

# ALBERTA ENVIRONMENTAL APPEAL BOARD DECISION

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Date of Decision: November 29, 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** Notices of Appeal filed by Ronald  
Hanson, Frank Jensen, Mark Davy, Daniel Davy, Soren Davy, Ken  
Reid, Robert Copley, Irene Hanson, Wayne Hanson, and the City  
of Airdrie with respect to *Water Act* Approval No. 00137206-00-  
00 and *Water Act* Preliminary Certificate No. 00137211-00-00  
issued to Apple Creek Golf and Country Club by the Director,  
Southern Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional  
Services, Alberta Environment re: Apple Creek Golf and Country Club* (29  
November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.).

**PRELIMINARY MEETING VIA  
WRITTEN SUBMISSIONS:**

Dr. Steve E. Hrudehy, Panel Chair;  
Mr. Ron V. Peiluck;  
Mr. Ron Hierath.

**PARTIES:**

**Appellants:** Mr. Ronald Hanson (01-123 and 02-050); Mr. Frank Jensen (01-124 and 02-051); Mr. Mark Davy (01-125 and 02-052); Mr. Daniel Davy (01-126 and 02-053); Mr. Soren Davy (01-127 and 02-054); Mr. Ken Reid (01-128); Mr. Robert Copley (01-129 and 02-055); Ms. Irene Hanson (01-130 and 02-056); Mr. Wayne Hanson (01-131 and 02-057); City of Airdrie, represented by Mr. Jeff Greene, Team Leader, Planning and Development Department, City of Airdrie (02-001 and 02-058); and the Municipal District of Rocky View No. 44, represented by Mr. Peter Kivisto, Municipal Manager, Municipal District of Rocky View No. 44.

**Director:** Ms. May Mah-Paulson, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

**Approval Holder:** Apple Creek Golf and Country Club, represented by Mr. Rick Skauge, Apple Creek Golf and Country Club, and Mr. Jan Korzeniowski, J.K. Engineering Ltd.

## **EXECUTIVE SUMMARY**

Alberta Environment issued a Preliminary Certificate and an Approval under the *Water Act* to Apple Creek Golf and Country Club with respect to their operations at SE35-27-01-W5M in the Municipal District of Rocky View, Alberta. The Preliminary Certificate, subject to meeting certain conditions, grants a licence authorizing the diversion of 119,929 cubic metres of water annually from McPherson Coulee and the Approval authorizes the construction of a channel improvement, control gates, dykes, and a diversion pipe on McPherson Coulee and an unnamed water body. McPherson Coulee is a tributary of Nose Creek.

Ten appeals were filed with respect to the Preliminary Certificate and eleven appeals were filed with respect to the Approval. (One person who filed an appeal with respect to the Approval did not file an appeal with respect to the Preliminary Certificate. One of the appeals filed with respect to the Preliminary Certificate and one of the appeals filed with respect to the Approval were dismissed in two separate decisions.)

The Board decided to conduct an information session with the Appellants, Apple Creek Golf and Country Club, and Alberta Environment to provide the Appellants with an overview of the Approval, the Preliminary Certificate, Alberta Environment's approval process, Apple Creek's project, and the Board's appeal process. After the information session, Alberta Environment requested that the Board dismiss all of the appeals, except the appeals filed by Mr. Ronald Hanson. Alberta Environment argued that because Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy, Mr. Robert Copley and the City of Airdrie did not file Statements of Concern, they are not eligible to file appeals. Alberta Environment also argued that the appeals of Mr. Ken Reid, Ms. Irene Hanson, Mr. Wayne Hanson, and the City of Airdrie should be dismissed because they are not directly affected by either the Approval or the Preliminary Certificate.

After reviewing all of the submissions from the parties and the evidence before the Board, the Board has decided to hear the appeals filed by Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson. The Board has also decided to make the City of Airdrie a party to these appeals.

The Board has decided to dismiss the appeals of Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy, Mr. Ken Reid, and Mr. Robert Copley and the City of Airdrie. The individuals whose appeals have been dismissed can apply for intervenor status in the hearing.

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## **I. BACKGROUND**

[1] On March 18, 2002, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”) issued Approval No. 00137206-00-00 (the “Approval”) and Preliminary Certificate No. 00137211-00-00 (the “Certificate”) to the Apple Creek Golf and Country Club (the “Approval Holder”) authorizing the construction of channel improvement, control gates, dykes, and a diversion pipe on McPherson Coulee and an unnamed water body, and upon compliance with certain conditions issuing a Licence (the “Licence”), allowing the diversion of 119,929 cubic metres of water annually from McPherson Coulee (collectively the “Project”), all in SE 35-27-01-W5M in the Municipal District of Rocky View No. 44.<sup>1</sup> The Approval and the Certificate were issued under the *Water Act*, R.S.A. 2000, c. W-3.

[2] On March 25, 2002, the Environmental Appeal Board (the “Board”) received Notices of Appeal from Mr. Ronald Hanson, Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy, Ms. Irene Hanson, and Mr. Wayne Hanson appealing the Approval.<sup>2</sup> On March 28, 2002, the Board received revised Notices of Appeal from these individuals that appealed the Certificate as well.<sup>3</sup> On March 27, 2002, the Board received a Notice of Appeal from Mr. Robert Copley appealing both the Approval and the Certificate.<sup>4</sup> On March 28, 2002, the Board received a Notice of Appeal from Mr. Ken Reid appealing the Approval only.<sup>5</sup> On April 3, 2002, the Board received a Notice of Appeal from the City of Airdrie appealing the Approval and the Certificate.<sup>6</sup>

[3] On April 17, 2002, the Board received a Notice of Appeal from the Municipal District of Rocky View No. 44 (the “Municipal District”) appealing the Approval and

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<sup>1</sup> The Certificate has priority 2000-07-05-002. The Approval Holder also holds Licence 10813 under the *Water Act* for 32,071 m<sup>3</sup> having priority 1962-03-19-001, with McPherson Coulee as its source of supply, and also located on SE 35-27-1-W5M. Licence 10813 is not the subject of these appeals.

<sup>2</sup> Notices of Appeal 01-123, 01-124, 01-125, 01-126, 01-127, 01-130, and 01-131 respectively.

<sup>3</sup> Notices of Appeal 02-050, 02-051, 02-052, 02-053, 02-054, 02-056, and 02-057 respectively.

<sup>4</sup> Notices of Appeal 01-129 and 02-055 respectively.

<sup>5</sup> Notice of Appeal 01-028.

<sup>6</sup> Notices of Appeal 02-001 and 02-058 respectively.

Certificate. The appeal of the Approval by the Municipal District was dismissed on June 25, 2002.<sup>7</sup> The appeal of the Certificate by the Municipal District was withdrawn after the submissions respecting the matters that are the subject of this Decision were received. The Board issued a Discontinuance of Proceedings on August 1, 2002.<sup>8</sup>

[4] The Board acknowledged receipt of the appeals of the Appellants<sup>9</sup> and requested that the Director provide copies of the records (the “Record”) relating to these appeals. The Board also notified the Approval Holder of the appeals.

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

[6] On April 12, 2002, the Board acknowledged receipt of the letter dated April 11, 2002, from the Director, as well as two additional approvals issued to the Approval Holder under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the “Act” or “EPEA”). These approvals authorized the construction, operation, and reclamation of a waterworks system (Approval 136299-00-00) and a wastewater system (Approval 136303-00-00). Copies of these approvals were provided to the Appellants as well as information regarding the timelines for filing appeals of these approvals. The Board has not received any appeals with respect to these approvals.

[7] On April 23, 2002, the Board acknowledged receipt of the Record from the Director and provided copies to the Appellants and Approval Holder. In this letter, the Board requested that the Appellants and the Approval Holder provide their comments with respect to

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<sup>7</sup> *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.).

<sup>8</sup> *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (1 August 2002), Appeal No. 02-059-DOP (A.E.A.B.).

<sup>9</sup> Mr. Ronald Hanson, Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy, Mr. Ken Reid, Mr. Robert Copley, Ms. Irene Hanson, Mr. Wayne Hanson, the City of Airdrie, and the Municipal District of Rocky View No. 44 (collectively the “Appellants”).

the Director's suggestion of holding an informal information session prior to scheduling a mediation meeting. The Board provided the Record to the Appellants and Approval Holder on April 30, 2002.

[8] On April 25, 2002, the Board acknowledged receipt of the letter from the Municipal District supporting the Director's suggestion of holding an informal information session with respect to these appeals.

[9] On May 9, 2002, the Board acknowledged receipt of a copy of a letter from the Approval Holder to the Director. In this letter, the Board confirmed that an informal information meeting would be held on May 27, 2002, in Airdrie, Alberta. The purpose of the meeting was to provide the Appellants with an overview of the Approval, the Certificate, the approval process, the Project, and the appeal process.

