

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – December 17, 2007

Date of Decision – May 12, 2008

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

-and-

IN THE MATTER OF appeals filed by Westridge Utilities Inc. with respect to *Water Act* Licence No. 00240846-00-00 issued to the Municipal District of Rocky View No. 44 and *Water Act* Licence No. 0024847-00-00 issued to Her Majesty the Queen in Right of Alberta, by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.).

**PRELIMINARY MOTIONS HEARING
BEFORE:**

Dr. Steve E. Hrudehy, Chair,
Mr. Jim Barlishen, Board Member, and
Mr. Eric O. McAvity, Q.C., Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Denise Black, Board
Secretary; Ms. Marian Fluker, Associate
Counsel; and Mr. David Burns, Student-at-
Law.

APPEARANCES:

Appellant: Westridge Utilities Inc., represented by Mr.
John Gruber.

Licence Holders: Municipal District of Rocky View No. 44,
represented by Ms. Joanne Klauer, Brownlee
LLP; and Her Majesty the Queen in Right of
Alberta.

Director: Mr. Kevin Wilkinson, Director, Southern
Region, Environmental Management, Alberta
Environment, represented by Ms. Charlene
Graham, Alberta Justice.

Other: Mr. Jim Webber, Western Irrigation District.

WITNESSES:

Appellant: Mr. John Gruber, President, Westridge Utilities
Inc.

Licence Holder: Mr. Rob Coon, Chief Administrative Officer,
Municipal District of Rocky View No. 44.

Director: Mr. Kevin Wilkinson, Director, Southern
Region, Environmental Management, Alberta
Environment.

EXECUTIVE SUMMARY

Alberta Environment issued a licence to divert water to the Municipal District of Rocky View No. 44, authorizing the operation of a works and the diversion of up to 2,220,268 cubic metres of water annually for commercial, municipal, and recreational purposes near Balzac, Alberta. Alberta Environment also issued a licence to Her Majesty the Queen in Right of Alberta allocating a volume of 246,696 cubic metres of water annually in the Bow River for the implementation of a water conservation objective. The licences are the result of a transfer of water from the Western Irrigation District to the Municipal District of Rocky View No. 44 with a 10 percent holdback transferred to Her Majesty the Queen in Right of Alberta.

The Environmental Appeals Board received a Notice of Appeal from Westridge Utilities Inc. The Board held a Preliminary Motions Hearing to hear submissions on the issue of whether Westridge Utilities Inc. was directly affected and should be granted standing.

The Board found Westridge Utilities Inc. was not directly affected, because its concerns were not based on any environmental impact that would affect it and its concerns were too speculative in nature to establish the necessary connection to the licences under appeal. No effect arising from these licences were apparent, because the licences did not result in any change to the volume, rate, location, or time of diversion of water, and all the terms and conditions were the same as contained in the licence held by the Western Irrigation District. The intent of the 10 percent holdback through the licence issued to the Her Majesty the Queen in Right of Alberta is to create an improvement by increasing flow available to the Bow River, thereby potentially reducing the likelihood of an environmental impact affecting any licence holder in the basin. As a result, the Board dismissed the appeals.

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I. BACKGROUND

[1] On September 26, 2007, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), issued Licence No. 00240846-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Municipal District of Rocky View No. 44 (the “Licence Holder” or the “MD”) authorizing the operation of a works and the diversion of 2,220,268 cubic metres of water annually from the Bow River for commercial, municipal (subdivision water supply), and recreational (entertainment complex) purposes in the Balzac area in the Municipal District of Rocky View No. 44, Alberta. The Director also issued Licence No. 00240847-00-00 under the *Water Act*¹ to Her Majesty the Queen in Right of Alberta for a volume of 246,696 cubic metres of water annually in the Bow River downstream of SE 13-24-01-W5M for the implementation of a water conservation objective. The Licences are the result of a transfer of water from the Western Irrigation District (“WID”) to the Municipal District of Rocky View No. 44 with a 10 percent holdback transferred to Her Majesty the Queen in Right of Alberta.

[2] On October 26, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Westridge Utilities Inc. (the “Appellant” or “Westridge”) appealing the Licences.

[3] On October 31, 2007, the Board wrote to the Appellant, the Licence Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the record (the “Record”) relating to the Licences, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received on November 20, 2007.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board (“AEUB”) asking whether this

¹ The arguments presented to the Board at the Preliminary Motions Hearing were with respect to Licence No. 00240846-00-00 issued to the MD. Therefore, in this decision, this licence will be referred to as the “Licence” and any reference to both licences issued will be referred to as the “Licences.”

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

[5] On November 5, 2007, the Appellant indicated its intent to apply to the Court of Queen's Bench for an order of certiorari with respect to the Director's decision to approve the transfer of water allocation from the WID to the Licence Holder and the issuance of the Licences. The Board responded on November 6, 2007, that it "...takes no position on the judicial review and will not participate."

[6] On November 6, 2007, the United Horsemen of Alberta notified the Board it had an interest in the appeals.

[7] On November 8, 2007, the Director asked the Board to address the issue of standing, and if a hearing is held, to define the issues under appeal.

