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# ALBERTA ENVIRONMENTAL APPEAL BOARD

## Decision

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Date of Decision – January 28, 2002

**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 Ms. Margaret Ouimet and CASP Hwy 37 with respect to Preliminary Certificate No. 00150725-00-00 issued under the *Water Act* to Ouellette Packers (2000) Ltd. by the Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment.

Cite as: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.*

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## EXECUTIVE SUMMARY

This appeal relates to a Preliminary Certificate and proposed Licence issued to Ouellette Packers (2000) Ltd. under the *Water Act*. The Preliminary Certificate provides that if Ouellette Packers meets the conditions of the Preliminary Certificate, it will be granted a Licence to divert 8,292 cubic meters of water annually from a well located in SW 03-055-26-W4M, near St. Albert, Alberta. Ouellette Packers intends to establish a hog processing plant at this location and the water is required to supply the plant. Ms. Margaret Ouimet and a group of local residents calling themselves “CASP Hwy 37” filed an appeal opposing the issuance of the Preliminary Certificate and proposed Licence.

The Board has determined that Ms. Ouimet and the members of CASP Hwy 37 have not provided sufficient evidence to demonstrate that they are directly affected. In addition, the Board is also of the view that Ms. Ouimet’s real concern is the potential release of contaminants into the environment from the hog processing plant. In the Board’s view, if Ms. Ouimet is correct, the proper place to address the potential release of contaminants into the environment from the hog processing plant is in the Approval issued for that plant, under the *Environmental Protection and Enhancement Act*.

The Board has also determined that it has not been presented with any evidence that would warrant extending the deadline for the other members of CASP Hwy 37 to file their own appeals.

## I. BACKGROUND

[1] On July 23, 2001, the Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment (the “Director”) issued Preliminary Certificate No. 00150725-00-00<sup>1</sup> to Ouellette Packers (2000) Ltd. (the “Certificate Holder”) pursuant to the *Water Act*, R.S.A. 2000, c. W-3. The Preliminary Certificate provides that if the Certificate Holder meets the conditions prescribed in the Preliminary Certificate, it will be granted a Licence for the diversion of 8,292 cubic meters of water annually from a well in SW 03-055-26-W4M (the “Ouellette Well”), near St. Albert, Alberta. The proposed Licence is for an industrial use to supply a hog processing plant.<sup>2</sup>

[2] On August 24, 2001, the Environmental Appeal Board (the “Board”) acknowledged receipt of a Notice of Appeal, filed by Ms. Margaret Ouimet, Secretary for a group of local residents calling themselves “CASP Hwy 37” (the “Appellants”). In general terms, the Notice of Appeal raised concerns about potential contamination and water quantity.<sup>3</sup> On the same date, the Board forwarded a copy of the appeal to the Certificate Holder and the Director, and by the same letter, requested a copy of all documents related to the appeal (the “Record”) from the Director.

[3] According to standard practice, on August 24, 2001, the Board also wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under either of the Boards’ legislation. Both responded in the negative.

[4] On August 31, 2001, the Board received a letter from the Certificate Holder challenging the directly affected status of CASP Hwy 37 and the jurisdiction of the Board to hear this appeal in that the issues being raised by the Appellants will be dealt with under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).

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<sup>1</sup> See the Director’s Record, 1.0.

<sup>2</sup> See the Director’s Record, 4.17 and 4.37.

<sup>3</sup> Included with the Notice of Appeal was a note from “CASP Hwy 37 - Ms. Marjorie McRae” attaching a newspaper article dated August 7, 2001 and entitled “Water Problems Likely, Says New Aquifer Data.” The source of the newspaper article is not known.