[10] On May 31, 2002, the Board wrote to the Parties,<sup>10</sup> summarizing the informal information meeting that was held on May 27, 2002. The Board stated that:

“Following the exchange of information, discussions continued which effectively resulted in a fundamental question from the Appellants asking how can they be assured of what types of impacts this project will have on the watercourse through some sort of model or other prediction. As a result, Alberta Environment was requested to determine whether it would be possible to give a better indication of the type and timing of the impacts that would result from this project. They were requested to provide an indication of when and if it will be possible to develop such a model or prediction by June 4, 2002.

The Board must now determine what the next steps are to be taken with respect to these appeals. As indicated to the parties at the meeting, the Board notes that there may be concerns regarding the ability of the Board to consider some of the appeals, because some of the parties may not have filed statements of concern or may not have filed statements of concern within the required timeframes. If any of the parties have concerns regarding this issue or know of any other concerns with these appeals, they should advise the Board by June 4, 2002.” (Emphasis omitted.)

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<sup>10</sup> “Parties” in these appeals refers to the Appellants, the Approval Holder, and the Director.



[11] On May 31, 2002, the Board received a copy of the Nose Creek 2000 Surface Water Quality Data Report from the Director and provided a copy to the Appellants and the Approval Holder.

[12] On June 11, 2002, the Board acknowledged receipt of a letter dated June 4, 2002, from the Director in which it was suggested that the Director complete the "...water availability study for the Nose Creek Basin using the Branch 'Watshort' computer program..." and indicated that it would take two to three months to complete this work. The Board advised:

"The Board believes that it may of benefit to all parties involved, if Alberta Environment were to complete the 'water availability study of the Nose Creek Basin using the Branch 'Watshort' computer program' and the Rosebud Creek information. Such information may address the types of concerns voice by the participants at the meeting on May 27, 2002 and may also be of assistance to Alberta Environment and the Board should a hearing of these appeals proceed."

The Board also advised in its letter that the "...preparation of this information does not prejudice the parties or the Board from considering the jurisdictions/questions that may arise in these appeals."<sup>11</sup>

[13] On June 11, 2002, the Board also acknowledged a letter from the Director, dated June 4, 2002. The Director's letter requested that the Board dismiss all of the appeals in this matter, with the exception of the appeals filed by Mr. Ronald Hanson. The Director raised two issues. The first issue was the failure of Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy and Mr. Robert Copley to file Statements of Concern and therefore, according to the Director, they are not eligible to file a Notice of Appeal. Included later in the Director's submission was an argument that the City of Airdrie has also not filed a valid Statement of Concern. The second issue was that, according to the Director, Mr. Ken Reid, Ms. Irene Hanson, Mr. Wayne Hanson and the City of Airdrie are not directly affected and therefore their appeals should be dismissed.<sup>12</sup> The Director provided detailed arguments supporting her motion and

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<sup>11</sup> On June 13, 2002, the Board acknowledged receipt of a letter dated June 12, 2002, from the Director advising that the Director will provide the "Water Availability Study using the Watshort Program."

<sup>12</sup> The Director also argued that the Municipal District was not directly affected, however, the Municipal District subsequently withdrew its appeal.

eventually relied upon this motion as her submission in this matter. Attached to the Director's motion was a map, that included a detailed legend, identifying the various authorizations held by the Appellants under the *Water Act* entitled "Appellant Authorizations – Water Act – Apple Creek" dated May 27, 2002 (the "Director's Map").<sup>13</sup>

[14] In its letter of June 11, 2002, the Board set a schedule to receive submissions in response to the Director's motion.<sup>14</sup> The Board's letter warned that a "...[f]ailure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*."<sup>15</sup>

[15] On June 25, 2002, the Board acknowledged receipt of initial submissions from Mr. Ronald Hanson, Ms. Irene Hanson, Mr. Wayne Hanson, Mr. Robert Copley, and the Municipal District of Rocky View No. 44. The Board's letter indicated that messages had been left for Mr. Mark Davy, Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen, Mr. Ken Reid and the City of Airdrie indicating that the Board had not received a response to its request for a submission from these parties. The letter went on to ask for submissions from these remaining parties by June 27, 2002, and reset the deadlines for the response submissions and rebuttal submissions. The letter again contained the warning that "...[f]ailure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*."

[16] On June 26, 2002, the Board acknowledged receipt of an initial submission from the City of Airdrie, and on June 28, 2002, the Board acknowledged receipt of an initial submission from Mr. Mark Davy. No submissions were received from Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen, or Mr. Ken Reid.

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<sup>13</sup> A copy of the Director's Map is attached as an Appendix to this Decision.

<sup>14</sup> The Board requested that: the Appellants provide their initial submissions by June 21, 2002; the Director and the Approval Holder provide their response submissions by June 28, 2002; and the Appellants provide their response submissions by July 5, 2002.

<sup>15</sup> Section 95(5)(a)(iv) of the Act provides:

"The Board (a) may dismiss a notice of appeal if ... (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92...."

[17] On July 3, 2002, the Board acknowledged receipt of a response submission from the Approval Holder and a letter from the Director that advised "...the Director will not be submitting any further submissions on these preliminary issues and relies upon the letter sent to the Board on Tuesday, June 4, 2002."

[18] On July 11, 2002, the Board wrote to the Parties and advised, "...the Board has not received rebuttal submissions from the Appellants, which were due July 9, 2002. Submissions are therefore closed."

## **II. SUMMARY OF EVIDENCE AND SUBMISSIONS**

### **A. Appellants**

1. Ronald Hanson, Irene Hanson and Wayne Hanson

[19] In their Notice of Appeal, Mr. Ronald Hanson, Ms. Irene Hanson and Mr. Wayne Hanson (collectively the "Hansons") stated that they operate a 300 cow/calf ranch on 2000 acres, part of which is SE 26-27-1-W5M, W½ of NE 23-27-1-W5M, NW 23-27-1-W5M, and SW 23-27-1-W5M.<sup>16</sup> They indicated that this land is either supplied with water by Nose Creek or the water table is dependant on the flow of Nose Creek and that McPherson Coulee is a major contributor to Nose Creek.<sup>17</sup>

[20] The Director's Map indicates that the Nose Creek flows adjacent to the southeast corner of the SE 26-27-1-W5M, through the center of NE 23-27-1-W5M, and through the center of SW 23-27-1-W5M all of which are downstream within approximately 4 kilometres of the Project and the confluence of Nose Creek and McPherson Coulee.

[21] The Director's Map indicates that Mr. Ronald Hanson holds five authorizations under the *Water Act* in the Nose Creek basin. These authorizations are:

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<sup>16</sup> See: Notices of Appeal of Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson, all dated March 26, 2002.

<sup>17</sup> See: Notices of Appeal of Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson, all dated March

Location	Authorization	Priority Number	Quantity	Source of Supply
SE 26-27-1-W5M	Registration 157768	1958-12-31-235	505 m <sup>3</sup>	Surface Runoff
NE 21-27-1-W5M	Registration 157768	1977-07-31-018	51 m <sup>3</sup>	Stream (Creek)
SE 21-27-1-W5M	Registration 157768	1987-10-31-011	288 m <sup>3</sup>	Stream (Dugout)
SW 26-27-1-W5M	Registration 157768	1994-12-31-392	506 m <sup>3</sup>	Surface Runoff
NE 22-27-1-W5M	Registration 157768	1996-12-29-902	1738 m <sup>3</sup>	Stream (Creek)

All of the Registrations held by Mr. Ronald Hanson are senior in priority to the Approval Holder's Certificate.

[22] Of the Registrations held by Mr. Ronald Hanson, the Registration on SE 26-27-1-W5M appears to be located physically closest to Nose Creek, which appears to flow adjacent to the southeast corner of the quarter section. However, according to the Director's Map, the source of supply for this Registration is surface runoff. (The Board notes that this is the Registration that the Director is prepared to accept as "potentially affected" by the Project and the basis for not objecting to the standing of Mr. Ronald Hanson.)<sup>18</sup> According to the Director's Map, another Registration is located on the quarter section immediately to the west (SW 26-27-1-W5M). It is approximately 1 kilometer west of Nose Creek and is also identified as having its source of supply as surface runoff.

[23] The other three Registrations (NE 21-27-1-W5M, SE 21-27-1-W5M, and NE 22-27-1-W5M) are all located to the west of Nose Creek (approximately between 1.6 and 4 kilometres away) and are identified on the Director's Map as having a stream as the source of supply. They appear to be located on a tributary to Nose Creek called Writing Creek, located to the west of Nose Creek and having its confluence with Nose Creek in NE 23-27-1-W5M.

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26, 2002.

<sup>18</sup> See: Director's Submission, dated June 4, 2002, at page 7: "It is the Director's submission that only Registration No. 157768 located in the SE 26-027-01-W5 could be potentially affected by the Apple Creek diversion."

[24] The Director's Map indicates that Ms. Irene Hanson holds one authorization under the *Water Act* in the Nose Creek basin. This authorization is:

Location	Authorization	Priority Number	Quantity	Source of Supply
SW 23-27-1-W5M	Registration 157770	1952-12-31-203	736 m <sup>3</sup>	Surface Runoff

Ms. Hanson's Registration is senior in priority to the Approval Holder's Certificate.