[8] On November 14, 2007, the Board notified the Participants that a Preliminary Motions Hearing would be held on December 5, 2007, to determine the standing of the Appellant and determine the issues to be heard at the hearing, should one be held. The Board advised that written submissions for the Preliminary Motions Hearing were due by November 30, 2007.

[9] On November 19, 2007, the Appellant wrote to the Board, arguing that the Director's motion regarding standing did not meet the requirements of Rule 10 of the Board's Rules of Practice.² It argued the motion did not set out the grounds upon which the Director believed the Appellant did not have standing, state the issues the Director believed were not properly before the Board, and provide the disposition sought by the Director.

[10] On November 20, 2007, the Board confirmed to the Participants that it would like to proceed to a Preliminary Motions Hearing as scheduled on December 5, 2007, to determine if the Appellant was directly affected by the Licences and to determine the issues for a hearing, should one be held. The Board indicated the details of the Director's motion would be provided prior to the Preliminary Motions Hearing in his written submission.

[11] The Director provided his written submission on November 23, 2007. On the same date, the Licence Holder advised the Board that it opposed any request by the Appellant to

² Rule 10 of the Board's Rules of Practice provides: "All motions shall state the specific relief requested and

delay the Preliminary Motions Hearing, as the uncertainty created by the appeal was impacting development projects in the MD.

[12] On November 22, 2007, the Appellant expressed concern that the Preliminary Motions Hearing was proceeding as scheduled, because it believed the Director had not complied with Rule 10 of the Board's Rules of Practice. The Appellant further stated it would have difficulty complying with the submission deadlines because it was preparing an application before the AEUB. The Board provided its response on November 23, 2007, indicating that the motion filed by the Director complied with Rule 10 of the Board's Rules of Practice and that the motion was properly before the Board. The Board indicated the Director had filed his complete written submission in preparation for the Preliminary Motions Hearing, and as a result, any concerns the Appellant may have had about the substance of the Director's motion had been addressed. The Board confirmed the Preliminary Motions Hearing would be held on December 5, 2007, but it would limit the matters to be addressed to the question of whether the Appellant was directly affected.

[13] On November 26, 2007, the WID provided information relating to the water transfer process. The information had been provided to its water users when the water transfer was being considered.

[14] On November 27, 2007, the United Horsemen of Alberta notified the Board of its intent to apply for intervenor status should the matter proceed to a hearing and expressed concerns about any delays in considering these appeals.

[15] On November 27, 2007, the Appellant wrote to the Board requesting a reconsideration of the Board's decision not to grant a new date for the Preliminary Motions Hearing. In response, the Board notified the Participants on November 28, 2007, that it had granted the Appellant's request to postpone the Preliminary Motions Hearing. The Board advised the Participants the Preliminary Motions Hearing would now be held on December 17, 2007, and the only matter that would be addressed would be whether the Appellant is directly affected by the Licences under appeal. The Board also extended its deadline for the written submissions to December 12, 2007.

the basis thereof. Except as provided below, they shall be made in writing.”

[16] The Licence Holder provided its submission on November 30, 2007, and the Appellant's submission was provided on December 12, 2007. The Director's submission was provided on November 23, 2007.

[17] On December 12, 2007, Ivanhoe Cambridge Inc. requested to intervene in the appeals and participate in the proceedings should the matter proceed further.

[18] The Preliminary Motions Hearing was held on December 17, 2007. On December 20, 2007, the Board notified the Participants that the appeals were dismissed with reasons to follow. The reasons are as stated below.

II. SUBMISSIONS

A. Appellant

[19] The Appellant argued the Board's decision in *Walsh and Abrams v. Director, Southern Region, Regional Services, Alberta Environment*,³ indicates the Board is applying a liberal application to the issue of standing, because there is no basis for distinguishing the appellant, Walsh, from any other water user. The Appellant argued that, based on the *Walsh* decision, directly affected status could extend to thousands of people.

[20] The Appellant argued the case law submitted by the Director and the Licence Holder is instructive with respect to standing as it applied prior to August 2006, when the South Saskatchewan River Basin Management Plan (the "SSRB Management Plan") was approved by Cabinet.

[21] The Appellant argued the moratorium on issuing new water licences created in the SSRB Management Plan formally turned water into a commodity in the South Saskatchewan River Basin. The Appellant stated the transfer between the WID and the Licence Holder is a consequence of a transaction in the "Southern Alberta water market," where the decision to buy or sell is based solely on price.

[22] The Appellant stated there presumably are other licences in the South Saskatchewan River Basin that are not using all of the water allowed in their licences, and there

³ See: Preliminary Motions: *Walsh and Abrams v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (02 May 2007), Appeal Nos. 06-071 and 072-ID1 (A.E.A.B.) ("*Walsh*").

are entities that need the water but have no access to the previous mechanism of making an application to Alberta Environment for a new water licence. The Appellant argued that as a result of water becoming a commodity, those who require additional or new water allocations (for example water utilities such as Westridge) must become participants in the water commodity market.

[23] The Appellant stated water is a resource of great value owned by all Albertans. The Appellant argued that now there is a market for water that is regulated by Alberta Environment pursuant to the *Water Act* and the SSRB Management Plan, the manner in which it is regulated directly affects all participants.

