group deemed to be directly affected. One exception has been the Lake Wabamun Environmental Protection Association ("LWEPA"). LWEPA has appeared before the Board in relation to issues occurring at Lake Wabamun, west of Edmonton. This association "…was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which the (*sic*) many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process."[74] In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

[122] The Appellants argued SAEG is similar to the Lake Wabamun Environmental Protection Association. The Board disagrees. LWEPA was formed in order to engage in the regulatory process. The membership is confined to the individuals who live around Lake Wabamun, an area surrounded by intense industry. It is obvious all the residents within this confined area around Lake Wabamun would be affected by the Director's decision in relation to the industry in the area. Here, there is not enough information regarding the membership of SAEG to draw any similar conclusions. From what was presented to the Board, SAEG is concerned about a large area, including three river systems and Southern Alberta in general. This is too broad of an area to draw a nexus between the project approved and the individual members of SAEG. The Board does, however, recognize SAEG's interest, involvement, and efforts regarding environmental issues in Southern Alberta generally.

[123] As SAEG has not provided sufficient evidence to shown that the Licence Amendment will affect the majority of its members, the Board dismisses the appeal of SAEG.

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[74] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation)* Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

2. Directly Affected – Individual Members of SAEG

[124] As has been discussed, the Board is of the view that the Notice of Appeal and Statement of Concern in this matter were filed on behalf of SAEG as an organization. However, the Board is of the view that even if the Notice of Appeal and Statement of Concern had been filed on behalf of the Individual Members of SAEG, the appeal should still be dismissed as the Board has concluded that they are not directly affected by the Licence Amendment.

[125] In determining whether any of the individual members of SAEG were directly affected, the Board looked at the Appellants' addresses to assess where they lived in relation to the project. None of the Appellants own property along the Oldman River downstream of where the SMRID receives its water or uses the water for irrigation purposes. Ms. Huntley lives in Lundbreck, which is located west of Pincher Creek, considerably upstream of the influence of the SMRID and therefore the Licence Amendment does not affect her. Mr. Walker indicated that he lives upstream from Fort MacLeod, which also puts him considerably upstream of the influence of the SMRID and therefore the Licence Amendment also des not affect him. As discussed previously, this adds an element of remoteness and limits the possibility of the members to be directly affected.

[126] All of the Individual Members indicated that they lived in the Lethbridge area (most have municipal Lethbridge addresses) and used the Waterton, Belly, St. Mary and Oldman rivers, and surrounding riparian areas for various forms of recreation, including walking, hiking, canoeing and boating, fishing, swimming, nature appreciation, photography, artistic inspiration, viewing wildlife, and other aesthetic purposes. All of the Individual Members expressed concerns about low water levels in these rivers, particularly the Waterton, Belly and St. Mary rivers, and the impact this is having on the aquatic ecosystem and riparian areas. In the Board's view, these uses and concerns are not sufficient to find that the Individual Members are directly affected. As the Board has already discussed, the Board does not see a proximate connection between these uses and Licence Amendment.

[127] Further, the Board is of the view that the type of concerns being expressed by the Appellants are part of the generalized interest of all Albertans in protecting the environment.[75]

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[75] See: *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995),

Support for this conclusion can be found in the affidavit of Ms. Sylvia Campbell where she states: "I believe I and other citizens will be deprived of the opportunity to enjoy the rich diversity of wildlife now available on a walk in the valley." Under the *Water Act* and EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision.[76] If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. In order to give meaning to this test, the Board is of the view that the interests expressed must be beyond the generalized interests of all Albertans. The generalized interests identified by these Appellants in this case are not specific enough to make a finding of directly affected.

[128] This conclusion is consistent with the *Blodgett*[77] case, where the Board held:

> " The evidence that has been presented to the Board with respect to the importance of the Big Lake area to Ms. Blodgett has been powerful. In over 800 appeals, it may very well be that Ms. Blodgett has been the most eloquent and moving in presenting a case that she is personally and emotionally directly affected by the decision of the Director. The Board has no doubts whatsoever about her commitment and the importance to her of protecting the environment generally and in protecting Big Lake in particular. The Board commends her for this work. The Board also has no doubt that Ms. Blodgett regularly and consistently uses Big Lake area and that the natural environment in general and the Big Lake area in particular is the inspiration for Ms. Blodgett's artistic endeavours. We wish more Albertans had her love and commitment to the environment.
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> However, at law, the Board does not accept that, in this case, this is sufficient for her to be directly affected by the Director's decision to issue this Approval within the meaning of section 115(1)(a)(i) of the *Water Act*."[78]

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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.).

