

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – August 1, 2003

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

-and-

IN THE MATTER OF appeals filed by Douglas A. Hudson, Cameron and Elaine Snoble and Clara Snoble, Marvin and Patricia Loberg, David and Sharon Volker, Shirley Hogg, L. Bozarth, Gerald H. and Judith E. Bozarth, R. Wayne and Kerri Badger and family, the County of Grande Prairie No. 1, and Nellie Sterr with respect to *Water Act* Preliminary Certificate No. 00156592-00-00, issued to the Town of Sexsmith by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Hudson et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Town of Sexsmith* (1 August 2003), Appeal Nos. 02-093, 094, 102, 103, 122, 127, 128, 129, 134, and 135-D (A.E.A.B.).

BEFORE:

Dr. William A. Tilleman, Q.C., Chair.

PARTIES:

Appellants:

Mr. Douglas A. Hudson, Mr. Cameron and Ms. Elaine Snoble and Ms. Clara Snoble, Mr. Marvin and Ms. Patricia Loberg, Mr. David and Ms. Sharon Volker, Ms. Shirley Hogg, Mr. L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, Mr. R. Wayne and Ms. Kerri Badger and family, the County of Grande Prairie No.1, and Ms. Nellie Sterr.

Director:

Mr. Garry Sasseville, Director, Northern Region, Regional Services, Alberta Environment, represented by Ms. Michelle Williamson, Alberta Justice.

Certificate Holder: Town of Sexsmith.

EXECUTIVE SUMMARY

Alberta Environment issued a Preliminary Certificate under the *Water Act* to the Town of Sexsmith. Upon meeting certain conditions, the Preliminary Certificate would grant a water licence to the Town authorizing the diversion of 58,200 cubic metres of water annually from the well in LSD 03-13-74-06-W6M near Sexsmith, Alberta.

Fourteen appeals were filed with respect to the Preliminary Certificate. Alberta Environment identified a number of preliminary issues with respect to the appeals. However, the Board decided that it would conduct an information meeting and deal with any preliminary issues after the information meeting was held.

Shortly after the Board advised that it wished to hold an information meeting, the Town of Sexsmith withdrew its application for the Preliminary Certificate. In response, Alberta Environment cancelled the Preliminary Certificate. As a result, four of the appeals were withdrawn, and the Board issued a Discontinuance of Proceedings respecting these four appeals. With respect to the remaining appeals, after giving the parties an opportunity to provide the Board with written submissions, the Board determined the issues raised in the remaining Notices of Appeal were moot. Further, five of the Appellants did not submit a response to the Board's questions as to the effect of the cancellation of the Preliminary Certificate.

Therefore, the Board dismissed the remaining appeals as the issues raised were moot, and the five appeals were also dismissed for failing to provide additional information as requested by the Board.

The Board noted that in the written submissions of the individuals who filed appeals, they continued to express concerns about the impact of the Town on their water supplies. The Board was satisfied that the *Water Act* contains mechanisms to address these concerns with respect to the existing uses of water by the Town. The Town is still required to operate within the terms of its existing licences, and it does not have the authority to divert any more water than it did prior to the application for the Preliminary Certificate.

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I. BACKGROUND

[1] On November 20, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”) issued Preliminary Certificate No. 00156592-00-00 (the “Certificate”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of Sexsmith (the “Certificate Holder”). The Certificate states that, upon complying with the conditions specified in the Certificate, the Certificate Holder will receive a licence to divert 58,200 cubic metres of water annually from the well in LSD 03-13-74-06-W6M near Sexsmith, Alberta, for a term of 5 years with priority number 2002-05-13-002.