[5] On August 31, 2001, the Board also received a letter from the Director including the initial part of the Record. Copies of the initial part of the Record were forwarded to the parties. In the same letter, the Director questioned if the appellant in this matter was Ms. Ouimet or CASP Hwy 37 represented by Ms. Ouimet. The Director also questioned the timeliness of the appeal. In response to the Director's questions, the Board contacted Ms. Ouimet who advised that she filed the Notice of Appeal on behalf of CASP Hwy 37. The Board confirmed this information in a letter dated September 5, 2001 and asked the Appellants to contact the Board if this was incorrect. *No further correspondence on this question was received from the Appellants* until the Board subsequently received the written submissions.<sup>4</sup> In the same letter, the Board advised that it appeared to the Board that the Notice of Appeal was filed within the time limits prescribed set out in section 116(1)(b) of the *Water Act*.<sup>5</sup> None of the parties expressed further concern with the timeliness of the appeal.

[6] On September 4, 2001, the Board acknowledged the Certificate Holder's letter. In this letter, the Board set a schedule for receiving written submissions from the parties to determine if the Appellants were directly affected and if the Board had the jurisdiction to move forward with this appeal.

[7] On September 7, 2001, the Board received the remainder of the Director's Record and forwarded copies to the parties.

[8] On September 7, 2001, legal counsel for the Appellants contacted the Board and advised that they had just been retained and requested an extension to the deadline for filing written submissions. The Board granted an extension to all of the parties.

[9] On September 10, 2001, the Board acknowledged a letter dated September 6, 2001, from the Director and a letter dated September 7, 2001, from the Certificate Holder. In these letters, the Director and the Certificate Holder raised further preliminary issues that they

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<sup>4</sup> See discussion at paragraph 14 below.

<sup>5</sup> The Preliminary Certificate was issued on July 23, 2001. The Notice of Appeal was received by the Board on August 24, 2001. Section 116(1)(b) of the *Water Act* provides:

“A notice of appeal must be submitted to the Environmental Appeal Board ... (b) in any other case, [other than a water management order, enforcement order or approval] not later than 30 days after receipt of notice of the decision that is appealed from to or the last provision of notice of the decision that is appealed from.”

wished to have addressed. In the acknowledgement letter, the Board requested the following three issues be addressed by the parties in their written submissions:

- “1. Is CASP Hwy 37 directly affected and does the Board have jurisdiction to hear this appeal?;
2. CASP Hwy 37 is not a corporate entity and therefore is not a ‘Person’ entitled to file a Notice of Appeal; and
3. CASP Hwy 37 did not file a statement of concern and therefore is not entitled to file a Notice of Appeal accordingly, to section 115(1)(b)(i) of the *Water Act*.”<sup>6</sup>

When the Board asked the parties to address these issues, it was operating on the understanding, based on the conversation that the Board’s staff had with Ms. Ouimet, that the Appellants in this matter were CASP Hwy 37 and not Ms. Ouimet.<sup>7</sup>

[10] Between September 17, 2001 and October 2, 2001, the Board received the written submissions. On October 2, 2001, the Board advised that the submissions of the parties would be reviewed and a decision issued in due course. The Rebuttal Submission filed by the Appellants included an affidavit sworn by Ms. Ouimet. As discussed below, the Initial Submission of the Appellants and the Rebuttal Submission of the Appellants raised questions for the Board about the identity of the Appellants.<sup>8</sup>

[11] On October 9, 2001, the Board acknowledged a letter dated October 4, 2001, from the Director in which he reserved his right to challenge the evidence (the affidavit sworn by Ms. Ouimet) in the Rebuttal Submission of the Appellants if the matter proceeded further.

[12] On November 13, 2001, the Board advised the parties that the appeal had been dismissed with reasons to follow. These are those reasons.

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<sup>6</sup> Section 115(1)(b)(i) 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: ... (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted (i) by the preliminary certificate holder or by any person *who previously submitted a statement of concern* in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108....” (Emphasis added.)

<sup>7</sup> This telephone conversation was confirmed in the Board’s letter of September 5, 2001.

<sup>8</sup> See Initial Submission of the Appellants dated September 17, 2001, paragraph 2. See Rebuttal Submission of the Appellants dated October 1, 2001, Affidavit of Ms. Ouimet, paragraph 3.