[76] The Board notes that in their written submissions, the Appellants argued the criteria established by the Board to assess the directly affected status of parties should be different based on whether the appeal is under EPEA or the *Water Act*. The Board does not agree with this view.

[77] *Blodgett* v. *Director, Northeast Boreal Region, Regional Services, Alberta Environment* re*: Genstar Development Company* (28 December 2001), Appeal No. 01-074-D (A.E.A.B.).

[78] *Blodgett* v. *Director, Northeast Boreal Region, Regional Services, Alberta Environment* re*: Genstar Development Company* (28 December 2001), Appeal No. 01-074-D (A.E.A.B.) at paragraphs 48 and 49.

As with Ms. Blodgett, the Board commends the members of the Southern Alberta Environmental Group, and particularly Ms. Bradley and Mr. Jericho, for their involvement in environmental issues, however, this involvement does not provide a basis for a directly affected finding.

[129] All of the Individual Members oppose the policy of allowing an irrigation district to supply water for uses other than traditional irrigation, and many expressed concern about water being allocated to a "special interest group" (referring to the SMRID). As previously indicated, policy concerns such as these do not form the basis for a directly affected finding.

[130] A number of the Individual Members also expressed concerns relating to the volunteer and professional involvement in the Waterton, Belly, St. Mary and Oldman rivers. Mr. Brown, Ms. Lingle, and Ms. Wyn-Evans Fujikawa, all advanced concerns similar to Ms. Bradley, arguing that they were professionally involved in these rivers, and on that basis they should be granted standing. With respect, such involvement is also to generalized to be the basis for a directly affected finding. The professional involvement merely shows that they are interested in the issue. No evidence was presented as to how their professional involvement will be impacted by this Licence Amendment. The type of evidence that would required would be like that found in the *Gadd*, where the Appellant's eco-tourism business could possibly be impacted by the authorization issued in that case.[79]

[131] Finally, in the affidavit filed by Ms. Wyn-Evans Fujikawa, she indicates that as a resident of Lethbridge, her drinking water comes from the river system. The Board notes that a number of the Individual Members are residents of Lethbridge, and as a result, their drinking water supply also comes from the river system. In the Board's view this argument also fails because of proximity. The water utility in the City of Lethbridge provides the Appellants within the City with water. If the water utility were to file an appeal, they may have a sufficient nexus to be found to be directly affected. However, the Board does not accept that the water utilities customers have a sufficient nexus to be found to be directly affected. It is highly unlikely that the water utilities customers will be able to detect any change in their water supply as a result of the Licence Amendment.

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[79] Preliminary Motions: *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.) at paragraphs 70 to 72.

[132] In conclusion, even if the Board were to accept that an appeal had been filed by the Individual Members of SAEG, it would still come to the conclusion that they are not directly affected in this case.

**F. Ms. Cheryl Bradley**

1. Directly Affected

[133] Ms. Bradley stated she spends much of her leisure time "…canoeing and walking in the river valleys in southern Alberta as well as enjoying water-based parks in the City of Lethbridge, including Henderson Lake."[80] She submitted she is affected by the Director's decision since she is a professional biologist interested in conservation of riparian environments and water quality. Ms. Bradley listed the number of organizations she has been involved in, including the Oldman River Basin Advisory Committee, the Oldman River Basin Water Quality Initiative, and the Urban Beneficial Management Practices Group. She also stated she was a resident of Lethbridge and uses the water from the Oldman River.

[134] Although the Board notes the concern Ms. Bradley has of the area, and commends her for her participation in the various water planning activities that she has identified, she has not identified any interest that would be affected in a manner beyond the generalized interest that all Albertans have in protecting the Environment. The interest that is affected must be specific, and she stated she uses the river valleys throughout Southern Alberta, an area that exceeds that of the St. Mary River Irrigation District.

[135] As stated, the Licence Holder will not be entitled to withdraw more water from the river system, and the rate and place of withdrawal is not changing. If the Licence Amendment was not issued, the water could still be withdrawn, but used for irrigation purposes only. The use and enjoyment of the riparian areas will not be affected by the use of the water under the Licence Amendment. Without being able to demonstrate an affect on the environment and her use of the environment, the Board cannot find Ms. Bradley directly affected by the Director's decision to issue the Licence Amendment.