[2] On December 16, 2002, the Environmental Appeal Board (the “Board”) received appeals from Mr. Douglas A. Hudson (02-093) and Mr. Cameron and Ms. Elaine Snoble and Ms. Clara Snoble (02-094). On December 18, 2002, the Board received appeals from Mr. Marvin and Ms. Patricia Loberg (02-102) and Mr. David and Ms. Sharon Volker (02-103). On December 20, 2003, the Board received appeals from Mr. Gordon and Ms. Joan Scarlett (02-121), Ms. Shirley Hogg (02-122), and Mr. R. Wayne and Ms. Kerri Badger on behalf of themselves and on behalf of their family (Mr. Tyler Badger, Ms. Nyssa Badger, Mr. Cordell Badger, Ms. Shana Badger, Mr. Brent Badger, Ms. Adeena Badger, Mr. Norman Badger, and Ms. Alva Badger) (collectively the “Badger family”) (02-129). On December 22, 2002, the Board received appeals from Mr. Grant Berg (02-125), Mr. Ray and Ms. Marion Braumberger (02-126), Mr. L. Bozarth (02-127), Mr. Gerald H. and Ms. Judith E. Bozarth (02-128), and Mr. Ernie and Ms. Louise Braumberger (02-130). On December 24, 2002, the Board received an appeal from the County of Grande Prairie No. 1 (02-134), and on December 30, 2002, the Board received an appeal from Ms. Nellie Sterr (02-135), appealing the Certificate. (All collectively the “Appellants.”) The Board also received requests for a Stay from Ms. Shirley Hogg, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, Mr. L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, and Mr. Ernie and Ms. Louise Braumberger.

[3] The Board wrote to the Appellants, the Certificate Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Certificate Holder and the Director of the appeals. The Board also requested the Director

provide the Board with a copy of the records (the "Record") relating to these appeals and requested the Parties provide available dates for a mediation meeting or hearing. The Board received a copy of the Record on January 17, 2003, and copies were forwarded to the Appellants and the Certificate Holder.

[4] 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.

[5] On December 24, 2002, the Board wrote to the Appellants asking for submissions on the request for a Stay.¹ In the same letter, the Board requested the Parties, including the Director and the Certificate Holder, to also provide their comments to the following questions: When does the Town intend to commence diverting water? What is it under the Certificate that the persons who have filed the Notices of Appeal are requesting the Board to stop? The Board noted that if there is no work or diversion of water planned under the Certificate at this time, then there may be nothing to Stay.²

¹ The Board asked the Parties for written comments on the following questions with respect to the Stay:

1. What are the serious concerns of Ms. Shirley Hogg, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, and Mr. Ernie and Ms. Louise Braumberger that should be heard by the Board?
2. Would Ms. Shirley Hogg, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, and Mr. Ernie and Ms. Louise Braumberger suffer irreparable harm if the Stay is refused?
3. Would Ms. Shirley Hogg, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, and Mr. Ernie and Ms. Louise Braumberger suffer greater harm if the Stay was refused pending a decision of the Board on the appeals than the Town of Sexsmith would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are Ms. Shirley Hogg, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, L. Bozarth, Mr. Gerald and Ms. Judith Bozarth, and Mr. Ernie and Ms. Louise Braumberger directly affected by Alberta Environment's decision to issue Preliminary Certificate No. 00156592-00-00 to the Town of Sexsmith? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected.

² See Board's Letter, dated December 24, 2002.

[6] Following a review of the written submissions,³ the Board wrote to the Parties on February 5, 2003, and advised them that the Board had decided that it would not grant the Stay at this time because the request is premature.⁴ In the same letter the Board notified the Parties that it had decided to hold an information meeting with the Parties to allow the Director and the Certificate Holder to present information regarding the Certificate.

[7] In his February 6, 2003 letter to the Board, the Director raised concerns regarding the status of some of the Notice of Appeal filers. On February 12, 2003, the Board wrote to the Parties advising that the information meeting was scheduled for March 7, 2003, in Grande Prairie, Alberta, and any preliminary motions would be dealt with after the information meeting.

[8] On February 25, 2003, the Board received notification from the Certificate Holder that it was withdrawing its application for any increase in diversion and had asked the Director to cancel the Certificate. On March 7, 2003, the Director cancelled the Certificate. As a result, the Board notified the Parties that the information meeting was cancelled.

[9] On March 12, 2003, the Board requested the Parties provide comments as to the effect that the cancellation of the Certificate had on the Appeals.⁵

³ The Board acknowledged receipt of letters dated January 2, 3, 6, 7, 9, and 10 from the County of Grande Prairie, Mr. and Ms. Volker and Ms. Elaine and Clara Snoble, Mr. Hudson, Mr. L. Bozarth, Ms. Hogg, Ms. Judy Bozarth, Mr. and Ms. Loberg, the Certificate Holder, and the Director responding to the Board's questions in the December 24, 2002 letter.