## II. ISSUES

[13] When the Board established its written submission process, it identified the following issues to be considered:<sup>9</sup>

1. Is CASP Hwy 37 directly affected, and does the Board have jurisdiction to hear this appeal?;
2. CASP Hwy 37 is not a corporate entity and therefore is not a “person” entitled to file a Notice of Appeal; and
3. CASP Hwy 37 did not file a Statement of Concern and therefore is not entitled to file a Notice of Appeal according to section 115(1)(b)(i) of the *Water Act*.

As stated, these issues were set by the Board on the understanding, based on the conversation that the Board’s staff had with Ms. Ouimet, that the Appellants in this matter were *CASP Hwy 37* and not Ms. Ouimet.

[14] However, in the Initial Submission of the Appellants the Board was advised, instead, that the Notice of Appeal was filed by *Ms. Ouimet in her own capacity and as Secretary of CASP Hwy 37*.<sup>10</sup> Then, in the Rebuttal Submission of the Appellants, the position changed again and the Board was advised that the Notice of Appeal was filed *by Ms. Ouimet in her own capacity, as Secretary of CASP Hwy 37, and on behalf of the individual members of CASP Hwy 37*.<sup>11</sup>

[15] The Appellants’ change in position between the initial filing of the Notice of Appeal, the filing of the Initial Submission, and the filing of the Rebuttal Submission troubles the Board somewhat in that the opposing parties in this appeal (the Certificate Holder and the Director) may not have had an opportunity to provide full arguments in response to these changing positions on standing. The Board notes, particularly, the introduction of a new argument – adding further appellants (the individual members of CASP Hwy 37) – in the Rebuttal Submission. However, given the Board’s decision to dismiss the appeal, the Board is of

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<sup>9</sup> See Board’s letter of September 10, 2001.

<sup>10</sup> See Initial Submission of the Appellants dated September 17, 2001, paragraph 2.

<sup>11</sup> See Rebuttal Submission of the Appellants dated October 1, 2001, Affidavit of Ms. Ouimet, paragraph 3.

the view that neither the Director nor the Certificate Holder have suffered any prejudice as a result.

[16] Further, in the Initial Submission of the Appellants, an additional issue was also raised. The Appellants requested that "...the Board exercise its discretion under s. 116(2) to extend the thirty-day period for an appeal to allow the members of CASP Hwy 37 to file their own appeals...."<sup>12</sup> Again, the Board questions whether the opposing parties in this appeal have had an opportunity to fully argue this question, but given the Board's decision, and not knowing exactly who these individuals are, it does not matter.

[17] The Board will consider the following restated issues (which incorporate the original issues stated by the Board):

1. May CASP Hwy 37 file an appeal?
2. May Ms. Ouimet file an appeal?
3. May the individual members of CASP Hwy 37 file an appeal?
4. Should an extension of the thirty-day appeal period be granted to allow the individual members of CASP Hwy 37 to file their own appeals?

[18] The Board has previously dealt with similar issues under EPEA and, in our opinion, the analysis under the *Water Act* is substantially the same as under EPEA. The previous decisions made under EPEA, as well as those decided under the *Water Act*, provide some guidance to the Board in addressing similar issues in other appeals.

### **III. DISCUSSION**

#### **A. May CASP Hwy 37 File an Appeal?**

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<sup>12</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 40. Section 116(2) of the *Water Act* provides:

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



[19] The Board has previously held that whether an organization is directly affected is not dispositive in determining standing.<sup>13</sup> In other words, what is relevant is whether the *individuals that make up the group* are directly affected. As stated in *Kostuch*:

“The determination of whether a person is 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.*”<sup>14</sup> (Emphasis added.)

In *Bailey*, 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)], 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.*”<sup>15</sup> (Emphasis added.)

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<sup>13</sup> In *Graham et al. v. Alberta (Director of Chemicals Assessment and Management, Environmental Protection)* (1996), 20 C.E.L.R. (N.S.) 287 (A.E.A.B.) at paragraph 21, E.A.B. Appeal No. 95-025, the Board dismissed a Notice of Appeal filed by the Lesser Slave Lake Indian Regional Council stating:

“The Alberta Court of Appeal held in *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory and Appeal Board)*, [(1996), 34 Admin.L.R. (2d) 167 at paragraph 12] that for the purpose of establishing a direct effect, it is not enough for a corporate body to merely represent the interests of those who may be directly affected.”