[24] The Appellant argued a commodity market fosters speculation in the commodity even though the Director indicated that speculation is not a desired result of a water market. The Appellant stated there is little information available on the water market such as who is buying and selling water and at what price. The Appellant also stated there is little information with respect to pricing mechanisms, regulatory oversight of transactions, water treatment and distribution issues, and transaction costs. The Appellant believed it would take time for the water market to grow and develop and for the necessary regulatory and legislative framework to be created and evolve as conditions change.

[25] The Appellant stated two fundamental policies underlying the *Water Act* are "...the creation of mechanisms for the financial disposition of water and the prevention of speculation resulting therefrom."⁴

[26] The Appellant argued it meets the test for standing as it currently exists and it submitted the test must be expanded to include those potentially affected by trades in water.

[27] The Appellant explained it is an investor-owned water utility operating within the Municipal District of Rocky View, and it is licenced to divert water to provide potable water to its customers. It stated it has significant infrastructure, including a treatment plant and reservoirs. In comparison, the Appellant explained the MD did not have a licence to divert surface water for the purpose of providing potable water, and the MD does not provide, nor does

⁴ Appellant's submission, dated December 12, 2007, at page 5.

it have the infrastructure to deliver potable water to any communities in the Balzac area. The Appellant stated the MD is not subject to rate regulation by the AEUB as is Westridge.

[28] The Appellant noted the WID was licenced to divert 160,400 acre feet of surface water, and in 2000 and 2001, the WID used all of its licenced quantity.

[29] The Appellant argued it is directly affected as a direct and natural consequence of the SSRB Management Plan, because the Director must consider, when deciding whether a transfer should be approved, “Existing, potential and cumulative effects on household users, traditional agriculture users and other higher and lower priority licensees.”⁵ [Emphasis omitted.]

[30] The Appellant argued the SSRB Management Plan recognized the potential for a direct effect on lower priority licensees when a transferee is inserted in a higher priority position, and the effect is magnified when the basin is subject to a moratorium. The Appellant argued that in such circumstances, if a lower priority licensee files a Statement of Concern that it is directly affected and its concerns must be dealt with as mandated in the SSRB Management Plan. The Appellant submitted this did not occur in this case. The Appellant explained it filed a Statement of Concern on September 20, 2007, and the Licence Holder responded, stating the Appellant’s concerns were procedural in nature. According to the Appellant, the Director responded, indicating how the Appellant’s environmental concerns were being addressed. The Appellant argued this shows its Statement of Concern was not addressed, and the letter it received from the Director was intended for another person.

[31] The Appellant argued the Director misdirected himself in addressing the issue of whether a lower priority licensee was directly affected, because the Director must consider potential effects as well as actual effects. The Appellant stated the Director has no discretion to ignore potential impacts on lower priority licensees, and had the Director correctly addressed the issue, he would have concluded that Westridge was directly affected.

[32] The Appellant argued the Director failed to consider water quality, including public health and safety and assimilative capacity, because no material was filed with the transfer application which would permit such an assessment. The Appellant argued the Director must

⁵ Appellant’s submission, dated December 12, 2007, at page 6.

assess whether the proposed transferee has demonstrated in the application that it has the ability to provide drinking water in compliance with Alberta Environment standards.

[33] The Appellant stated it supplies potable water within the Municipal District of Rocky View and its reputation could be harmed if there is a potential for the perception that water is being supplied as drinking water when the supplier has not demonstrated that it is capable of treating the water to Alberta Environment standards. The Appellant stated this concern is not merely speculative because, in the past, it has been associated with water providers allegedly unable to meet safe drinking water standards. The Appellant argued that because no information was provided in the application regarding the infrastructure to safely treat and distribute the water, there could be potential public concerns with respect to potable water quality in the Municipal District of Rocky View, which would negatively impact Westridge. The Appellant argued the Director does not have the jurisdiction to approve the transfer unless the water quality issue is considered.

[34] The Appellant argued the transfer will likely result in speculation in water, which will increase the cost of water that Westridge may have to purchase in the future. The Appellant stated the MD has no current use for the transferred water, no infrastructure to treat and distribute any portion of the water to the Balzac area, and most of the projects stated in the application as being the reason for the diversion have not been approved by the planning department. The Appellant stated that water banking leads to speculation in water allocation, which is contrary to the SSRB Management Plan. The Appellant argued there is no information in the application to suggest the transferred water will likely be used within three years from September 2007, thereby giving rise to speculation in water.

[35] The Appellant stated that water is a scarce resource and its scarcity will push the cost up, negatively affecting Westridge. The Appellant explained that, because of the South Saskatchewan River Basin moratorium, it will be compelled to participate in the water market place in order to service expansions in the service area. The Appellant argued the increased cost of its water service could cause developers to choose to invest their capital outside the Westridge service area, thus inhibiting the potential for expansion.

[36] The Appellant stated the priority system applies to a river basin rather than to individual rivers, so when water rationing is required in a river basin, junior licences in that basin are at a greater risk of being rationed than a senior licence, even if the senior licence is for a different river. Therefore, according to the Appellant, the communities receiving potable water pursuant to the transfer will have a lower risk of rationing or restrictions than communities served by Westridge.

[37] The Appellant argued that the issue of whether it is harmed because of its geographic location is not properly before the Board and that this location issue should be dealt with at a substantive hearing of the appeal itself.