[25] The Registration held by Mr. Irene Hanson is located on a quarter section immediately west of a quarter section (SE 23-27-1-W5M) through which Nose Creek flows, and is located approximately 0.8 kilometres away from Nose Creek. However, Ms. Hanson's Registration is identified in the Director's Map as having surface runoff as its source of supply.

[26] The Director's Map indicates that Mr. Wayne Hanson holds three authorizations under the *Water Act* in the Nose Creek basin. These authorizations are:

Location	Authorization	Priority Number	Quantity	Source of Supply
NE 23-27-1-W5M	Registration 157766	1978-12-31-077	552 m <sup>3</sup>	Stream (Dugout)
NW 23-27-1-W5M	Registration 157766	1978-12-31-078	196 m <sup>3</sup>	Surface Runoff
NW 23-27-1-W5M	Registration 157766	1978-12-31-079	196 m <sup>3</sup>	Stream (Spring)

All of Mr. Wayne Hanson's Registrations are senior in priority to the Approval Holder's Certificate.

[27] The first Registration held by Mr. Wayne Hanson, which is on NE 23-27-1-W5M, appears to be located near the confluence of the tributary known as Writing Creek coming from the west and Nose Creek and has its source of supply identified as a stream. The second and third Registrations held by Mr. Wayne Hanson, both on NW 23-27-1-W5M, are located on a quarter section immediately west of the quarter section (NE-23-27-1-W5M) through which Nose Creek flows, and approximately 0.8 kilometers away from Nose Creek. Also flowing through the southern part of the quarter section on which the second and third Registrations are located is the tributary to Nose Creek known as Writing Creek, located to the west of Nose Creek and having its confluence with Nose Creek in NE 23-27-1-W5M. The second Registration is identified as having surface runoff as its source of supply. The source of supply for the third Registration is identified in the Director's Record as having a stream as its source of supply.

[28] Mr. Ronald Hanson, Ms. Irene Hanson and Mr. Wayne Hanson filed Statements of Concern with the Director on October 1, 2000.<sup>19</sup> On December 4, 2000, the Director wrote to Mr. Ronald Hanson, Ms. Irene Hanson and Mr. Wayne Hanson and advised that their Statements of Concern had been accepted.<sup>20</sup>

[29] The Hansons filed two initial submissions in response to the Director's motion. The first was filed by Mr. Ronald Hanson<sup>21</sup> and the second was filed jointly by Ms. Irene Hanson and Mr. Wayne Hanson.<sup>22</sup>

[30] In his submission, Mr. Ronald Hanson stated that the "...creek flow affects the water table and ecosystem of the whole Nose Creek basin of which they [(the Hansons)] each own land that contains portions of the Nose Creek Basin."<sup>23</sup> Mr. Hanson argued that the Board should accept all of the Notices of Appeal, stating that he:

"...requests that you accept all appeals of the downstream appellants because no one downstream realized the drastic affect [*sic*] theses approvals to Apple Creek Golf and Country Club were going to have on downstream users. I feel it is more important to make right decisions, than it is to follow rules to the letter, to silence legitimate concerns that most farmers were not aware of at the beginning of the approval process."<sup>24</sup>

[31] In the submission filed by Ms. Irene Hanson and Mr. Wayne Hanson, they restate their view that the Project will affect the lands that they identified in their Notices of Appeal. They state that their "...family which consists of Ron Hanson, Irene Hanson and Wayne Hanson, operate our Ranch in a partnership. So all property owned by any one of the family affects the whole partnership."<sup>25</sup> Finally, Ms. Irene Hanson and Mr. Wayne Hanson submitted that: "...we

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<sup>19</sup> See: Director's Record, Tab 81.

<sup>20</sup> See: Director's Record, Tab 74.

<sup>21</sup> See: Mr. Ronald Hanson's Submission, dated June 21, 2002.

<sup>22</sup> See: Ms. Irene Hanson and Mr. Wayne Hanson's Submission, dated June 21, 2002.

<sup>23</sup> See: Mr. Ronald Hanson's Submission, dated June 21, 2002. In his submission, he stated that Ms. Irene Hanson, Mr. Ronald Hanson, and Mr. Wayne Hanson operate the lands as a partnership.

<sup>24</sup> Mr. Ronald Hanson's Submission, dated June 21, 2002.

<sup>25</sup> Mr. Irene Hanson and Mr. Wayne Hanson's Submission, dated June 21, 2002.

do not think any one [*sic*] down stream from Apple Creek realized what a major affect this water act approval was going to have on the creek flow and the ecosystem of the Nose Creek basin.”<sup>26</sup>

2. Mark Davy, Daniel Davy, and Soren Davy

[32] In his Notice of Appeal, Mr. Mark Davy stated that he owns the NE 14-27-1-W5M and that he operates a mixed farm in conjunction with Mr. Daniel Davy and Mr. Soren Davy on N 14-27-1-W5M and NW 13-27-01-W5M.<sup>27</sup> Mr. Davy indicated that Nose Creek flows through the NE of 14-27-1-W5M and indicated that there is a dugout on this quarter and another dugout on NW 14-27-1-W5M, both of which are said to be recharged from Nose Creek.<sup>28</sup>

[33] The Director’s Map indicates that the Nose Creek flows through the center of NE 14-27-1-W5M which is downstream (approximately 5.6 kilometres) of the Project and the confluence of Nose Creek and McPherson Coulee.

[34] The Director’s Map indicates that Mr. Mark Davy has an application for an authorization pending under the *Water Act* in the Nose Creek basin. Mr. Daniel Davy and Mr. Soren Davy hold two authorizations under the *Water Act* in the Nose Creek basin. These authorizations are:

Location	Authorization	Priority Number	Quantity	Source of Supply
Mark Davy				
NE 14-27-1-W5M	Registration	Pending	Pending	Pending
Soren Davy				
NW 13-27-1-W5M	Registration 79332	1900-12-31-007	225 m <sup>3</sup>	Surface Runoff
Daniel Davy				
NW 14-27-1-W5M	Registration 79340	1959-12-29-019	207 m <sup>3</sup>	Surface Runoff

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<sup>26</sup> Ms. Irene Hanson and Mr. Wayne Hanson’s Submission, dated June 21, 2002.

<sup>27</sup> See: Notice of Appeal of Mr. Mark Davy, dated March 24, 2002.

<sup>28</sup> See: Notice of Appeal of Mr. Mark Davy, dated March 24, 2002.

The Registrations of Mr. Daniel Davy and Mr. Soren Davy are senior in priority to the Approval Holder's Certificate. The Board has no information regarding the priority assigned to Mr. Mark Davy's Registration, but assumes that it will also be senior in priority to the Approval Holder's Certificate.<sup>29</sup>

[35] Mr. Mark Davy did not file a Statement of Concern with the Director. (Mr. Daniel Davy and Mr. Soren Davy also did not file Statements of Concern with the Director.)

[36] In his submission, which was filed after the initial deadline for submissions had passed, Mr. Mark Davy expressed concern regarding the water flow through his land located at the NE¼ 14-27-1-W5M. He stated that the water flow on his land has steadily decreased to a level that he may have to look for alternate water sources. He stated that a study should be done to determine the feasibility of using Nose Creek. Mr. Mark Davy did not provide an explanation for his failure to file a Statement of Concern with the Director.

[37] Mr. Daniel Davy and Mr. Soren Davy did not file a submission with the Board.

3. Robert Copley

[38] In his Notice of Appeal, Mr. Copley indicates that the flow of water from McPherson Creek has stopped through his property (NW 25-27-1-W5M).

[39] The Director's Map indicates that Mr. Copley holds one authorization under the *Water Act* in the Nose Creek basin. This authorization is:

Location	Authorization	Priority Number	Quantity	Source of Supply
NW 25-27-1-W5M	Registration 80446	1996-12-29-570	925 m <sup>3</sup>	Aquifer

Mr. Copley's Registration is senior in priority to the Approval Holder's Certificate.

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<sup>29</sup> Section 28 of the *Water Act* provides:

"If in the opinion of the Director an applicant for a registration complies with this Act, the Director must assign a priority number to the registration that corresponds to the first known date of diversion of water but no earlier than July 1, 1894, for the purpose of raising animals or



[40] The Director's Map indicates that Nose Creek and McPherson Coulee flow through the NW 25-27-1-W5M and that the confluence of Nose Creek and McPherson Coulee is located in the southwest corner of this quarter section. The NW 25-27-1-W5M is located immediately downstream (less than 1 km) of the Project on McPherson Coulee.

[41] Mr. Copley did not file a Statement of Concern with the Director.

[42] In his submission, Mr. Copley expressed concerns regarding the amount of water to be used by the Approval Holder and the disturbance in the creek bed. He suggested the Approval Holder pipe in water from the City of Airdrie and install another pipe to remove sewage from the site.<sup>30</sup> Mr. Copley did not provide an explanation for his failure to file a Statement of Concern with the Director.