This case was judicially reviewed and then taken to the Court of Appeal. See: *Graham et al. 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.).

<sup>14</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 38, E.A.B. Appeal No. 94-017 (“*Kostuch*”).

<sup>15</sup> 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*) E.A.B. Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID (“*Bailey*”). *Hazeldean Community League et al. v. Director of Air and Water Approvals, Alberta Environment* (May 11, 1995), E.A.B. Appeal No. 95-002 (“*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.*) E.A.B. Appeal No. 00-073.

The relevant part of section 91 of EPEA, which is the equivalent of section 115(1)(b)(i) under the *Water*

[20] As a result, the Board is of the view that the Board must instead consider the status of Ms. Ouimet and, then to the extent possible, consider the status of the other individual members of CASP Hwy 37.

**B. May Ms. Ouimet File an Appeal?**

[21] Section 115(1)(b)(i) of the *Water Act* indicates that there are two requirements to file a valid Notice of Appeal in response to the Director's decision to issue a Preliminary Certificate: First the person filing the Notice of Appeal must have filed a Statement of Concern, and second, the person filing the Notice of Appeal must also be directly affected.

[22] Ms. Ouimet has met the first part of the test under section 115(1)(b)(i) – the requirement to file a Statement of Concern. At least in part, the filing of a valid Statement of Concern and being directly affected are legally interconnected. The ability to file a Statement of Concern under section 109(1)(a)<sup>16</sup> of the *Water Act* includes the need for the Director to consider whether the person filing the Statement of Concern is directly affected. That decision has been made by the Legislature in section 109(1)(a) of the *Water Act* which provides:

“If notice is provided (a) under section 108(1), any person who is *directly affected* by the application or proposed amendment ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.”<sup>17</sup> (Emphasis added.)

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Act, provides:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances: (a) where the Director issues an approval ... a notice of appeal may be submitted (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)....”

<sup>16</sup> Section 109(1)(a) 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 ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.”

<sup>17</sup> The relevant part of section 108(1) of the *Water Act* provides:

“An applicant ... (b) for a licence ... shall provide notice of the application in accordance with the regulations.”

[23] The Board notes that the Director accepted Ms. Ouimet's Statement of Concern on the basis that in his view she was directly affected.<sup>18</sup> 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.<sup>19</sup> 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*.<sup>20</sup>

[24] 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.<sup>21</sup> 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:

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<sup>18</sup> Director's Record, 2.3. In a letter from the Director to the Ouimets, the Director stated: “You will be considered to be a ‘directly affected person’ for the purpose of the *Water Act* in the review of this application.”

<sup>19</sup> The Board notes, with interest, a table (which is undated) prepared by the Director at 4.6 of the Director's Record that provides a listing of the “Letters of Concern Rec'd”. It appears to the Board that the Director reviewed these letters and decided which individuals were directly affected and which were “indirectly” affected. The Board also notes that while Ms. Ouimet was subsequently determined by the Director to be directly affected for his purposes (see Director's Record 2.3), it appears he made no decision with respect to Ms. Ouimet in this table. The Board also notes that there do not appear to be any reasons provided by the Director as to why he accepted certain Statements of Concern and rejected others. In noting this, the Board is not expressing the view that the Director is required to provide such reasons.

<sup>20</sup> Section 2(d) of the *Water Act* provides:

“The purpose of this Act is to support and promote conservation and management of water, including the wise allocation and use of water, while recognizing ... (d) the share responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision making.”

<sup>21</sup> When the Director makes his decision as to whether a person is directly affected, usually the only information that he has in front of him is the Statement of Concern. He does not have the benefit of full submissions from the various interested parties as to whether the person should be considered directly affected.

“... considerable judgement 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.”