[38] The Appellant argued that it meets the test for standing as it is currently framed, but the Board needs to respond to changing economic and market conditions. It submitted that "...where the government has caused water to become a commodity and established a market for same, a party who is potentially negatively impacted by a transaction in that market is entitled to standing."⁶ The Appellant stated that, if there are to be rules and guidelines with respect to trading water as a commodity, the public interest would be served by the Board undertaking a full hearing where a party, such as itself, is directly affected.

B. Licence Holder

[39] The Licence Holder explained it submitted an application to the Director to transfer 2,000 acre-feet of water to the MD from an existing 160,400 acre-feet allocation held by the WID from the Bow River. The Licence Holder stated there is no change in the point of diversion and the rate of diversion is pro-rated to the WID licence to avoid any overall change in the rate of diversion.⁷

[40] The Licence Holder submitted the Appellant is not directly affected because the Licences neither impact the Appellant's interests nor its use of water from the Bow River. The Licence Holder argued there is no proximity between the Appellant's and the MD's licences. The Licence Holder explained that all of the Appellant's existing licences are for the Elbow

⁶ Appellant's submission, dated December 12, 2007, at page 11.

⁷ As a result of the 10 percent holdback inherent in the Licence that will be transferred to Her Majesty the Queen in Right of Alberta there will be a 10 percent reduction in the overall diversion.

River, not the Bow River. It further explained the Appellant's diversion points on the Elbow River are located approximately 35 kilometres west (upstream) of the location where the WID diversion infrastructure is located on the Bow River.

[41] The Licence Holder submitted there are no material changes to the water diversion after the transfer of the 2,000 acre-feet⁸ from the WID to the MD and the Province. It explained there is no change in the amount of water being diverted, because the WID licence was reduced by the 2,000 acre-feet. The Licence Holder stated the "...cumulative total licences allocation for the MD, WID and the Province continues to total 160,400 acre feet."⁹ The Licence Holder explained the point of diversion has not changed and the MD will obtain its 1,800 acre feet allocation via the existing WID infrastructure. The Licence Holder stated it will divert water during the WID's historical diversion period in the summer months, filling the South Langdon Reservoir to the summer water level to provide for the winter diversion supply. The Licence Holder stressed that no diversion from the Bow River would occur in the winter months. The Licence Holder explained the total cumulative rate of diversion would not change and is proportionate to the WID's licenced rate. It stated the MD's rate of diversion is 0.13 cms (low stage), 0.19 cms (high stage) and 0.24 cms (flood stage).

[42] The Licence Holder noted the Licence issued to the MD has the same terms and conditions of the original WID licence.

[43] According to the Licence Holder, all five licences held by the Appellant on the Elbow River are senior to a significant number of junior licences, and in the event of a water shortage on the Elbow River, the more junior licences would be impacted before the Appellant. The Licence Holder stated that even the most junior licences held by the Appellant on the Elbow River are senior to 33 licences issued on the Bow River. Therefore, if there was some connection between the licences issued on the Elbow River and those issued for the Bow River, there could be 33 junior licences impacted before the most junior of the Appellant's licences was impacted in the event of a water shortage.

⁸ Note: 1 acre foot = 1,233.489 cubic metres

⁹ Licence Holder's submission, dated November 29, 2007, at paragraph 12.

[44] The Licence Holder submitted the Board should dismiss the appeal on the basis the Appellant is not directly affected because of the lack of proximity between the Appellant's interests and the Licences. The Licence Holder argued that, because the Appellant obtains its water from the Elbow River, the Licences will not impact or harm the water utilized by the Appellant.

C. Director

[45] The Director explained he received seven Statements of Concern, including one from the Appellant, a company that supplies potable water to an area west of Calgary. The Director stated he considered the Statement of Concern but did not make a determination as to whether the submission met the requirements for a Statement of Concern under the *Water Act*.¹⁰

[46] The Director paraphrased previous Board decisions¹¹ and submitted that, "In order to be directly affected, the person must have a substantial interest in the outcome of the approval that surpasses the common interest of all residents who are affected by the approval. In addition, the person must also show that the action of the Director will cause a direct effect on that interest and that it will be actual or imminent, not speculative."¹²

¹⁰ Section 109 of the *Water Act* states:

"(1) 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.

(2) 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."

¹¹ See: Stay Decision: *Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (11 January 2005), Appeal Nos. 04-009, 04-011, and 04-012-ID1 (A.E.A.B.); *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.); *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (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.); and *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.).

¹² Director's submission, dated November 23, 2007, at paragraph 12.

[47] The Director stated it is difficult to see how the transfer directly affects the Appellant's interests in any way. The Director explained this is not a new allocation of water and there is no change to the total amount of water withdrawn from the Bow River. The Director stated the Licence involves a transfer of already allocated water as contemplated by section 82(3) of the *Water Act* and the SSRB Management Plan. The Director stated it is a simple change in ownership of an existing allocation, with 1,800 acre-feet being transferred from the WID to the MD. The Director explained that in approving the transfer, he withheld 10 percent of the total transferred allocation for the purpose of protecting the aquatic environment. He stated the holdback reduces the amount of water allocated for use by 246,696 cubic metres. The Director argued that as a result of the holdback, there are clear benefits to the Bow River and all of its users because this water will remain in the Bow River. The Director explained the holdback is inextricably linked with the transfer, because without the transfer, there is no holdback. He stated the licenced allocation for the MD plus the holdback equal the allocation licenced to the WID prior to the transfer.