2. Statement of Concern

[136] Under the *Water Act*, a person who wishes to amend an existing licence must apply to the Director for the amendment.[81] The person applying for the licence amendment is required by section 108 of the *Water Act* to advertise the fact that the application has been made, usually in a local newspaper having circulation in the area of the proposed project.[82] This is called the Notice of the Application. The Notice of the Application advises people who have

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80 See: Ms. Cheryl Bradley's letter, dated January 7, 2004.

81 Section 54(3) of the *Water Act* provides:

"An applicant for an amendment to a licence under subsection (1) must

(a) make an application in a form and manner satisfactory to the Director,

(b) submit the information required by the Director,

(c) pat the required fees, and

(d) provide notice of the application in accordance with Part 8."

82 Section 108(1) of the *Water Act* provides:

"An applicant

(a) for an approval,

(b) for a licence, …

shall provide notice of the application in accordance with the regulations."

The relevant portion of the *Water (Ministerial) Regulation*, A.R. 205/98 provides:

"13(1) For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

(a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;

(b) provide notice of the application, decision or order through a registry established by the Government for that purpose;

(c) provide notice of the application, decision or order through a telecommunication system or electronic medium;

(d) provide notice of the application, decision or order in The Alberta Gazette;

(e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;

(f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to

(i) any person determined by the Director, and

(ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;

(g) provide notice in any other form and manner considered appropriate by the Director."

In this case, the Director has the Licence Holder publish in two local newspapers for two days.

concerns with the proposed project (potential appellants) of the project and invites them to submit a Statement of Concern to the Director.[83] The Notice of Application in this case read:

> "Any person who is directly affected by the application may submit a statement of concern to: [the Director] within 30 days of the providing of this notice.... Failure to file statements of concern may affect the right to file a notice of appeal with the Environmental Appeal Board."[84]

[137] Once the Notice of the Application has been published, people who have concerns with the proposed amendment normally have 30 days to file a Statement of Concern. These timelines are specified by section 109(2) of the *Water Act* and must be adhered to. Section 109(2) of the *Water Act* provides:

> "A statement of concern must be submitted
>
> (a) in the case of an approval, within 7 days after the last providing of the notice, and
>
> (b) in every other case, within 30 days after the last providing of the notice,
>
> or within any longer period specified by the Director in the notice."

[138] The purpose of filing a Statement of Concern is twofold. First, it provides the Director with the filer's input into the decision that the Director must make. Second, the filing of a Statement of Concern preserves the filers right to appeal. Both of these rights are contingent on a Statement of Concern being filed and being filed on time.

[139] 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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83 Section 13(2)(d) of *Water (Ministerial) Regulation*, A.R. 205/98 provides:

"A notice with respect to an application under subsection (1) must contain … (d) a statement that a person who is directly affected by the application may submit a statement of concern to the Director within the time period as provided for by section 109(2) of the Act and set out in the notice…."

Section 109(1) of the *Water Act* provides:

"If notice is provided

(a) under section 108(1), any person who is directly affected by the application or proposed amendment, and

(b) under section 108(2), the approval holder, preliminary certificate holder or licensee,

may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment."

84 Director's Record at Tab 36.

> (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 …."

[140] The requirement to filing a timely Statement of Concern as a prerequisite to filing a Notice of Appeal has been previously dealt with by the Board under EPEA and the *Water Act*. The Statement of Concern and Notice of Appeal processes under EPEA are virtually identical to those under the *Water Act,* and therefore, the Board is of the view that the same principles should apply. In the case of *O'Neill*,[85] we held:

> "Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even where a statement of concern has not been filed – due to an extremely unusual case (e.g. directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O'Neill, refuses to answer Board questions and provide at least *some* evidence of the requisite statement of concern and its proper filing. His appeal cannot proceed." (Emphasis in the original, footnotes omitted.)

The Board has applied the principles outlined in *O'Neill* in a number of cases, resulting in the dismissal of Notices of Appeal where no Statement of Concern has been filed.[86]

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[85] *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (12 March 1999), Appeal No. 98-0250-D (A.E.A.B.) paragraph 14 ("*O'Neill*").