4. Frank Jensen

[43] In his Notice of Appeal, Mr. Jensen expressed concern about the restriction of Nose Creek during construction and that Nose Creek has been dry for 8 months. He also indicated that he held a Registration on Nose Creek. Mr. Jensen indicated that he holds the NW 24-27-1-W5M.<sup>31</sup>

[44] The Director's Map indicates that Mr. Jensen holds two authorizations under the *Water Act* in the Nose Creek basin. These authorizations are:

Location	Authorization	Priority Number	Quantity	Source of Supply
NE 23-27-1-W5M	00163586	1944-12-31-016	352 m <sup>3</sup>	Nose Creek
NE 23-27-1-W5M	00163586	1944-12-31-017	352 m <sup>3</sup>	Stream (Creek)

Both of Mr. Jensen's Registrations are senior in priority to the Approval Holder's Certificate.

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applying pesticides to crops from the sources of water on the land specified in the application for registration."

<sup>30</sup> See: Mr. Robert Copley's Submission, received June 24, 2002.

<sup>31</sup> See: Notice of Appeal of Mr. Frank Jensen, dated March 25, 2002.

[45] The Director's Map indicates that Nose Creek flows through the quarter section to the west of the quarter section that Mr. Jensen owns (NW 24-27-1-W5M). However, Mr. Jensen's Registrations appear to be in the quarter to the west of the quarter section that Mr. Jensen owns. The NW 24-27-1-W5M is approximately 2.2 km downstream of the Project. The source of supply for both Mr. Jensen's Registrations appears to be Nose Creek.

[46] Mr. Jensen did not file a Statement of Concern with the Director and did not file a submission with the Board when requested to do so.

5. Ken Reid

[47] Unlike the other Appellants in these appeals, Mr. Reid submitted a Notice of Concern regarding the Approval only. Although he expressed general concerns for the ecological integrity of Nose Creek, in his Notice of Appeal, Mr. Reid did not identify how he, personally, would be affected.<sup>32</sup> Mr. Reid's Notice of Appeal indicates that he owns the NE 26-27-1-W5M.

[48] The Director's Map indicates that Mr. Reid holds one authorization under the *Water Act* in the Nose Creek basin. This authorization is:

Location	Authorization	Priority Number	Quantity	Source of Supply
NE 2-28-1-W5M	00169412	1900-12-31-067	545 m <sup>3</sup>	Stream (dugout)

Mr. Reid's Registration is senior in priority to the Approval Holder's Certificate.

[49] The Director's Map indicates that Mr. Reid's Registration is located on Nose Creek approximately 3.5 km upstream of the confluence of McPherson Coulee and Nose Creek.<sup>33</sup> However, the property that Mr. Reid identifies as owning is in the quarter section (NE

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<sup>32</sup> See: Notice of Appeal of Mr. Ken Reid, dated March 26, 2002.

<sup>33</sup> See: Director's Submission, dated June 4, 2002.

26-27-1-W5M) immediately south of the Project. There are no authorizations under the *Water Act* identified on the Director's Map as being associated with NE 26-27-1-W5M.

[50] No submission was received from Mr. Reid in response to the Board's request.

6. City of Airdrie

[51] In the City of Airdrie's Notice of Appeal, they indicate that they filed a Statement of Concern with the Director on October 13, 2000, in response to a "...notice advertised in the in the *Airdrie Echo*."<sup>34</sup> The principal complaint of the City of Airdrie is that its concerns expressed in the Statement of Concern were not taken into account in the decision process.

[52] The Director's Map indicates that the City of Airdrie encompasses approximately 8 and ¼ sections of land, stretching from the SW 13-27-1-W5M in the north to S 25-26-1-W5M in the south. The northern boundary of the City of Airdrie is approximately 4.6 kilometres downstream from the Project. The Director's Map indicates that Nose Creek flows through the City of Airdrie for approximately 6.5 kilometres from the north to south, through the southwest corner of SW 13-27-1-W5M, through the W 12-27-1-W5M, through the northeast corner of NW 1-27-1-W5M, through the E 1-27-1-W5M, and along the eastern edge of E 36-26-1-W5M and E 25-26-1-W5M.

[53] The Director's Record indicates that the City of Airdrie holds two authorizations under the *Water Act* in the Nose Creek basin. These authorizations are:

Location	Authorization	Priority Number	Quantity	Source of Supply
SE 1-27-1-W5M	Licence 70090	1996-10-09-001	568,371 m <sup>3</sup>	Nose Creek
SE 11-27-1-W5M	Preliminary Certificate 70270	1996-09-10-001	34,537 m <sup>3</sup>	Surface runoff tributary to Nose Creek

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<sup>34</sup> See: Notice of Appeal of City of Airdrie, dated April 10, 2002. In its Notice of Appeal, the City of Airdrie refers to an advertisement in the *Airdrie Echo*. However, in the City of Airdrie's Submission, dated June 25, 2002, it refers to the *Rocky View Times*. A review of the Director's Record indicates that the advertisement was placed in the *Rocky View Times*. See: Director's Record, Tab 85. There is not indication in the Director's Record, or that was provided to the Board otherwise, that an advertisement was placed in the *Airdrie Echo*.

The priority of the City of Airdrie's Licence and Preliminary Certificate are senior to that of the Approval Holder's Certificate.

[54] Licence 70090 held by the City of Airdrie, a copy of which was attached to the Director's Submission,<sup>35</sup> is located on the SE 1-27-W5M, through which Nose Creek flows. (On the Director's Map, the indicator identifying this Licence appears to be incorrectly placed on the SW-1-27-1-W5M.) The source of supply for Licence 70090 is Nose Creek and the stated purpose is for recirculation and is therefore non-consumptive. The Licence provides, among other things, that: "Diversion from Nose Creek shall not be permitted unless a minimum residual flow of 3 cubic feet per second is maintained."<sup>36</sup>

[55] Preliminary Certificate 70270 held by the City of Airdrie is located on the SE-11-27-1-W5M, in a quarter section adjacent to Nose Creek and has a source of supply "surface runoff tributary to Nose Creek." According to the Director,<sup>37</sup> the purpose of the licence is for other/recreational purposes to create a pond that has aesthetic value (i.e., water quality).

[56] In its submission,<sup>38</sup> the City of Airdrie argued that it had submitted a Statement of Concern to the Director on October 13, 2000. The City of Airdrie advises that it was subsequently told by the Director that it was not directly affected. The Director's Record confirms that a Statement of Concern was received on October 13, 2000,<sup>39</sup> and that the Director responded to the City of Airdrie on December 4, 2000, indicating that the City of Airdrie "...will not be considered as directly affected and your submission will not be considered a statement of concern."

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<sup>35</sup> See: Director's Submission, dated June 4, 2002.

<sup>36</sup> See: Director's Submission, dated June 4, 2002, Licence 70090, Condition 4.

<sup>37</sup> See: Director's Submission, dated June 4, 2002.

<sup>38</sup> See: City of Airdrie's Submission, dated June 25, 2002.

<sup>39</sup> See: Director's Record, Tab 80. An internal fax coversheet indicates that the Statement of Concern was received from the City of Airdrie on October 13, 2000, at 6:00 p.m. A review of the actual Statement of Concern from the City of Airdrie has the fax header indicating that it was received October 13, 2000, at 16:02 (or 4:02 p.m.). In any event, the Statement of Concern bears a stamp from the Alberta Environment Regulatory Approvals Centre indicating that it was received on October 13, 2000.

[57] According to its submission, it was the City of Airdrie's understanding that "no further environmental review" would be done by the Director unless verification was received that the development could proceed. The City of Airdrie stated that the Municipal District had refused the redistricting application of the Approval Holder, and therefore, it understood the Director would not be proceeding with any other review. The Board notes that the City of Airdrie appears to suggest that this "understanding" was a reason that their Statement of Concern was filed late, but according to the dates detailed in the City of Airdrie's submission, these events occurred after the Statement of Concern was filed.<sup>40</sup>

[58] Further, the City of Airdrie then stated that it did not receive "immediate" notification of the applications and that the advertisement was placed in the *Rocky View Times*, a newspaper that is not distributed in the City of Airdrie.

[59] With respect to the question of directly affected, the City of Airdrie stated:

"The City contends that, as it is directly downstream from the proposed development, it is directly affected by the withdrawal of substantial amounts of water from the Nose Creek. Watercourses do not end at municipal boundaries and serve important environmental as well as recreational value to this community. In keeping with the principals of sustainable development and an acknowledgement of the unique attributes of the Nose Creek to this community we hope that the Appeal Board will hear the City's concerns."<sup>41</sup>

7. Municipal District of Rocky View No. 44

[60] While the Municipal District provided a submission in response to the Director's motion, as previously noted in this Decision, its appeal of the Approval was previously dismissed and its appeal of the Certificate was subsequently withdrawn. Therefore, the Board need not address the Municipal District's submission.

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<sup>40</sup> See: City of Airdrie's Submission, dated June 25, 2002. According to the City of Airdrie's Submission, their Statement of Concern was filed on October 13, 2000, the redistricting application was refused on December 19, 2000, a member of Director's staff indicated that "no further environmental review will be done" on January 16, 2001, and this was confirmed by the Director, Enforcement and Monitoring, Southern Region, Regional Services, Alberta Environment on March 14, 2001.