[48] The Director explained the point of diversion is the same licenced point of diversion for the WID. The Director stated the Licence Holder will divert water through existing WID infrastructure so the transfer will not impact the rights of other household users, traditional agricultural users, or other licensees. The Director argued there is no new impact or change to the Bow River.

[49] The Director stated there is no change to the period of diversion. The Director explained the Licence Holder will divert its allocation of water during the same operational period in which the WID operates, and no water will be diverted from the Bow River during the winter months. The Director stated the South Langdon Reservoir will be filled to the summer water level to provide winter water.

[50] The Director stated there is no change in the total rate of diversion, and the rate for the Licence Holder is proportionate to the WID's licenced rate.

[51] The conditions of the Licence concerning diversion are the same as those imposed on the WID, so the MD is required to divert water in the same manner as the WID. The Director stated this is a diversion within an existing diversion.

[52] The Director explained the Appellant has five water licences to supply potable water to residential users in the Springbank area west of Calgary. The Director stated the Appellant gets its water from the Elbow River at several points 35 kilometres upstream of the Licence Holder's diversion off the Bow River.

[53] The Director stressed the Appellant uses the Elbow River, not the Bow River, and the Elbow River merges with the Bow River downstream of the Appellant's diversions but upstream of the WID diversion.

[54] The Director argued that it was difficult to see how the transfer directly affected the Appellant's interests in any way. The Director argued the Appellant is no more affected by the transfer than any other member of the public.

[55] The Director argued the Appellant is not directly affected, because it cannot show the water transfer will harm a natural resource the Appellant uses or will harm the Appellant's use of a natural resource. The Director stated the Appellant's activities are too distant to claim a reasonable probability of harm, because its wells and point of diversion are located 35 kilometres upstream on a different river.

[56] The Director argued there will be no harm to the Appellant because the Licence Holder will receive a portion of an existing allocation and use an existing diversion and canal system to withdraw its water. He stated the timing, rate, volume, and conditions are identical to those already in place, and therefore, there would be no impact. The Director submitted there would be a benefit to the Bow River because 246,696 cubic metres of water from the allocation will remain in the Bow River for the protection of the water body and the aquatic environment.

[57] The Director requested the appeal be dismissed for lack of standing.

III. PRELIMINARY MATTERS

[58] At the start of the Preliminary Motions Hearing, the Appellant raised concerns regarding the timing of the Preliminary Motions Hearing, in that it had requested the Preliminary Motions Hearing be postponed until January 2008. The Board considered this request in its November 28, 2007 letter, and the Board granted the adjournment request, postponing the Preliminary Motions Hearing from December 5, 2007, to December 17, 2007. The Board also

limited the matters to be heard at the Preliminary Motions Hearing to whether the Appellant was directly affected. The matter of determining issues for a hearing, should one be held, was postponed in order for the Appellant, and the other Participants, to focus on only one matter. This was done to reduce the issues the Appellant had to address in preparing its written submission. The Board also extended the deadline to receive submissions until December 12, 2007, only five days before the Preliminary Motions Hearing, even though the Board normally requires the submissions be provided at least seven days prior to the proceedings.

[59] The Board must be fair to all of the Participants and makes every effort to accommodate Participants' schedules. Most participants in appeals do have other obligations and the Board tries to accommodate them as much as possible. However, there are times when the Board must make a decision regarding the scheduling of a hearing that may not be ideal for all of the participants. In this case, the Appellant had submissions to prepare for the AEUB that were due on November 30, 2007, with the possibility of additional submissions that would be due on December 14, 2007. However, the Board was also aware of the difficulties the Licence Holder was having in securing water for the Balzac development and that financing and/or construction opportunities may be lost due to uncertainty created by the appeal. The Board balanced these interests by postponing the Preliminary Motions Hearing, perhaps not to the extent the Appellant requested but until after the submission dates for the AEUB matter, and by reducing the matters that would be heard to the absolute minimum possible in the circumstances.

[60] Further, the Appellant asked for clarification as to whether the November 8, 2007 letter from the Director was the "Notice of Motion" that gave rise to the Preliminary Motions Hearing. The Board confirmed this letter was the motion that started the Preliminary Motions Hearing proceedings. The Board referred to its November 23, 2007 letter in which it explained the requirements, as set out in Rule 10 of the Board's Rules of Practice, were complied with. Rule 10 states, in part, "All motions shall state the specific relief requested and the basis for the motion. Except as provided below, they shall be made in writing." The Board's November 23, 2007 letter stated the relief sought by the Director was to have the appeal dismissed on the basis the Appellant was not directly affected, and the notice was in writing. Therefore, the Director complied with the Rules of Practice by including all required elements for a proper motion.

IV. DISCUSSION

A. Jurisprudence

[61] The Board has discussed the issue of directly affected in numerous decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *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*").

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

"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 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.”¹³

[63] 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

¹³ *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.).

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....”¹⁴

[64] 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 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 it is directly affected.¹⁵

[65] The Court of Queen’s Bench in *Court*¹⁶ stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be within reason, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing. This is the same regardless of whether it is an individual person or corporate person.