[86] *Grant and Yule* v. *Director, Bow Region, Natural Resources Services, Alberta Environment,* re: *Village of Standard* (15 May 2001), Appeal Nos. 01-015 and 016-D (A.E.A.B.); *St. Michael Trade and Water Supply Ltd.* v. *Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot Holdings* (17 July 2001), Appeal No. 01-055-D (A.E.A.B.); and *Warner et al.* v. *Director, Central Region, Regional Services, Alberta Environment*, re: *AAA Cattle Company Ltd.* (15 June 2002), Appeal No. 01-113 and 01-115-D (A.E.A.B.); *Dyck* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.).

The Board also dealt with this issue in *Bildson* v. *Acting Director, North East Slopes Region, Alberta Environmental Protection,* re: *Smoky River Coal Ltd.* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.). In his appeal, Mr. Bildson filed his Statement of Concern three weeks late, but the Director accepted it anyway and treated it as a valid Statement of Concern.

[141] In her January 15, 2004 letter to the Board, Ms. Bradley stated she signed the Statement of Concern "…on behalf of SAEG." She did not sign it on behalf of herself and SAEG, and there is nothing in the Statement of Concern to indicate it was submitted on behalf of the individuals, including herself. There is nothing in the Statement of Concern describing how she, personally will be affected.

[142] Without a filed Statement of Concern, the Board rarely accepts the Notice of Appeal. The filing of a Statement of Concern is a prerequisite to the filing of a Notice of Appeal, and unless the appellant can demonstrate special circumstances existed that prevented the filing of a Statement of Concern, the Board cannot accept the Notice of Appeal.

[143] Ms. Bradley was aware of the Statement of Concern process, and in fact, prepared and submitted the Statement of Concern on behalf of SAEG. It was at this time that she should have prepared a Statement of Concern on her behalf and submitted it to the Director, or at the very least indicated that the Statement of Concern was on behalf of herself as well as SAEG. Unfortunately, she chose not to submit an individual Statement of Concern, and the Statement of Concern filed on behalf of SAEG did not specify individual members of the group that were included. Therefore, the Board must dismiss the appeal of Ms. Cheryl Bradley for failing to submit a Statement of Concern.

3. Late Filed Appeal

[144] Section 116(1) of the *Water Act* provides:

> "A Notice of Appeal must be submitted to the Environmental Appeals Board
>
> (a) not later than 7 days after
>
> (i) receipt of a copy of a water management order or enforcement order, or
>
> (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from, or
>
> (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from."

Therefore, in the case of an amendment of a licence issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is 30 days. Ms. Bradley submitted her Notice of Appeal on January 6, 2004, 38 days after the legislated timeframe to submit appeals.

[145] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states:

> "The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so."

[146] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.[87] The onus is on the appellant to demonstrate to the Board that the time limit should be extended to allow the appeal.

[147] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for a water licence or an amendment to an existing water licence to go through an application process. Once a decision is made to issue or amend, or for that matter not to issue or amend, the licence, then there is an appeal period in which the applicant for the licence or anyone who is directly affected (and who filed a statement of concern) can file an appeal. The time limit in which an appeal must be filed is prescribed so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

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[87] See: Preliminary Motions: *Hanson et al.* v. *Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Dyck* v. *Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.); *Shennan et al.* v. *Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc*. (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association* v. *Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk* v. *Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al.* v. *Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44* v. *Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft* v. *Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.); *Town of Valleyview* v. *Director, Northern Region, Regional Services, Alberta Environment* (1 August 2003), Appeal No. 03-009-D (A.E.A.B.).

[148] Companies need to know that decisions that can affect the way they operate will not be susceptible to continuous change. If a right of appeal was allowed to exist for an indefinite period of time, uncertainty would be created that would make it impossible for a licence holder to properly plan its operations and to ensure they have a stable water supply. The time lines included in the legislation, and the certainty they create, balance the interests of all the parties.

[149] The Board examined whether Ms. Bradley provided sufficient reasons to grant an extension of time to file an appeal. To allow an extension of time, an appellant must show that extenuating or special circumstances existed that prevented her from filing within the legislated timeframe. In her response to the Board's letter asking for reasons why an extension should be granted, Ms. Bradley stated she was outside of the country at the time the Licence Amendment was granted, but she responded to the Board shortly after returning back. This does not demonstrate the special circumstances that are required for the Board to extend the time period.

[150] Section 2 of the *Water Act* anticipates Alberta citizens to have a shared responsibility in providing advise regarding water management and conservation. Ms. Bradley was aware of the application as she did submit a Statement of Concern on behalf of SAEG. An individual who has concerns regarding an impending application should be even more diligent in seeking additional information regarding the application, including making inquiries as to when the Licence Amendment might be issued.