On January 16, 2003, the Board wrote to Mr. Berg, Mr. Ray and Ms. Marion Braumberger, the Badger family, and Mr. Ernie and Ms. Louise Braumberger requesting a reply to the Board's letters of December 23 and 24, 2002, and were advised of the Board's timelines. The Board received their responses dated between January 14 and 19, 2003.

⁴ See: Board's Letter, dated February 5, 2003, which states:

"...until the Town of Sexsmith has filed a Certificate of Completion and Alberta Environment has accepted the Certificate of Completion the Town is not permitted to take water. Further, until the Town is allowed to take water it is not possible for the 'irreparable harm' to occur. Without an immediate possibility of irreparable harm the request for a Stay is premature."

⁵ Comments were received from the Director on March 13, 2003, and between March 19 and 24, 2003, comments were received from Mr. Gordon and Ms. Joan Scarlett, the County of Grande Prairie, Mr. L. Bozarth, Mr. David and Ms. Sharon Volker, Ms. Clara and Ms. Elaine Snoble, Mr. Cameron Snoble, Ms. Shirley Hogg, Mr. Ernie and Ms. Louise Braumberger, Ms. Marion and Mr. Roy Braumberger, and Mr. Grant Berg. In their submissions, Mr. Gordon and Ms. Joan Scarlett, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, and Mr. Ernie and Ms. Louise Braumberger withdrew their appeals. Final written comments were received from the Director on March 27 and April 9, 2003, and from the Certificate Holder on March 31, 2003.

[10] On April 10, 2003, the Board issued a Discontinuance of Proceedings with respect to the appeals filed by Mr. Gordon and Ms. Joan Scarlett, Mr. Grant Berg, Mr. Ray and Ms. Marion Braumberger, and Mr. Ernie and Ms. Louise Braumberger.

[11] On May 8, 2003, the Board notified the Parties that it was dismissing the remaining Appeals with reasons to follow. These are the reasons.

II. Submissions

A. Appellants

[12] In its letter, the County of Grande Prairie stated that, as the Certificate Holder had withdrawn its application for an increased diversion, "...it would appear appropriate for the Board to dismiss the County's appeal..."⁶

[13] Mr. L. Bozarth submitted that the Certificate Holder was still withdrawing water from the same aquifer under the existing licences that will deplete the Appellant's water supply, and he queried whether the Certificate Holder would drill new wells for those affected by the decision. Mr. L. Bozarth also stated that the Certificate Holder has other options to get water pumped in while others in the area do not have alternatives available.

[14] In their submission, the Volkens and the Snobles wanted reassurances that the diversions from the existing wells will remain the same and once the Certificate Holder has hooked up to other sources of water, the existing wells will be shut down. They concluded by stating that groundwater "... should be protected. Industry should not be allowed to use it."⁷

[15] Ms. Shirley Hogg stated that the cancellation of the Certificate does not alleviate the concerns regarding the groundwater supply. She further stated that it does not make a difference whether the water is diverted from well #1 or #2, it would have the "...same negative effect on this aquifer and our water supplies, here, as in the past."⁸ Ms. Hogg submitted that the Certificate Holder's water wells have had a negative impact on the community during the past 20

⁶ County of Grande Prairie's Letter, dated March 13, 2003.

⁷ Volkens' and Snobles' Submission, dated March 19, 2003.

years, including incidences where water wells in the area quit and well production levels dropped drastically "...as a result of past bulk diversions from the town's water wells during the time the Sexsmith Canola Plant was in production and thereafter."⁹ Ms. Hogg further stated that they were told at a public meeting that some of the 104 wells in the area would likely be affected by an increased diversion, and "...why repeat past mistakes?"¹⁰

[16] Ms. Hogg admitted she was "...somewhat relieved..." to know that the Certificate Holder was proceeding with its regional water development program with the City of Grande Prairie and the County of Grande Prairie, and once the alternate system is in place, it would not have to use the two wells. She argued that the Certificate Holder should not be allowed an increased diversion as it has more than enough water for its current use.

[17] Ms. Hogg stated that she wants to know of any concrete plans the Certificate Holder has in place to "...address and conduct any future investigation and mitigation procedures (regarding the effects of these wells on our water supplies)."¹¹ Ms. Hogg further stated that she wanted to know how the Certificate Holder planned to identify and address, in a timely manner, unanticipated effects on the local water supply.