[66] The effect does not have to be unique in kind or magnitude.¹⁷ However, the effect the Board is looking for needs to be more than an effect 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.¹⁸ Under the *Water Act*, 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

¹⁴ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

¹⁵ 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.).

¹⁶ *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.).

¹⁷ 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.).

¹⁸ 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.).

appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review of the Director's decision, it intended it be narrower.

B. Corporate Appellants

[67] In the case of a legal person in the form of a corporation, such as the Appellant in this case, the test is effectively the same. The Board will look at how the corporation's interests are being affected, and the more ways in which the corporation is affected, the greater the possibility of finding it directly affected. The Board also looks at how the corporation uses the environment, how the project will affect the environment, and how the effect on the environment will affect the corporation's use of the area. As with the individual person, the closer these elements are connected (their proximity), the more likely the corporation is directly affected.

[68] The only difference in the test is the nature of the interests that can be affected. An individual has two types of interests. These interests are recognized in law as interests associated with trusteeship and those interests associated with guardianship. The first are the interests of the individual's estate, which includes such things as the ownership of property, the use and enjoyment of that property, and the ability to earn a living. The second are interests of the physical individual (the *personum*), such as health and well-being and physical safety and security.

[69] A corporation, like an individual, has an estate including the property and assets that it owns and the ability to carry on its business. Therefore, how these rights can be affected are effectively the same as how the estate rights of an individual can be affected. What is different is that a corporation does not have, in and of itself, a physical body like an individual. As a result, it is more difficult to conceptualize how the "*personum*" of a corporation can be directly affected. However, one example is where the employees of the corporation are affected. This could occur where a project results in the increase of air emissions adjacent to an office of the corporation, where the employees of the corporation work.

C. Analysis

[70] To be found directly affected by the Director's decision to issue the Licence, the Appellant must be able to demonstrate a direct effect on a personal interest or right. The more remote or speculative the connection, the less likely the Appellant will be found to be directly affected. The Appellant in these appeals argued it would be directly affected because of the possible effect the water transfer may have on its priority right in its water licences, the effect the water transfer may have on the acquisition of water as a result of the water market, on financial and economic grounds, and on its reputation as a competent purveyor of drinking water.

[71] In its submission, the Appellant argued its situation was the same as that of the appellant in *Walsh*, in that the appellant was found to be directly affected even though her concerns were the same as potentially thousands of other users of the water. With respect, the Board cannot agree with the Appellant's arguments. The appellant in *Walsh* lived in Turner Valley and used the water from the Town's supply for her household and personal use other than for drinking. She reserved the latter right, to consume the water, if her confidence in the safety of the water supply was established. Ms. Walsh was familiar with the nature of residual industrial contamination in the region because of her service on the Turner Valley Gas Plant Restoration Advisory Panel. If there was a possibility of contaminants from abandoned oil and gas wells entering the Town's water supply, Ms. Walsh, as well as the finite number of residents in Turner Valley who use the public water supply, would be affected. There is a direct link to an environmental factor created by the project – the potential contamination of the water and the residents' use of that water.

[72] The Appellant submitted that in *Walsh*, there was little if any evidence of actual contamination of the water. The issue of whether there was a possibility contaminants could enter the reservoir was the issue to be determined at the substantive hearing of the appeal. The Appellant ignores that in *Walsh*, she established as a matter of fact that the reservoir in question was located on land which held a number of abandoned oil and gas wells, some of which had not been reclaimed and others which had not been accurately located according to AEUB records. While it is correct that it was reserved for the substantive hearing to determine whether the fact of existing sources of contamination on the reservoir site actually endangered the safety of the water as regulated by the amending approval under appeal, the *prima facie* case of reasonable

potential was clearly, not speculatively, established. In the determination of directly affected, the appellant in *Walsh* demonstrated there was a potential of a natural resource, the water, being negatively impacted, which could in turn negatively impact her use of the resource. The arguments presented by Westridge did not demonstrate a potential negative impact on a resource, only conjecture on the Appellant's potential ability to compete financially in the water market.

[73] The Board disagrees with the following interpretation of directly affected submitted by the Director: "In order to be directly affected, the person must have a substantial interest in the outcome of the approval that surpasses the common interest of all residents who are affected by the approval. In addition, the person must also show that the action of the Director will cause a direct effect on that interest and that it will be actual or imminent, not speculative."¹⁹ This stands in direct contradiction of Justice MacIntyre's comments that "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."²⁰ Ironically, if the Director's interpretation was correct, then the appellant in *Walsh* may not have been directly affected, yet, in that case, the Director in question had accepted the appellant's Statement of Concern with an expressed acknowledgement that she was directly affected.

[74] In the case currently before the Board, the Appellant did not argue there would be an environmental impact, only an economic impact should it be required to purchase water from a water market. As stated in the Court of Queen's Bench decision of *Court*, there needs to be an effect on the environment:

"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."²¹

¹⁹ Director's submission, dated November 23, 2007, at paragraph 12.

²⁰ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 68, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

²¹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 69, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) ("*Court*"). See also: *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*").