[151] Ms. Bradley was well aware of the application and the possibility the Licence Amendment might be issued at any time. Even though she was not certain of when the amendment would actually be issued, she did have the foresight to discuss the matter with the SAEG prior to her departure. Ms. Bradley certainly had the opportunity to leave instructions with someone, or she could have provided a contact number, in the event the Licence Amendment was issued prior to her return. In that Ms. Bradley was the main contact for SAEG with respect to this issue, it is apparent by the filing of the other Notice of Appeal by Mr. Jericho that some sort of instructions had been left, these instructions could have easily included filing a Notice of Appeal on behalf of Ms. Bradley.

[152] In his oral evidence, the Director stated he decided to issue the Licence Amendment when it appeared the community was drifting apart instead of coming together on the issue, and the Appellants had started to hold the discussions through newspaper articles instead of with the Director and the SMRID.[88] The Appellants were aware other stakeholders in the area were awaiting the Director's decision as well.[89] This was also a signal to Ms. Bradley that diligence was required to remain informed on the progress of the application.

[153] Ms. Bradley had the opportunity to participate in the application process and was well aware of what was required to file an appeal. She did not make the required effort to ensure her Notice of Appeal was filed within the specified time frames. As a result, Ms. Bradley has not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal must therefore be dismissed.

## G. Mr. Klaus Jericho

[154] As stated above, the Board finds it difficult to find the Appellants directly affected. The amount of water that can be withdrawn will not change with the Licence Amendment, and therefore, any use of the area will not be affected.

[155] Mr. Jericho stated he uses the "…river valleys and riparian areas for recreational activities including hiking, canoeing, bird watching and flora and fauna observation and identification."[90] As has been discussed, these activities are not different than what any Albertan can use the area for; thus, he has not demonstrated an interest and impact over and above that of all Albertans.

[156] Therefore, the appeal of Mr. Klaus Jericho must also be dismissed.

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88 See: Director's Record at Tab 14.

89 See: Director's Record Tab 18, Letter from Alberta Environment to Ms. Cheryl Bradley, dated October 3, 2003, in which it was stated: "A response would be appreciated within 10 day[s] however if you some additional time please let me know. We receive regular requests from stakeholders in the basin that a decision be made on this issue."

90 Appellants' submission, dated April13, 2004, at paragraph 25.

## VI. ISSUES TO BE HEARD AT A HEARING

[157] Under section 95 of EPEA, the Board can determine the issues that will be heard at a hearing, and once determined, no other matters will be considered by the Board. Sections 95(2), (3), and (4) of EPEA provide:

> "(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of an appeal….
>
> (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
>
> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

[158] As the Board has dismissed the appeals, no hearing will be required and therefore no issues have to be determined.

## VII. STAY APPLICATION

[159] Filing an appeal with the Board does not automatically stay the decision being appealed. Sections 97(1) and (2) of 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."

[160] 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 above, the Board has concluded the Appellants did not file valid appeals, and therefore are not entitled to a Stay. As a result, the Board need not consider this issue further.

## VIII. CONCLUSION

[161] For the foregoing reasons, the Board finds that SAEG as an organization, the Individual Members of SAEG, Mr. Klaus Jericho, and Ms. Cheryl Bradley are not directly affected by the Licence Amendment. In addition, the Board finds that the Statement of Concern that was filed, which is a prerequisite to filing a valid Notice of Appeal, was filed on behalf of SAEG as an organization only. The Board also finds that the Statement of Concern was not filed by Ms. Bradley on her own behalf. Further, Ms. Bradley's Notice of Appeal was filed late and there are no extenuating circumstances to warrant an extension of the filing period.

[162] Therefore, the Board dismisses the Notices of Appeals filed by Mr. Klaus Jericho, on behalf of himself and the Southern Alberta Environmental Group (03-145) and by Ms. Cheryl Bradley (03-154).

Dated on November 4, 2004, at Edmonton, Alberta.

- *original signed by* -

Dr. Frederick C. Fisher, Q.C.
Chair

- *original signed by* -

Mr. Al Schulz
Board Member

- *original signed by* -

Dr. James Howell
Board Member

**Appendix 1 – "Map of Alberta Environment's Oldman River Basin Water Management Infrastructure" – Exhibit 1.**