[18] Ms. Hogg concluded by stating that it was the "...responsibility of all of us to conserve limited supplies of groundwater. Working towards this end we trust we can all proceed with future developments amicably."¹²

B. Certificate Holder

[19] The Certificate Holder notified the Director, and copied to the Board, that it had withdrawn the application for an increase in the water diversion from one of its wells due, in part, to the opposition from residents living in the area surrounding the water wells and their concern of loss of water. It continued by stating that it "...is very conscious of the importance of

⁸ Ms. Shirley Hogg's Submission, dated March 17, 2003.

⁹ Ms. Shirley Hogg's Submission, dated March 17, 2003.

¹⁰ Ms. Shirley Hogg's Submission, dated March 17, 2003.

¹¹ Ms. Shirley Hogg's Submission, dated March 17, 2003.

¹² Ms. Shirley Hogg's Submission, dated March 17, 2003.

a long term supply and will be diligent in our efforts to see the construction of the regional waterline to completion.”¹³

[20] The Certificate Holder stated that its current water licence “...allows for a total diversion of 302,727 cu. m. annually, of which we have only been drawing 233,441 cu. m. (2002) using only approximately 77% of [our] total allotment.” It further stated that less water will be diverted from well #2 with an increased diversion from well #1, and it “...will make every effort to be in compliance according to the licence.”¹⁴

C. Director

[21] The Director submitted that the appeals should be dismissed as the cancellation of the Certificate rendered the appeals moot, and the Appellants’ concerns “...can be satisfied within the existing licensing regime.”¹⁵ The Director explained that the Certificate Holder was still required to operate within the terms of its existing licences, and it does not have the authority to divert more water now than it did prior to the application for the Certificate. The Director further stated that the existing licences require the Certificate Holder to adhere to the specific terms and conditions, including domestic water well investigation and mitigation conditions. Therefore, “...Alberta Environment can direct the Town to take specific action in the event any negative impacts occur or seem likely to occur.”¹⁶ The Director continued by stating that he has the discretion to add additional monitoring if it appears unanticipated effects may occur, even though, based on nearly 20 years of monitoring data, unanticipated effects are unlikely.

[22] In his final submission, the Director stated “...there is no remedy that could be given to address the Appellants (*sic*) concerns regarding the preliminary certificate since the preliminary certificate has been cancelled by the Director. Accordingly... this appeal ought to

¹³ Certificate Holder’s Letter, dated February 26, 2003. In its letter of February 25, 2003, the Certificate Holder stated that the waterline could be in operation by the end of 2004, assuming government approval. The waterline is a project to provide city water to the municipality of Sexsmith through a partnership with the City and County of Grande Prairie. See: Certificate Holder Letter, dated March 10, 2003.

¹⁴ Certificate Holder’s Letter, dated February 25, 2003.

¹⁵ See: Director’s Letters, dated March 13, 2003, and March 27, 2003.

¹⁶ Director’s Letter, dated March 27, 2003.

be dismissed and the file closed.”¹⁷ The Director stated this does not mean that “...the Appellants who have not withdrawn their appeals are precluded from discussing their concerns with Alberta Environment, however it is our position that their concerns be addressed in a different forum.”¹⁸ The Director stated that the Appellants or anyone else with concerns may contact the hydrogeologist for the region.

[23] The Director submitted that:

“... the Town of Sexsmith is required to operate wells #1 and #2 within the terms of their existing licences – numbers 08088 and 20664. This means that the Town is not authorized to divert any more water from these wells than the amounts set out under these aforementioned licences. In order for the Town to increase the amount of water diverted from well #1 or #2 over what is set out in the existing licences, the Town would have to make a new application to the Director for a new licence to do so. Any new licence application would involve technical review, advertising etc.”¹⁹

III. DISCUSSION

[24] The Board will address the remaining Notices of Appeal with respect to two matters: first, whether the appeals are now moot as a result of the Certificate being cancelled; and second, the failure of some Appellants to respond to the Board’s letter of March 12, 2003.

A. Are the Appeals now Moot?

1. Judicial Analyses of Mootness

[25] The Courts have extensively analyzed the issue of mootness. In the leading case, *Borowski v. Canada (Attorney General) (No. 2)*,²⁰ the Court stated that “...if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be

¹⁷ Director’s Submission, dated April 8, 2003.