[75] The Board has granted standing to appellants on economic grounds in previous decisions.²² In those decisions, the Directors issued an approval or licence that could have affected the appellants' use of the environment upon which his or her livelihood relied. In this case, the Appellant does not lose the water it is allocated under its licences and its current use of the water is not affected. The Appellant argued it will be forced to pay more for water if it is required to compete in the water market. This challenging situation may only arise if the Appellant expands its business beyond its current licence capacity. Although Westridge may be required to pay more for its water should it decide to expand, its basic livelihood is not curtailed. In all likelihood, any increased cost of water would be passed onto the customers as it would for any other new, competitive water provider in the vicinity of the Appellant. In any case, the Appellant provided no analysis of any realistic scenario of how the general economic concerns it holds about future water pricing could be interpreted as creating a situation where the Licences under appeal realistically undermined its livelihood.

[76] The Appellant submitted there are licence holders in the South Saskatchewan River Basin that do not use all of the water allocated to them under their licences. However, those who need the water have no way to access the water, except through what the Appellant called a water market. Currently, there is no more water that can be allocated in the South Saskatchewan River Basin. No matter how many applications are filed, the Director cannot create more water. The Appellant is likely correct in stating that there are unused portions of existing water licences and there are those who are seeking water for new projects or for expansion. What water is available is now available only through a water market that was created by the *Water Act* in 1999²³ and which has resulted in 28 licence transfers since 2002

²² 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*"); and 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.).

²³ See section 82 of the *Water Act*, which states, in part:

“(1) Subject to this section and sections 34, 81 and 83, on application, the Director may

- (a) approve the transfer of an allocation of water under a licence and, subject to subsections (6) and (7)(b), issue a new licence for the transferred allocation of water subject to any terms and conditions that the Director considers appropriate, including specifying in the licence the land or undertaking to which the licence is appurtenant, or
- (b) refuse to approve the transfer of an allocation.

including transfers before the South Saskatchewan River Basin was closed. The water market the Appellant objected to was not created by the Licences under appeal, and that water market has been operational before this particular licence transfer was granted.

[77] The Appellant's objection to the creation of the water market cannot be linked to the licence transfers under appeal. Supply and demand will primarily dictate the number of water transfers in the future, but the Director is the final decision maker in a transfer of water and the Director can stop the transfer if he considers it in the best interest for the environment. The Director cannot become involved in negotiations between parties to a transfer. The Board has jurisdiction for making a decision that may confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make.²⁴

[78] The Appellant appears primarily concerned that it is now forced to compete for water in the water market. A more appropriate time for voicing these concerns would have been during the public consultation process that preceded passage of the *Water Act* in 1999. The creation of that market and the ensuing prices are not within the Board's jurisdiction.

[79] The Licence allows for the transfer of water from the WID to the MD. The diversion point from the Bow River is not changing. In fact, the terms and conditions of the WID licence have been incorporated into the current Licence under appeal. The Appellant was

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- (2) A transfer of an allocation of water under a licence may be made
 - (a) with respect to all or part of an allocation of water from a licence, and
 - (b) either permanently or for a specified period of time.
 - (3) The Director may approve a transfer of an allocation of water under a licence only if
 - (a) the volume of water to be transferred does not exceed the volume of water under the licence from which the transfer of the allocation is to be made,
 - (b) the transfer of the allocation, in the opinion of the Director, does not impair the exercise of rights of any household user, traditional agriculture user or other licensee other than the household user, traditional agriculture user or other licensee who has agreed in writing that the transfer of the allocation may take place, and
 - (c) the transfer, in the opinion of the Director, will not cause a significant adverse effect on the aquatic environment...."

²⁴ See: Section 98(2)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states: "In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision."

unable to demonstrate that the transfer will change anything about the water diversion except who uses the water at the end. The Board appreciates the Appellant has a lower priority licence than the WID and now the Licence Holder. However, no matter which party calls the priority, whether it is the WID or the MD, the priority does not change, nor any effect of that priority on the Appellant.

[80] The transfer does not change the location of the diversion point. The Appellant holds a licence to divert water from the Elbow River, a tributary to the Bow River. The Licence allows for water to be withdrawn from the Bow River downstream of the confluence of the Elbow and Bow Rivers. If the transfer had allowed for the diversion point to be relocated to the Elbow River, the Appellant may have had stronger grounds to show how it was directly affected because, in that case, a substantially smaller pool of licence holders could have been affected by a priority call limited to the Elbow River. However, that is not the situation in this transfer. The diversion point is still on the Bow River, and the diversion rate is the same whether the withdrawal is completely for the use of the WID or if it is shared between the WID and the MD.

[81] If a priority call is made, the more junior the licence, the more likely it will be affected. In this case, the Appellant's licence is junior to the WID's licence. If the WID or MD requires a priority call, all licences junior to the Appellant's licence will be affected first, and in this case, there are more than 200 licences junior to the Appellant's along that reach of the Bow and Elbow Rivers.

[82] The likelihood that any of the junior licences will be subject to a priority call has not been increased by the Licences under appeal. Rather, the added volume of water retained in the Bow River by virtue of the holdback that is created by the Licences under appeal could potentially alleviate the frequency of priority calls initiated by downstream senior licences on junior upstream licences. The potential for the Appellant being affected by a priority call is not increased from what it was under the original licence to the WID and, more likely, the possibility of a priority call could be reduced because of the extra water provided to the Bow River by the holdback.