<sup>41</sup> See: City of Airdrie's Submission, dated June 25, 2002.

**B. Director**

[61] The Director submitted arguments with respect to all of the Appellants. The Director stated that notice of the Application was posted on the government website, on the “Public Notice Bulletin Board” in the Director’s offices, and in the *Rocky View Times*, and therefore, “...there was proper statutory notice of the application in accordance with the *Act*.”<sup>42</sup> According the Director’s Record, the deadline for providing a Statement of Concern was October 5, 2000, for both the Approval and the Certificate according to the notice published on the government website,<sup>43</sup> September 13, 2000, for the Approval and October 6, 2000, for the Certificate according to the notice on the Public Notice Bulletin Board,<sup>44</sup> and October 12, 2000, for both the Approval and the Certificate according to the notice published in the *Rocky View Times*.<sup>45</sup> The Director argued that notice to the public generally was sufficient to satisfy the requirements of the Act and that individual notice to interested persons is not required as the burden would be “...too much for the Director to carry.”<sup>46</sup>

[62] The Director stated that Mr. Daniel Davy, Mr. Mark Davy, Mr. Soren Davy, Mr. Frank Jensen, and Mr. Robert Copley did not file Statements of Concern. The Director submitted that all of these “...Notices of Appeal be dismissed for a failure to file a Statement of Concern.”<sup>47</sup>

[63] The Director submitted that Mr. Ken Reid had filed a Statement of Concern but was deemed not to be directly affected as his concerns were “...general in nature and did not demonstrate any personal interest that was impacted or affected.” The Director also argued that

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<sup>42</sup> See: Director’s Submission, dated June 4, 2002.

<sup>43</sup> See: Director’s Record, Tab 95. The Board notes that this is only 29 days from the date of posting instead of the required 30 days.

<sup>44</sup> See: Director’s Record, Tab 95. The Board notes that this is the only notice that differentiates between the notice period for the Approval (which in this notice is set at the usual 7 days) and the Certificate. The other two notices do not differentiate.

<sup>45</sup> See: Director’s Record, Tab 85.

<sup>46</sup> See: Director’s Submission, dated June 4, 2002, where she quoted *Grant and Yule v. Director, Bow Region, Alberta Environment* re: *Village of Standard* (15 May 2001), Appeal Nos. 01-015 and 01-016 (A.E.A.B.).

<sup>47</sup> See: Director’s Submission, dated June 4, 2002.

Mr. Reid takes his water upstream of the Project, and thus, the water diversion for the Project would not affect his water rights.<sup>48</sup>

[64] According to the Director, the City of Airdrie submitted a Statement of Concern after the time period allowed – on October 13, 2000, being one day late. The Director also found the City of Airdrie was not directly affected for the following reasons:

- “1. The concerns raised in the October letter indicate that the City is a member of the Nose Creek Watershed Partnership. The letter goes on to set out general concerns regarding water quantity and quality;
2. The City of Airdrie is approximately four and [a] half miles downstream from the diversion site. In those miles, both an unnamed creek and Writing Creek connect in to Nose Creek; and
3. The City of Airdrie has two licences [(actually a Licence and Preliminary Certificate)]....”<sup>49</sup>

[65] The Director argued that the City of Airdrie is not directly affected as the Licence pertains to a “recirculation project,” and is therefore non-consumptive. The Director also argues that the water for the Preliminary Certificate is from an unnamed tributary that “...flows *into* Nose Creek downstream of the confluence of McPherson Coulee and Nose Creek.”<sup>50</sup> (Emphasis in the original.) The Director submitted that the Notice of Appeal should be dismissed because the City of Airdrie is not directly affected.

[66] The Director accepted the Statement of Concern filed by Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson. However, the Director argued that only one of the “traditional agricultural registrations” registered in the name of Mr. Ronald Hanson was “...potentially affected by the Apple Creek diversion.” The Registrations in Ms. Irene Hanson’s and Mr. Wayne Hanson’s are, according to the Director, “...are on the Writing Creek sub-basin which would not be impacted by flows in Nose Creek as Writing Creek flows *into* Nose Creek downstream of the McPherson Coulee confluence with Nose Creek.”<sup>51</sup> (Emphasis in original.)

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<sup>48</sup> See: Director’s Submission, dated June 4, 2002.

<sup>49</sup> See: Director’s Submission, dated June 4, 2002.

<sup>50</sup> See: Director’s Submission, dated June 4, 2002.

<sup>51</sup> See: Director’s Submission, dated June 4, 2002.

Thus, the Director submitted that Ms. Irene Hanson and Mr. Wayne Hanson are not directly affected and their Notices of Appeal should be dismissed.

**C. Approval Holder**

[67] In its submission, the Approval Holder argued against accepting any of the Notices of Appeal filed by the Appellants. The Approval Holder summarized the concerns of the Appellants as:

- “• Water withdrawal from the creek and its effect on downstream users, cattle watering, ground and surface water recharge, water quality, recreation and conservation, flushing flows, and most of all the low flows in the Creek.
- Work in the Creek channel and its effects on the riparian nature of the creek and downstream water quality and aquatic life.
- Fertilizer and pesticides surface runoff from the golf course and its effect on the downstream water quality.”<sup>52</sup>

[68] The Approval Holder argued that Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson did not provide “...any specific concerns regarding the water withdrawal from the McPherson Coulee (Creek) and the improvement works to be carried out in the creek channel by the Applicant.”<sup>53</sup> The Approval Holder stated that the Hansons had not indicated how they would be “...directly affected and what problems or damages they may sustain by the water withdrawal from and the works carried out in the Creek.”<sup>54</sup>

[69] In response to the issues presented by Mr. Robert Copley, the Approval Holder stated that it did not intend to operate the facility illegally or wastefully by withdrawing unauthorized water from the Creek or groundwater or by operating the water systems when it was not warranted. The Approval Holder submitted that the control structures in the Creek channel would be minimized and the natural vegetation would be preserved for approximately five meters on both sides of the creek bed. The Approval Holder also stated that it had

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<sup>52</sup> See: Approval Holder’s Submission, dated July 2, 2002.

<sup>53</sup> See: Approval Holder’s Submission, dated July 2, 2002.

<sup>54</sup> See: Approval Holder’s Submission, dated July 2, 2002.



previously explored the possibility of obtaining water from and disposing sewage to the City of Airdrie, but the City of Airdrie "...was not in favour of the proposal."<sup>55</sup>

[70] The Approval Holder supported the feasibility study of Nose Creek that was suggested by Mr. Robert Davy. The Approval Holder continued by stating that "...the proposed ground and surface water monitoring by the Applicant would provide valuable data for future water quality and flow evaluations in the subject area."<sup>56</sup> The Approval Holder submitted that the decrease in water flow on Mr. Davy's land is a result of the amount of precipitation received, and the Project would not impact the Creek during low flow periods as it can remove water only when the rate of flow exceeds 2 cubic feet per second (cfs).

[71] In response to the issues presented by the Municipal District, the Approval Holder stated that the Municipal District may have some concerns regarding the Creek and the surrounding area but it "...does not operate any facility or have any operations or water withdrawal licences in the subject area."<sup>57</sup>

[72] The Approval Holder also stated that the actual increase in the amount of water to be withdrawn is 30,000 m<sup>3</sup> per year as nearly 90,000 m<sup>3</sup> is currently diverted from the Creek without any restriction. The Approval Holder continued:

"With the provision of the Preliminary Certificate to limit the water withdrawal to flows above 2cfs, the Creek ecology, riparian habitats and downstream users will be better protected than they are at present. Also, the monitoring requirements included in the Preliminary Certificate will provide valuable information on the creek flows and water levels which is not available at present. Although, the water diversion from the Creek to the lake has occurred for many years, there have not been any complaints from the Appellants, in the past, in this regard."<sup>58</sup>

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<sup>55</sup> See: Approval Holder's Submission, dated July 2, 2002.

<sup>56</sup> See: Approval Holder's Submission, dated July 2, 2002.

<sup>57</sup> See: Approval Holder's Submission, dated July 2, 2002.

<sup>58</sup> See: Approval Holder's Submission, dated July 2, 2002.

[73] The Approval Holder stated that the "...proposed site alterations and specifically the creek channel are so minimal that they will not be noticed and their impact on the vegetation condition will be negligible...."<sup>59</sup>

[74] The Approval Holder addressed the concerns expressed by the City of Airdrie by listing the various steps the Approval Holder is taking to minimize the environmental effects. It stated:

"Preservation of the water quality in the Creek is incorporated in the Golf Course design and operation practices and monitoring. This includes the following:

1. Surface runoff from the major part of the Golf Course area ...will be contained within the site by a provision of shallow dykes located along the creeks.
2. Irrigation system will be controlled by soil moisture and rain sensors to prevent overwatering. Greens' irrigation will be given a priority and the rest of the Golf Course will be irrigated as available water supply permits.
3. Fertilizer application will be controlled by soil nutrient analyses.
4. Surface water flows, quality, withdrawal rates and quantity and the water storage lake levels will be monitored.
5. Groundwater levels and quality will be monitored.
6. An irrigation and chemical application manual will be prepared.
7. Licenced operators will be employed for the domestic water supply, sewage disposal, irrigation and chemical application."<sup>60</sup>

[75] The Approval Holder concluded by stating that the concerns raised by the Appellants had been addressed in the early stages of the development, and measures were incorporated to minimize the effect of the Project on the Creek and surrounding area.