¹⁸ Director’s Submission, dated April 8, 2003.

¹⁹ Director’s Submission, dated April 8, 2003.

²⁰ *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 (“*Borowski*”).

moot.”²¹ In *Borowski* the Court stated that it may decline to decide a case which raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, the Alberta Court of Appeal stated, “...an appellate court cannot order a remedy which could have no effect.”²²

[26] The Supreme Court of Canada has identified a two-step process in assessing if a moot issue should be heard. The first is to determine whether the tangible and concrete dispute has disappeared and the issue is now legally or factually moot, thus making the issue academic. If the answer is yes, then it is necessary to determine if the court should exercise its discretion to hear the case. The Court stated that a case is moot when it fails to meet the “live controversy” test. The Court in *Borowski* stated the matter was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.²³

[27] In *Borowski*, the Court set out a process to determine when, even though the issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical effect on the rights of the parties?) (judicial economy); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[28] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, judicial economy, the Court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

²¹ *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 at paragraph 15.

²² *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

²³ *Borowski* was asking the court to declare section 251 of the Criminal Code of Canada invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

1. where the outcome of the case will have a practical effect on the rights of the parties;
2. where the circumstances giving rise to the case are of a recurring nature but brief duration, thus rendering a challenge inherently susceptible to becoming moot; and
3. where the case raises an issue of public importance where a resolution is in the public interest.

Not all three requirements have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

[29] The third step is for the decision-maker to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

2. The Board's Analysis of Mootness

[30] The Board wrote to the Parties on March 12, 2003, requesting comments on the effect the cancellation of the Certificate would have on the appeals. The Board further stated:

“The Board notes that it appears that as the Preliminary Certificate has been cancelled there may now be no remedy that the Board can grant that would address the concerns identified in the Notices of Appeal. If this is the case, then the appeals may be moot and it may be appropriate for the Board to dismiss the Notices of Appeal.”²⁴

[31] Section 95(5)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), states:

“The Board

- (a) may dismiss a notice of appeal if
 - (i) it considers the notice of appeal to be frivolous or vexatious or without merit ...
 - (iii) for any other reason the Board considers that the notice of appeal is not properly before it”

²⁴ Board's Letter, dated March 12, 2003.

[32] The Board has considered when an issue is moot in previous decisions. For example, in the *Butte Action Committee*,²⁵ the Board stated:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”²⁶

[33] The moot issue was also discussed in *Kadutski*,²⁷ where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect.”²⁸

3. Application to These Appeals

[34] The Appellants in this appeal were concerned that if the Certificate Holder was allowed to divert more water than what is presently permitted, their wells would be affected. However, the Certificate Holder withdrew its application, thereby forfeiting its ability to divert more water at this time. It will be unable to divert more water without being in contravention of the existing licences. There are also conditions in the existing licences that, should neighbouring wells be affected by the diversion of water under the licences, the Director can take steps to ensure the effects are mitigated.

[35] As the Certificate Holder has withdrawn its application for a certificate, and the Director has accepted the withdrawal, the certificate has not, in actuality, come into existence. Nothing tangible remains for the Appellants to base an appeal. Their concerns relate to the diversion of water under the Certificate, but the Certificate does not exist, and the additional diversions of water will thus not be permitted.

²⁵ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

²⁶ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

²⁷ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

²⁸ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

[36] The Board's jurisdiction is to recommend to the Minister to confirm, reverse, or vary the decision of the Director.²⁹ In this instance, the only decision that still exists is the Director's decision to accept the withdrawal of the application and cancel the Certificate. The Board does not have the authority to reverse something that does not exist. The Director's cancellation of the Certificate has achieved – in total - the results sought by the Appellants. The Certificate Holder cannot increase the amount of water diverted from its wells.

[37] The Board reminds the Parties that the Certificate Holder is still required to abide with the terms of the existing water licences – numbers 08088 and 20664. The Certificate Holder is not authorized to divert any more water from the wells than the amounts set out in the existing licences. If the Certificate Holder's actions affect the surrounding residents, the residents can notify Alberta Environment of their concerns. If the Certificate Holder decides to increase the amount of water diverted from the wells, it must first file a new application with the Director for a new approval and licence. The Appellants, and any other person directly affected, can file statements of concern with the Director and notices of appeal with the Board if, and when, such an application is made.