[25] 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.<sup>22</sup> 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.<sup>23</sup>

[26] In this case, the Board has determined that Ms. Ouimet is not directly affected within the meaning of 115(1)(b)(i) of the *Water Act* for the reasons that follow.

[27] The starting point for the Board’s consideration of directly affected is found in the case of *Wessley*, which states that “... the definition of which persons are ‘directly affected’ is flexible and will depend upon the circumstances of each case.”<sup>24</sup> This allows the Board some flexibility in determining who has standing in an appeal. The Board has, in other decisions, discussed some of the factors it will consider in determining if a party is directly affected.

[28] In *Kostuch*, the Board stated “...that the word ‘directly’ requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental

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<sup>22</sup> When the Board makes its determination as to whether a person is directly affected it does so following a full submission process. In this submission process the appellant provides, in addition to their Statement of Concern and their Notice of Appeal, an initial submission arguing that he is directly affected, the Director and the holder of the authorization being challenged (here the Certificate Holder) get a chance to respond, and the appellant gets a right of rebuttal. As a result, in comparison to when the Director makes his decision, the Board has more information before it and that information has been more thoroughly vetted.

<sup>23</sup> 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, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

<sup>24</sup> *Fred J Wessley v. Director, Alberta Environmental Protection* (February 2, 1994), E.A.B. Appeal No. 94-001 at page 6 (“*Wessley*”).

or otherwise) that will be impacted or proximately caused by the Approval in question.”<sup>25</sup> The principle test for directly affected was stated in *Kostuch*:

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

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”<sup>26</sup>

[29] In coming to this conclusion in *Kostuch*, one of the considerations was that the interest of a directly affected person had to be greater than “the common interest of all residents who are affected by the approval.”<sup>27</sup> In this regard, in *Kostuch* the Board considered its previous decision in *Ross*.<sup>28</sup> *Ross* states:

“To be directly affected under section 84(1)(a)(v) [(now 91(1)(a)(ii))], this Board feels the person who appeals must have a substantive interest in the outcome of the approval *that surpasses the common interest of all residents who are affected by the approval*. [(*Maurice Boucher v. Director, Environmental Protection* (February 2, 1994), E.A.B. Appeal No. 93-004.)] ‘Directly affected’ depends upon the chain of causality between the specific activity approved ... and the

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<sup>25</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 28, E.A.B. Appeal No. 94-017.

<sup>26</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraphs 34 and 35, E.A.B. Appeal No. 94-017. 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 (Alta. Q.B.) at paragraph 25.

<sup>27</sup> *Ross v. Director, Environmental Protection* (May 24, 1994), E.A.B. Appeal No. 94-003 (“*Ross*”).

<sup>28</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33, E.A.B. Appeal No. 94-017.

environmental effect upon the person who seeks to appeal the decision.”<sup>29</sup>  
(Emphasis added.)

[30] Further, in *Kostuch* the Board states:

“The determination of whether a person is 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.

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*.”<sup>30</sup> (Emphasis added.)

[31] A similar view was expressed in *Paron*. In that case, 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 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 have been refused a similar approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”<sup>31</sup>

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<sup>29</sup> *Ross v. Director, Environmental Protection* (May 24, 1994), E.A.B. Appeal No. 94-003.

Section 91(1)(a)(ii) of EPEA provides:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances: (a) where the Director issues an approval ... a notice of appeal may be submitted ... (ii) by the approval holder or by any person who is directly affected by the Director’s decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3)...”

<sup>30</sup> *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38, E.A.B. Appeal No. 94-017.

<sup>31</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), E.A.B. Appeals No. 01-045, 01-046, 01-047-D at paragraph 22 (“*Paron*”).