### **III. DISCUSSION AND ANALYSIS**

[76] The Director has objected – raises jurisdictional bars – to the Board accepting the Notices of Appeal filed by the Appellants, except for the Notices of Appeal filed by Mr. Ronald

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<sup>59</sup> See: Approval Holder's Submission, dated July 2, 2002.

<sup>60</sup> See: Approval Holder's Submission, dated July 2, 2002.

Hanson, who holds a Registration that the Director concedes "...could be potentially affected by the Apple Creek Diversion." The basis for the Director's objections – the jurisdictional bars that she raises - are a failure to file a Statement of Concern and not being directly affected by the Approval and Certificate, both of which she argues prevent the Board from accepting the Notices of Appeal.

[77] The Board also has an additional issue to consider - the failure of some of the Appellants to respond to the Board's request for a submission. Pursuant to section 92 of EPEA,<sup>61</sup> the Board may by written notice request the submission of additional information (a submission) from the person who filed a Notice of Appeal and pursuant to section 95(5)(a)(iv) of EPEA,<sup>62</sup> the Board may dismiss the Notice of Appeal of a person who fails to respond to a request under section 92.

[78] The Board will consider the position of each of the Appellants in turn with respect to both of these jurisdictional bars and this additional issue.

**A. Irene Hanson and Wayne Hanson - Directly Affected Status**

[79] The Director has not challenged Mr. Ronald Hanson's Notice of Appeal on the basis that he holds a Registration that is "...potentially affected by the Apple Creek diversion." The Board agrees. Mr. Ronald Hanson is directly affected by the Approval and the Certificate. He operates a farming operation on land through which Nose Creek flows immediately downstream from the Project. He also holds a Registration on SE 26-27-1-W5M through which Nose Creek flows.

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<sup>61</sup> Section 92 of EPEA provides:

"Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice."

<sup>62</sup> Section 95(5)(a)(iv) of EPEA provides:

"The Board (a) may dismiss a notice of appeal if ... (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92...."

[80] However, the Director has challenged the standing of Ms. Irene Hanson and Mr. Wayne Hanson on the basis that they are not directly affected by the Approval or the Certificate. The Board disagrees and has decided to accept their Notices of Appeal.

1. Directly Affected

[81] The Appellants who did file a valid Statement of Concern must also show the Board how they are directly affected by the Director's decision. The directly affected test has been discussed in previous Board decisions. The starting point for the Board's consideration of directly affected is found in the case of *Wessley*,<sup>63</sup> which states that "...the definition of which persons are 'directly affected' is flexible and will depend upon the circumstances of each case."<sup>64</sup>

[82] Essentially, the Appellants must show that there is a "...direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question."<sup>65</sup> The principal 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

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<sup>63</sup> *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

<sup>64</sup> *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.) at page 6.

<sup>65</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.), (*sub nom. Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (12 June 1997), Appeal No. 94-017 at paragraph 28.

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>66</sup>

[83] 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>67</sup> In this regard, in *Kostuch* the Board considered its previous decision in *Ross*.<sup>68</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 environmental effect upon the person who seeks to appeal the decision."<sup>69</sup>

[84] 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

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<sup>66</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.), (*sub nom. Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (12 June 1997), Appeal No. 94-017 at paragraphs 34 and 35. 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>67</sup> *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) ("*Ross*").

<sup>68</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.), (*sub nom. Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (12 June 1997), Appeal No. 94-017 at paragraph 33.

<sup>69</sup> *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.).

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)...."

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>70</sup>

[85] 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>71</sup>

[86] *Paron* also reminds us that the onus to demonstrate this unique interest – to demonstrate that they are directly affected – is on the appellants. 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>72</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>73</sup>

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<sup>70</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.), (*sub nom. Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (12 June 1997), Appeal No. 94-017 at paragraph 38.

<sup>71</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, and 01-047-D (A.E.A.B.) at paragraph 22 (“*Paron*”).

<sup>72</sup> *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeals No. 01-045, 01-046, 01-047-D (A.E.A.B.) at paragraph 24.

<sup>73</sup> Section 29 of the Board’s Rules of Practice provide:

“Burden of Proof

2. Irene Hanson and Wayne Hanson

[87] With respect to Ms Irene Hanson and Mr. Wayne Hanson, the Director argues that their Registrations are in a basin that "...will not be impacted by the Apple Creek diversion." The Director states that the "...registrations on the Writing Creek sub-basin which would not be impacted by flows in Nose Creek as Writing Creek flows *into* Nose Creek downstream of the McPherson Coulee confluence with Nose Creek."

[88] The Board is prepared to accept the Director's argument on this point with respect to Ms. Irene Hanson. Her Registration is located on a quarter section of land immediately to the west of the quarter of land through which Nose Creek flows. However, the Board is not prepared to accept the Director's argument on this point with respect to Mr. Wayne Hanson. Mr. Wayne Hanson holds a Registration on the NE 23-27-1-W5M through which Nose Creek flows. As such, while Writing Creek also flows through this quarter section, the Board is prepared to accept for the purpose of this Decision, Mr. Wayne Hanson could be impacted by diversions from Nose Creek.

3. The Partnership

[89] The argument the Director does not address with respect to Ms. Irene Hanson and Mr. Wayne Hanson is that they work in a partnership, along with Mr. Ronald Hanson, to run their farming operation.<sup>74</sup> The Director stated that the Registration that could potentially be affected by the Project is only in Mr. Ronald Hanson's name, therefore only he would be directly affected. In the Board's view, while Mr. Ronald Hanson has the legal interest in the Registration, Ms. Irene Hanson and Mr. Wayne Hanson have, at the very minimum, an equitable

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

<sup>74</sup> See: Ms. Irene Hanson and Mr. Wayne Hanson's Submission, dated June 21, 2002, and Submission of Mr. Ronald Hanson, dated June 21, 2002.

interest in the Registration by virtue of their partnership with Mr. Ronald Hanson and therefore, the Board believes that they are also directly affected by the Approval and Certificate.<sup>75</sup>

[90] The Board therefore accepts the Notices of Appeal filed by Mr. Ronald Hanson, Ms. Irene Hanson, and Mr. Wayne Hanson.

**B. Frank Jensen, Mark Davy, Daniel Davy, Soren Davy, Robert Copley, and Ken Reid – Statements of Concern**

[91] The Director has challenged the standing of Mr. Frank Jensen, Mr. Mark Davy, Mr. Daniel Davy, Mr. Soren Davy and Mr. Robert Copley arguing that because they did not file a Statement of Concern with the Director, they are not eligible to file a Notice of Appeal. The Board agrees with the Director that the Notices of Appeal of these individuals should be dismissed.

1. Statements of Concern

[92] Under the *Water Act*, a person who wishes to construct a project that diverts water must apply for a licence to divert the water and an approval to construct the works that will be used to divert the water.<sup>76</sup> In response to these applications, as was done in this case, the

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<sup>75</sup> Section 1 of the *Partnership Act*, R.S.A. 2000, c. P-3 provides:

“In this Act ...

(g) ‘partnership’ means the relationship that subsists between persons carrying on a business in common with a view to profit;

(h) ‘partnership property’ means property and rights and interests in property brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes of an in the course of the partnership business...,”

See: *Scorgie (c.o.b. Craigellahie Farms) v. Scorgie*, [1994] A.J. No. 916 (Alta. Q.B) affirmed at [1997] A.J. 686 (Alta. C.A.) This case recognized that where a farming operation is run by way of a partnership, property legally held by one of the members of the partnership, is also held under a constructive trust by the other members of the partnership.

<sup>76</sup> Section 49(1) of the *Water Act* provides:

“Subject to subsection (2), no person shall

(a) commence or continue a diversion of water for any purpose, or

(b) operate a works,

except pursuant to a licence unless it is otherwise authorized by this Act.”



Director can choose to issue a preliminary certificate instead of issuing a licence. A preliminary certificate is a promise to grant a licence if certain terms and conditions are met.<sup>77</sup> The promised licence is attached to the preliminary certificate as an appendix.

[93] The person applying for the approval and the licence (preliminary certificate) is required by section 108 of the *Water Act* to advertise the fact that applications have been made, usually in a local newspaper having circulation in the area of the proposed project.<sup>78</sup> This is

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<sup>77</sup> Section 51(1) of the *Water Act* provides:

“On application for a licence by a person in accordance with this Act, the Director may, subject to subsection (2) and sections 34, 46 and 47, issue or refuse to issue

(a) a preliminary certificate to that person, or

(b) a licence to that person for

(i) the diversion of water, or

(ii) the operation of a works,

for any purpose specified in the regulations.”

<sup>78</sup> Section 108(1) of the *Water Act* provides:

“An applicant

(a) for an approval,

(b) for a licence, ...