[83] The Appellant argued that, if the MD does not provide potable water according to Alberta Environment's standards, the Appellant's reputation may be affected. The Appellant

explained it has been grouped together with other water suppliers, some of which did not meet applicable standards. The Licence Holder has not made an application for its waterworks system. That is a separate application and separate approval that can be appealed by any party that is directly affected by that approval. The Appellant provided no basis for how the reputation of Westridge would be affected by the MD supplying potable water to residents within the MD. The Appellant argued that, if the MD proved inadequate as a purveyor of municipal water, this could reflect negatively on the reputation of Westridge. With respect, this argument is premature and is entirely speculative and without foundation. The Licence Holder will be required to abide by the water quality standards of the day and if it does not, the Director can take enforcement action. The potential for such a possibility materially affecting the Appellant is unsubstantiated speculation. If the Appellant could make a case for being directly affected by such a future approval, the Appellant could appeal that approval when it is issued.

[84] Westridge argued the Director did not consider its Statement of Concern prior to making his decision. It based this on a letter received from the Director on September 13, 2007, indicating how its environmental concerns were being addressed even though the MD had sent a letter to the Director arguing Westridge's concerns were procedural in nature. When issuing a licence, the Director does not assess the type of use for the water but looks at whether the water is available for allocation and the water source can accommodate the withdrawal rate requested without negatively impacting the aquatic environment.²⁵ The Director explained he reviewed the Statement of Concern for environmental concerns and addressed those concerns as necessary.

[85] It was clear in the Director's testimony that he had considered other water users and the effect of the transfer on other licensees and the Bow River. He explained thoroughly the effect of the transfer on the Appellant and when a transfer could affect a junior licensee. Potential impacts the Director must consider are environmental in nature and do not include the potential impact to the cost of water resulting from the currently existing water market.

[86] The Appellant argued geographic location should not be considered in assessing directly affected as that matter should be dealt with at the substantive hearing. With respect, the

²⁵ See: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-121-R (A.E.A.B.).

Board cannot agree. The location of the Appellant in relation to the diversion point is an important consideration. It could make a difference if the MD's diversion was on the same river and if it was up or downstream of the Appellant's diversion points.

[87] The Appellant argued the Licence Holder will not be able to use the water within the next three years and therefore is only banking water possibly for speculative purposes. Banking of water can be prevented by the Director because section 55(1) of the *Water Act* allows the Director to suspend a licence if the licenced water is not used within three years.²⁶ The Director can review the Licence, and if there is a reasonable prospect the licenced water will not be used, the Director can suspend or cancel the Licence. In any case, the Appellant failed to show how this concern provided any basis to establish it as being directly affected.

[88] The Appellant argued the Board's test for directly affected must be expanded to include those impacted by water transfers. The Board will look at each appeal on an individual basis and if the appellant can demonstrate it will be directly affected, it may have standing before the Board.

[89] The Board dismisses the appeal because the Appellant failed to demonstrate it is directly affected by the issuance of the Licence to the MD. The possible economic effect of the water market was not created by the Licences under appeal and any economic effect arising is not something this Board can resolve. The Board must look at the environmental impacts of the Director's decision and how those impacts affect the Appellant. In this case, the Appellant did not show there was a potential environmental impact resulting from the transfer nor that it was directly affected. For the Licences under appeal, the Appellant did not identify an environmental impact of any kind that would affect anyone.

²⁶ Section 55 of the *Water Act* provides:

“55(1) The Director may suspend or cancel a licence ...

- (f) if, subject to the regulations, the Director is of the opinion that
 - (i) there has been no diversion of any of the water allocated in the licence, or there has been a failure or ceasing to exercise the rights granted under the licence, over a period of 3 years, and
 - (ii) there is no reasonable prospect that the licensee will resume diversion of all or part of the water specified in the licence or resume the exercise of the rights granted under the licence....”

[90] The licence issued to Her Majesty the Queen in Right of Alberta is a holdback resulting from the transfer to the MD. If the transfer was not allowed, the holdback would not have occurred. The Participants provided little argument regarding this licence, because the holdback should benefit the aquatic ecosystem of the Bow River. Since the appeal of the MD's Licence which lead to the transfer is dismissed, the appeal of Her Majesty the Queen in Right of Alberta's licence is also dismissed.

V. DECISION

[91] The appeals of Westridge Utilities Inc. are dismissed. The Appellant is not directly affected by the Director's decision to issue Licence No. 00240846-00-00 to the Municipal District of Rocky View No. 44 because there is no change in the Appellant's priority right and there is no change in the terms and conditions of the diversion, nor the volume, location, time, and rate of water diversion; there is no environmental impact arising from the issuance of the Licences. The Appellant is not directly affected by the issuance of Licence No. 0024847-00-00 issued to Her Majesty the Queen in Right of Alberta, because the intent of this licence is to improve the aquatic environment in the Bow River by increasing the flow that is not allocated to any user.

Dated on May 12, 2008, at Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudey, FRSC, PEng
Chair

“original signed by”

Mr. Jim Barlishen
Board Member

“original signed by”

Mr. Eric O. McAvity, Q.C.
Board Member