[32] *Paron* also reminds us that the onus to demonstrate this unique interest – to demonstrate that they are directly affected – is on the appellants (in this case, Ms. Ouimet, the organization, and the other individual members). In *Paron*, the Board held:

“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.”<sup>32</sup>

The Board’s Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.<sup>33</sup>

[33] The inquiry that the Board is faced with then is to determine whether Ms. Ouimet has discharged the onus placed upon her to demonstrate that she has a unique interest that is directly, proximately, and rationally connected to the decision of the Director. In the Board’s view, Ms. Ouimet has not met this test. For example, in reviewing the Notice of Appeal and Statement of Concern filed by Ms. Ouimet, she is concerned about the following issues, many of which are beyond the Board’s jurisdiction in any event:

1. municipal planning issues;
2. assistance during consultation with the Certificate Holder;
3. potential contamination as a result of the hog processing operation;
4. water quantity;
5. on-going studies of the water supply; and
6. compensation (land values and potential costs of mitigation).<sup>34</sup>

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<sup>32</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), E.A.B. Appeals No. 01-045, 01-046, 01-047-D at paragraph 24.

<sup>33</sup> 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.”

<sup>34</sup> The Board notes that these are re-occurring themes in virtually all of the Statements of Concern. See: Director’s Record, 2.0 to 2.60.

[34] Ms. Ouimet's Notice of Appeal is effectively a list of remedies that she is seeking, including a request for money, and is silent on how she is directly affected. As indicated, a newspaper article was attached to the Notice of Appeal indicating that there is an on-going study about the hydrogeology in the area, but beyond that there is no discussion of a connection between Ms. Ouimet and the Ouellette Well. Her Statement of Concern provides slightly more information, indicting that the Ouimets have four water wells and providing the water well drilling reports, which include the legal land descriptions as to where the wells are located.

[35] We note that the Initial Submission of the Appellants indicates that Ms. Ouimet owns property within 1.5 miles of the Ouellette Well and has a water well that she uses "...personally, recreationally and as part of a family agriculture operation...."<sup>35</sup> The Appellants further advise that that Ms. Ouimet is "...legitimately concerned about groundwater contamination..." that may possibly be caused by the Ouellette Well and has concerns that she "...will be deprived of full water rights and further concerns regarding the depletion of the water resources from her well...."<sup>36</sup> The Appellants submit that Ms. Ouimet's well "...shares a common source aquifer with the..." Ouellette Well.<sup>37</sup> Finally, the Appellants argue that

"...Ms. Ouimet is directly affected by the proposed well site in that it could effect her use of available water to her well and the quality of her potable water. It would also affect the use and enjoyment of her land along with posing potential environmental risks."<sup>38</sup>

[36] In the Rebuttal Submission of the Appellants, they attempt to bolster the position of Ms. Ouimet by providing an affidavit. The affidavit reiterates many of the comments made in the Initial Written Submission of the Appellants, and adds some additional information regarding the nature of Ms. Ouimet's wells. Beyond this, the affidavit states that Ms. Ouimet has "... real and legitimate concerns about groundwater contamination..." and that she believes that she will be "... deprived of full water rights should the Certificate be granted...."

[37] In the Board's view, the submissions of the Appellants provide arguments but no evidence upon which to base a finding that Ms. Ouimet is directly affected. The submissions are

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<sup>35</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 7.

<sup>36</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 14.

<sup>37</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 14.



principally a collection of concerns and bare statements about the nature of Ms. Ouimet's well(s). The submissions do not make the proximate and direct connections that are required to find that Ms. Ouimet is directly affected.

[38] It is significant to the Board and dispositive to this case that the evidence provided by Ms. Ouimet (in her Statement of Concern) and repeated in the newspaper article attached to the Notice of Appeal, *indicates that there is uncertainty about the source of supply for Ms. Ouimet's wells*. To illustrate, in her Statement of Concern, Ms. Ouimet states that there is a study going on that is "...trying to determine if our water is being supplied by three lakes which can be depleted, or by an aquafer [sic] river." Further, the Board notes the McRae's Statement of Concern which states:

"...I would like to bring your attention to our water well. When drilling this well for Mr. Ed Stelmaschuk (previous landowner). [sic] Mr. Marvin Perrott went through many different aqua fors [sic] in hope to hit soft water for Mr. Stelmaschuk."

These statements raise critical questions about the necessary connection of Ms. Ouimet's well(s) to the Ouellette Well. It is possible that her well(s) may not be directly or even generally affected.