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

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

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

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

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

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

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

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

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

(i) any person determined by the Director, and

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

called the Notice of the Application. In the notice that was published in this case,<sup>79</sup> the Approval Holder included both the Notice of the Application for the Approval and the Notice of the Application for the Licence (Certificate).<sup>80</sup>

[94] The Notice of Application advises people who have concerns with the proposed project (potential appellants) of the project and invites them to submit a Statement of Concern to the Director.<sup>81</sup> The Notice of Application in this case read:

“Pursuant to ...section 109 of the Water Act, any person who is directly affected by these operations may submit a written statement of concern regarding these applications. Failure to file a statement of concern may affect the right to file a Notice of Appeal with the Environmental Appeal Board. Such a statement of concern must be submitted to: [the Director] within 30 days of the date of this notice.”<sup>82</sup>

[95] Once the Notice of the Application for approval and a licence (preliminary certificate) has been published, people who have concerns with the proposed project (potential appellants) normally have seven days to file a Statement of Concern with respect to the approval

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

In this case, the Director has the Approval Holder publish in the local newspaper (s.13(1)(a)), posed the application on the Public Notice Bulletin Board (s.13(1)(b)) and published notice on the Government Website (s.13(1)(c)).

<sup>79</sup> The Notice of Application was published in the *Rocky View Times* on October 12, 2000. See: the Director’s Record, Tab 85.

<sup>80</sup> In fact, Notice of the Application in this case also addressed the application under EPEA for a waterworks system and in the same copy of the *Rocky View Times*, Notice of the Application was published for the application under EPEA for a wastewater system.

<sup>81</sup> Section 13(2)(d) of *Water (Ministerial) Regulation*, A.R. 205/98 provides:

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

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

“If notice is provided

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

(b) under section 108(2), the approval holder, preliminary certificate holder or licensee, may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.”

<sup>82</sup> Director’s Record, Tab 85.

and 30 days to file a Statement of Concern with respect to the licence (preliminary certificate). However, as indicated, in this case it would appear that the Director extended the timeline for filing Statements of Concern with respect to the Approval to match the timeline for the filing of Statements of Concern with respect to the Licence (Certificate). These timelines are specified by section 109(2) of the *Water Act* and must be adhered to. Section 109(2) of the *Water Act* provides:

“A statement of concern must be submitted

- (a) in the case of an approval, within 7 days after the last providing of the notice, and
- (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice.”

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

[97] In the case before us, the Director is arguing is that a number of Appellants either failed to file a Statement of Concern entirely and that a number of the Appellants did not file their Statements of Concern on time. In either event, the Director is arguing that these Appellants are, therefore, not entitled to file a Notice of Appeal. The basis of the Director’s argument, is section 115(1) of the *Water Act*, which provides:

“A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances: ...

- (c) if the Director issues or amends 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 109* who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108, ...;
- (d) 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.)

[98] The requirement to filing a timely Statement of Concern as a prerequisite to filing a Notice of Appeal has been previously dealt with by the Board under EPEA and the *Water Act*. The Statement of Concern and Notice of Appeal process under EPEA are virtually identical to those under the *Water Act*, and therefore, the Board is of the view that the same principles should apply. In the case of *O'Neill*,<sup>83</sup> we held:

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

The Board has applied the principles outlined in *O'Neill* in a number of cases, resulting in the dismissal of Notices of Appeal where no Statement of Concern has been filed.<sup>84</sup>

[99] The Board also dealt with this issue in *Bildson*.<sup>85</sup> In his appeal, Mr. Bildson filed his Statement of Concern three weeks late, but the Director accepted it anyway and treated it as a valid Statement of Concern.

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<sup>83</sup> *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (12 March 1999), Appeal No. 98-0250-D (A.E.A.B.), paragraph 14.

<sup>84</sup> *Grant and Yule v. Director, Bow Region, Natural Resources Services, Alberta Environment*, re: *Village of Standard* (15 May 2001), Appeal No. 01-015 and 016-D (A.E.A.B.); *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot Holdings* (17 July 2001), Appeal No. 01-055-D (A.E.A.B.); and *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment*, re: *AAA Cattle Company Ltd.* (15 June 2002), Appeal No. 01-113 and 01-115-D (A.E.A.B.).

<sup>85</sup> *Bildson v. Acting Director, North East Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Ltd.* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.).

2. Daniel Davy, Mark Davy, Soren Davy, Frank Jensen and Robert Copley

[100] Mr. Daniel Davy, Mr. Mark Davy, Mr. Soren Davy, Mr. Frank Jensen, and Mr. Robert Copley did not file Statements of Concern, which is a prerequisite in this case to the filing of a valid Notice of Appeal.

[101] In their submissions Mr. Mark Davy and Mr. Robert Copley did not provide any explanation of their failure to file a Statement of Concern with the Director. Further, Mr. Daniel Davy, Mr. Soren Davy, and Mr. Frank Jensen did not file any submissions with the Board. As a result, there is no basis on which to consider whether the exception discussed in *O'Neill* applies to any of these individuals, and the Board therefore finds that the *O'Neill* exception does not apply.

[102] The Notices of Appeal of Mr. Daniel Davy, Mr. Mark Davy, Mr. Soren Davy, Mr. Frank Jensen, and Mr. Robert Copley must be dismissed. These individuals are free to apply for intervenor status should this matter proceed to a hearing.

3. Ken Reid

[103] Mr. Ken Reid filed a Statement of Concern on October 17, 2001. The deadline for filing Statements of Concern was October 12, 2001 and therefore Mr. Reid's Statement of Concern was filed 5 days late. On this basis, the Director rejected Mr. Reid's Statement of Concern.

[104] Mr. Reid did not file a submission with the Board and as a result, there is no basis on which to consider whether the exception in *O'Neill* applies. The Board therefore finds that the exception does not apply, that Mr. Reid did not file a valid Statement of Concern. Therefore, Mr. Reid's Notice of Appeal must be dismissed.

**C. Soren Davy, Daniel Davy, Frank Jensen, and Ken Reid – Failure to File Submission**

[105] As discussed above, the Board has dismissed the Notices of Appeal of Mr. Soren Davy, Mr. Daniel Davy, and Mr. Frank Jensen for not filing Statements of Concern and Mr. Ken Reid for not filing a valid Statement of Concern.

[106] In addition, however, Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen and Mr. Ken Reid did not file submissions with the Board when requested to do so. As indicated above, the Board wrote to the Appellants, including Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen and Mr. Ken Reid, on June 11, 2002 and set a schedule to receive submissions in response to the Director's motion. The Board requested that the Appellants, including Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen, and Mr. Ken Reid, provide their initial submission to the Board by June 21, 2002. The Board's letter warned that a "...[f]ailure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*."

[107] On June 25, 2002, the Board wrote to the Appellants including Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen, and Mr. Ken Reid, indicating, among other things, that it left messages for these individuals that the Board had not received their submissions. The letter went on to ask, among other things, for submissions from these individuals by June 27, 2002. The letter again contained a warning that a "...[f]ailure to respond to the Board in a timely manner may result in the dismissal of the appeal pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*."

[108] Pursuant to section 92 of EPEA,<sup>86</sup> the Board may, by written notice, request the submission of additional information (a submission) from the person who filed a Notice of

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<sup>86</sup> Section 92 of EPEA provides:

"Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice."

Appeal and pursuant to section 95(5)(a)(iv) of EPEA,<sup>87</sup> the Board may dismiss the Notice of Appeal of a person who fails to respond to a request under section 92.

[109] Despite the Board's repeated requests, no submissions were received from Mr. Soren Davy, Mr. Daniel Davy, Mr. Frank Jensen, and Mr. Ken Reid. Therefore, pursuant to section 95(5)(a)(iv) of EPEA the Board also dismisses their appeals.

#### **D. The City of Airdrie**

[110] In her submission, the Director challenges the standing of the City of Airdrie on two fronts – that the City of Airdrie did not file a valid Statement of Concern because it was filed one day late and that the City of Airdrie is not directly affected. The Board accepts that arguments of the Director that the City of Airdrie did not file a valid Statement of Concern. Whether or not we believe that the City of Airdrie is directly affected (which incidentally we do), the Board has decided to make the City of Airdrie a party to these appeals, pursuant to section 95(6) of the Act and section 1 of the *Environmental Appeal Board Regulation*, A.R. 114/93.<sup>88</sup>

#### **1. Statement of Concern**

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<sup>87</sup> Section 95(5)(a)(i) of EPEA provides:

“The Board (a) may dismiss a notice of appeal if ... (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92....”

<sup>88</sup> Section 95(6) of the Act provides:

“Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

Section 1(f) of the *Environmental Appeal Board Regulation*, A.R. 113/93 provides:

In this Regulation, f) ‘party’ means

- (i) the person who files a notice of appeal that results in an appeal,
- (ii) the person whose decision is the subject of the notice of appeal,
- (ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the Water Act, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and
- (iii) any other person the Board decides should be a party to the appeal.”