[39] Further, the submissions do not present any arguments that would distinguish Ms. Ouimet from the other members of the community. She has not demonstrated any type of unique interest that is being affected over and above the community that is generally affected by the granting of this Preliminary Certificate. What we can say, based on the evidence before the Board, is that Ms. Ouimet may be generally affected by the Ouellette Well. This is insufficient to grant her standing to file an appeal.

[40] The Notice of Appeal also puts forward a number of other issues that the Board cannot hear. Issues such as municipal planning, assistance during consultation with the Certificate Holder, and compensation are clearly not properly before the Board.<sup>39</sup> The remaining

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<sup>38</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 15.

<sup>39</sup> The Board notes that these concerns are similar to the concerns expressed by the appellants in *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), E.A.B. Appeals No. 01-045, 01-046, 01-047-D. At paragraph 21 of *Paron* the Board stated:

"This is a political concern: it is not an environmental concern. As such, this concern has no

issue, potential contamination – which the Board believes is the true gravamen of Ms. Ouimet’s concerns - *is* a matter that the Board can deal with. *However*, the proper forum for this Board to deal with the potential contamination that Ms. Ouimet is concerned about in this case is under the Approval that will be required for this hog processing plant under EPEA.<sup>40</sup> (What Ms. Ouimet is concerned about is that contaminants may be released into the environment from the hog processing plant and that these contaminants may potentially enter groundwater supplies. If she is right, the proper place to address the potential release of contaminants from the hog processing plant is in the EPEA Approval that will govern the release of contaminants from that facility.)

**C. May the Individual Members of CASP Hwy 37 File an Appeal?**

[41] As the Board noted in its discussion of the directly affected status of CASP Hwy 37, what the Board considers relevant, is whether the individual members of the group are directly affected. In this regard, the Board notes that it was not until the Rebuttal Submission of the Appellants that they put forward the proposition that they were appealing on behalf of the individual members of CASP Hwy 37. The Board is of the view that it is appropriate to dismiss the “addition of these further appellants” pursuant to section 95(5)<sup>41</sup> of EPEA because it is not properly before the Board. The timing is wrong and the identities are uncertain.

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relevant place before the Board. Expressing a political concern about the manner in which the Approval Holder [(the local municipality)] does nothing to demonstrate that the Appellants are directly affected within the meaning of the *Water Act* – it does not demonstrate a direct, proximate or closely held rational connection between the Approval and related environmental consequences.”

<sup>40</sup> See Director’s Record 4.17 at page 5. On July 23, 2001, a member of the Director’s staff advised: “An EPEA approval is needed for the project. The application process has begun, however, an application has not yet been submitted to...” Alberta Environment.

<sup>41</sup> Section 95(5) of EPEA provides:

- “(5) The Board
- (a) may dismiss a notice of appeal if
    - (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
    - (i.2) in the case of a notice of appeal submitted under section 84(1)(a)(iv) or (v), g(ii) or (j), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,

[42] The main problem that the Board faces in considering the standing of the individual members of CASP Hwy 37 is that nowhere in the Notice of Appeal, the Statements of Concern, the Director's Record, or the submissions of the parties, are the individual members of CASP Hwy 37 specifically identified. We do not really know who these people are.

[43] From a close review of the Record, the Board is, at best, able to surmise that Mr. Ralph Ouimet (presumably Ms. Ouimet's husband), Ms. Marjorie McRae, and Mr. Victor Soetaert may be members of CASP Hwy 37.<sup>42</sup> But we are not certain about this and we certainly have no clear indication from these individuals that Ms. Ouimet has been authorized to act on their behalf to file this appeal.