[111] As discussed above, the filing of a Statement of Concern within the time periods prescribed is a prerequisite to being able to file a Notice of Appeal. The deadline for filing Statements of Concern in this case was October 12, 2001. The City of Airdrie filed its Notice of Appeal on October 13, 2001 – one day late – and on this basis the Director did not accept the Statement of Concern.

[112] As discussed above, the Board has considered the possibility that a Statement of Concern could be filed late or even not at all in the case of *O'Neill*. In the case of *O'Neill*,<sup>89</sup> as quoted above, we held:

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

As a result, in order to accept the Notice of Appeal filed by the City of Airdrie, the Board would have to find circumstances that are highly fact-specific and exceptionally rare.

[113] The argument presented by the City of Airdrie as to why it should be allowed to proceed with their appeal despite the fact the Statement of Concern was filed late is that they allegedly relied on representations of Alberta Environment that no further environmental review would be carried out in relation to the Project because of the decision of the Municipal District of Rocky View to refuse the redistricting application.

[114] According to its submission, it was the City of Airdrie’s understanding that “no further environmental review” would be done by the Director unless verification was received that the development could proceed. The City of Airdrie stated that the Municipal District had

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<sup>89</sup> *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (12 March 1999), Appeal No. 98-0250-D (A.E.A.B.), paragraph 14.



refused the redistricting application of the Approval Holder, and therefore, it understood the Director would not be proceeding with any other review. The Board notes that the City of Airdrie appears to suggest that this “understanding” was a reason that their Statement of Concern was filed late, but according to the dates detailed in the City of Airdrie’s submission, these events occurred *after* the Statement of Concern was filed.<sup>90</sup> As a result, in the Board’s view, this can not be used as the basis for circumstances that are highly fact-specific and exceptionally rare.

[115] The City of Airdrie further argued that it did not receive “immediate” notification of the applications and that the advertisement was placed in the *Rocky View Times*, a newspaper that is not distributed in the City of Airdrie.

[116] In this case, the Approval Holder was required to provide notice of the Approval and Certificate by placing the notice in the local paper as instructed by the Director. The notice was also published on the Alberta Environment website and on the Public Notice Bulletin Board in the Director’s Office.<sup>91</sup> The Board has determined in previous decisions that “...requiring actual notice to all potentially affected people is a burden that is too heavy for the Director to impose.”<sup>92</sup> The Board in *Cardinal River Coals*<sup>93</sup> stated:

“As a legal matter, section 84(1)(a)(iv) [now section 91(1)(i)], and sections 70 [now section 73] and 69 [now section 72] which are referenced directly and indirectly through section 84(1)(a)(iv) [now section 91(1)(i)], require that a statement of concern be provided as a prerequisite to filing an appeal if the Director provides notice. Presumably, notice means notice to the public generally rather than notice to particular interested persons, *especially* those persons of whose identity the Director is unaware; that burden is too much for the Director to carry. In other words, it is irrelevant that the particular appellant may have never

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<sup>90</sup> See: City of Airdrie’s Submission, dated June 25, 2002. According to the City of Airdrie’s Submission, their Statement of Concern was filed on October 13, 2000, the redistricting application was refused on December 19, 2000, a member of Director’s staff indicated that “no further environmental review will be done” on January 16, 2001, and this was confirmed by the Director, Enforcement and Monitoring, Southern Region, Regional Services, Alberta Environment on March 14, 2001.

<sup>91</sup> See: Director’s Submission, dated June 4, 2002.

<sup>92</sup> *Grant and Yule v. Director, Bow Region, Natural Resources Service, Alberta Environment*, re: *Village of Standard* (15 May 2001), Appeal Nos. 01-015 and 016-D (A.E.A.B.) at paragraph 20.

<sup>93</sup> Re: *Cardinal River Coals Ltd.* (1999), 28 C.E.L.R. (N.S.) 145 (A.E.A.B.).

actually received notice, as long as the notice itself was adequate for informing the public generally....”<sup>94</sup> (Emphasis in original.)

[117] In the Board’s view, Notice of the Applications was properly given and as a result, this cannot form the basis for circumstances that are highly fact-specific and exceptionally rare.

[118] In that the *O’Neill* exception does not apply in this case, the City of Airdrie’s Statement of Concern was not properly filed and therefore their Notice of Appeal must be dismissed.

## 2. Directly Affected

[119] The Director also challenged the City of Airdrie on the basis that they are not directly affected. Factually, the Board does not accept this argument.

[120] The Director’s position appears to be that a party can only be directly affected if it holds rights under the *Water Act*. While it is clearly correct that a party holding rights under the *Water Act* that are affected by the Director’s decision would have a compelling argument for being directly affected by that decision, it is not correct that the only effect that can qualify for directly affected status is an effect on rights held under the *Water Act*. There is no such restriction stated or implied in section 115 of the *Water Act* granting the right of appeal to parties who are directly affected by a specified decision of the Director.

[121] In this case, the City of Airdrie holds a licence and preliminary certificate for the Nose Creek basin. The source of supply for the licence is Nose Creek. The source of supply for the preliminary certificate is a tributary to Nose Creek. The licence is for a recirculation project – presumably meaning the City of Airdrie diverts the water, permits it to flow through some sort of works, and returns it to the Creek. The preliminary certificate is for some sort of recreational

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<sup>94</sup> Re: *Cardinal River Coals Ltd.* (1999), 28 C.E.L.R. (N.S.) 145 (A.E.A.B.) at paragraph 25.

purpose, and as indicated in their Notice of Appeal, the quality of this water is very important to the City.

[122] The Director's argument as to why the City of Airdrie is not directly affected by the Project is that they are 4 ½ miles downstream from the Project and in that distance a number of tributaries enter Nose Creek in that 4 ½ miles and therefore the water need for the City of Airdrie's licences should be made up from those supplies.<sup>95</sup>

[123] The Board does not accept the Director's cramped argument. The Board has no evidence before it that sufficient water can be provided from the additional tributaries to supply the City of Airdrie. Further, an examination of the licence held by the City of Airdrie provides for a minimum instream flow of 3 cubic feet per second. The minimum instream flow specified in the Approval Holder's licence is 2 cubic feet per second. As a result, the Board believes that it may be possible for the Approval Holder to interfere with the City of Airdrie's rights under its licence in the right circumstance. The Board is also of the view that the priority of the City of Airdrie's licence does not prevent it from claiming that it is being directly affected. While it is true, that under the priority scheme, the City of Airdrie would be able to ask that the Approval Holder's licence be suspended if the City of Airdrie does not get their full allocation of water, this does not mean that the City of Airdrie is not directly affected.

[124] Further, the Board believes that water quantity and water quality are inextricably linked. As a result, the potential for decreased flows in Nose Creek has the potential to negatively impact the water quality in Nose Creek. Nose Creek flows for a considerable length through the City of Airdrie. As such, the Board is of the view, based on the relationship between water quantity and water quality, that the City of Airdrie could be directly affected by anything that negatively impacts the flow of the Nose Creek.

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<sup>95</sup> See: Director's Submission, dated June 4, 2002. The Board notes that the Director states that City of Airdrie is 4 ½ miles or 7.2 kilometres downstream from the Project. Based on the Board's review of the Director's Map, the Board has computed this distance from the Project to the northern boundary of the City of Airdrie to be 4.6 kilometres.

3. Party Status

[125] While the Board must, on technical grounds, dismiss the City of Airdrie's Notice of Appeal because it is out of time, the Board is also of the view that the City of Airdrie should be heard at the hearing. The Board believes that the City of Airdrie will bring a broad range of interests to the hearing that will assist the Board in its considerations. The Board has therefore decided that pursuant to section 95(6) of the Act and section 1 of the *Environmental Appeal Board Regulation*, A.R. 114/93,<sup>96</sup> that the City of Airdrie should be a full party to these proceedings.

#### IV. DECISION

[126] The appeals of the Approval and the Certificate filed by Mr. Daniel Davy (01-126 and 02-053), Mr. Mark Davy (01-125 and 02-052), Mr. Soren Davy (01-127 and 02-054), Mr. Frank Jensen (01-124 and 02-051), Mr. Robert Copley (01-129 and 02-055), Mr. Ken Reid (01-128), and the City of Airdrie (02-001 and 02-058) are dismissed.

[127] The Board will hear the appeals of the Approval and Certificate filed by Mr. Ronald Hanson (01-123 and 02-050), Ms. Irene Hanson (01-130 and 02-056), and Mr. Wayne Hanson (01-131 and 02-057).

[128] The Board has decided to make the City of Airdrie a party to these appeals.

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Section 95(6) of the Act provides:

"Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

Section 1(f) of the *Environmental Appeal Board Regulation*, A.R. 113/93 provides:

In this Regulation, f) 'party' means

- (i) the person who files a notice of appeal that results in an appeal,
- (ii) the person whose decision is the subject of the notice of appeal,
- (ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the Water Act, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and

[129] The other parties are free to apply for intervenor status should the Hansons' appeal proceed to a hearing.

Dated on November 29, 2002, at Edmonton, Alberta.

- original signed -

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Dr. Steve E. Hrudehy

- original signed -

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Mr. Ron V. Peiluck

- original signed -

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Mr. Ron Hierath

## **Appendix**