[44] However, this does not help us, as another problem the Board faces is that no specific arguments have been presented with respect to these individuals and the direct effects on them. The Initial Submission of the Appellants advises that "CASP Hwy 37 comprises and represents a group of landowners with properties who have water wells as close as several hundred yards from the..." Ouellette Well and that the members of CASP Hwy 37 use their water wells "...personally, recreationally and as part of a family agriculture operation..."<sup>43</sup> The Rebuttal Submission of the Appellants states, in Ms. Ouimet's affidavit, that she believes "...that a majority of the members of CASP Hwy 37 are also directly affected by the Certificate issued to Ouellette, as they reside within close proximity to the Ouellette well site and they have serious issues relating to their groundwater and to water depletion."<sup>44</sup> Again, these submissions are merely a collection of concerns and they do not speak factually to any proximate and direct connection between the Ouellette Well and the individual members of CASP Hwy 37. These submissions certainly do not meet the requirements discussed in *Bailey* that require an appellant to "demonstrate the personal impact required by section 91" or *Hazeldean* that requires the Board to be "...clearly convinced that the majority of the individual members of the organization

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(i.2) for any other reason the Board considers that the notice of appeal is not properly before it..."

<sup>42</sup> See the attachment to the Notice of Appeal, which is a note from Ms. McRae to the Board enclosing a newspaper article. The note is signed "CASP Hwy 37 - Marjorie McRae". See also Director's Record 2.6, which is a letter to Mr. Doug Horner, MLA and which is signed "C.A.S.P. (Hwy 37) Directors. Chairperson: Ralph Ouimet - Vicechairperson: Victor Soetaert."

<sup>43</sup> Initial Submission of the Appellants dated September 17, 2001, paragraph 8.

are individually and personally impacted....”<sup>45</sup> (As stated, in this case we do not even really know who the individual members of the organization are.)

[45] What evidence that is provided by the Appellants indicates that there is uncertainty about the source of supply of the wells in the area.<sup>46</sup> Further, the submissions do not present arguments that would distinguish these individuals from the other members of the community. Thus, the individual members of CASP Hwy 37 have not demonstrated a unique interest over and above the community that is generally affected by the granting of this Preliminary Certificate.

[46] Thus, in the Board’s view, the submissions of the Appellants do not provide sufficient evidence upon which to base a finding that any of these individual members of CASP Hwy 37 are directly affected. The Board concludes that the other Appellants have not discharged the onus to demonstrate that the individual members of CASP Hwy 37 are directly affected.

#### **D. Extension of Time to File**

[47] Finally, the Appellants have also asked for an extension of time to permit the individual members of CASP Hwy 37 to file their own Notices of Appeal.

[48] Section 116(2) of the *Water Act* permits the Board to extend the period in which a Notice of Appeal can be filed. Specifically, section 116(2) states:

“The Environmental Appeal 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.”

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<sup>44</sup> Rebuttal Submission of the Appellants dated October 1, 2001, Affidavit of Ms. Ouimet, paragraph 14.

<sup>45</sup> 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*) E.A.B. 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* (May 11, 1995), E.A.B. Appeal No. 95-002.

<sup>46</sup> In her Statement of Concern, Ms. Ouimet states that there is a study going on that is “...trying to determine if our water is being supplied by three lakes which can be depleted, or by an aquafer [sic] river.” The Board also notes the McRae’s Statement of Concern which states:

“...I would like to bring your attention to our water well. When drilling this well for Mr. Ed Stelmaschuk (previous landowner). [sic] Mr. Marvin Perrott went through many different aqua fors [sic] in hope to hit soft water for Mr. Stelmaschuk.”

[32] In making this request the Appellants have indicated that "...there are sufficient ground to do so for the proper administration of justice to allow such appeals to be fairly heard."<sup>47</sup> Beyond this, the Appellants have provided no other explanation or reason why the Board should grant the extension.

[49] In the Board's view such an explanation is insufficient and, taking into account all of the reasons discussed above, the Board does not see any basis upon which to grant an extension of time to file other Notices of Appeal.

#### **IV. DECISION**

[50] Therefore, for the reasons provided above and pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, the appeal is dismissed.

Dated on January 28, 2002 at Edmonton, Alberta.

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William A. Tilleman, Q.C.  
Chairman

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<sup>47</sup> Initial Submission of the Appellants dated September 17, 2001 at paragraph 40.