[38] If there are problems when the Certificate Holder diverts all of its allowable water under the existing licences, those directly affected can contact the Director, submit a complaint, and it is the Director's obligation to investigate the concerns. The Director can then require the Certificate Holder to take the necessary steps to mitigate the problems if necessary. It is important for the Appellants to realize these measures are available under the existing licences, regardless of whether the Certificate is issued or not. In these circumstances, there are no additional remedies that the Board can offer other than those conditions already in place.

[39] The Board also notes the efforts the Certificate Holder is undertaking to secure alternative water sources for the community. The Certificate Holder is in consultation with the

²⁹ Section 98(2) of EPEA provides:
“In its decision, the Board may

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

City and County of Grande Prairie to develop a regional water program in order for the Town of Sexsmith to procure water from the Wapiti River.³⁰

[40] The issue before the Board is factually moot – circumstances have changed in that the application being appealed has been withdrawn and, essentially, no longer exists. When assessing the appeal based on the second step as pronounced by the Courts, the Board does not find any grounds on which to hear the appeal.

[41] In the present case before the Board, there are no other issues that remain outstanding, even though the Parties would, in all probability, argue their positions vigorously. The Appellants were concerned about the increase in the amount of water that could be withdrawn. However, once the application was withdrawn and the Certificate cancelled, an increase in the allotted water quantity is no longer an issue, and there are no other intervenors that would be affected by the outcome of the Board's decision.

[42] Judicial economy also questions whether it is fair to have the Certificate Holder be involved in an appeal of a matter that has no reasonable remedy. The Certificate Holder withdrew its application in response to the concerns expressed by the Appellants, significantly limiting expenses for all Parties concerned.

[43] The issue of water diversion is often brought before the Board, and as the resulting decisions are very fact specific, even if the Board was to make a determination in this case, it would provide little guidance for future appeals. In most circumstances, the issue remains viable for a considerable length of time, making it possible for an appeal to be heard.

[44] Therefore, even though the Board recognizes there are cases (not here) when a moot issue may be heard, the circumstances in *this* case do not warrant the Board hearing the appeal, and as a result, the Board dismisses the appeals as being moot.

B. Failure to Respond

³⁰ See: Certificate Holder's Letter, dated January 10, 2003.

[45] Under section 95(5)(a)(iv) of EPEA, the Board has the jurisdiction to dismiss an appeal if a party does not provide information as requested by the Board. Section 95(5)(a)(iv) provides:

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

Section 92 states:

“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.”

[46] All of the Appellants were notified on March 12, 2003, to provide a response as to the affect the cancellation of the Certificate had on the appeals. Mr. Douglas A. Hudson, Mr. Marvin and Ms. Pat Loberg, Mr. Gerald H. and Ms. Judith E. Bozarth, the Badger family, and Ms. Nellie Sterr did not respond to the Board’s letter.

[47] Therefore, pursuant to section 95(5)(a)(iv) of EPEA, the Board dismisses the appeals of Mr. Douglas A. Hudson, Mr. Marvin and Ms. Pat Loberg, Mr. Gerald H. and Ms. Judith E. Bozarth, the Badger family, and Ms. Nellie Sterr.

IV. SUMMARY

[48] In its letter of February 26, 2003, the Certificate Holder stated that it would be “...striving to be in compliance with the amounts licenced for diversion for each well.” The Board wants to stress to the Certificate Holder, and assure the Appellants, that the Certificate Holder has no option but to comply with the existing licences – numbers 08088 and 20664 – unless a further application is made to allow for an increase in the water diverted. The Director has the ability and the tools in place to ensure compliance with the terms and conditions of the licences. If the Certificate Holder does make a further application, the process starts anew, and those directly affected can submit statements of concern and may ultimately be able to submit new notices of appeal.

[49] Some of the concerns expressed by the Appellants were general in nature, and albeit they were legitimate concerns, they did not relate to the Certificate that was appealed. For example, the Appellants expressed concerns regarding the use of potable water in the energy and industry sectors.³¹ The Board recognizes the use of potable water is an important and serious issue for Albertans, but at issue in these appeals was the Certificate issued to the Town of Sexsmith to increase the diversion of water from existing wells. Under the existing licences, the Certificate Holder can only withdraw a limited amount of water, but the use of the water is not specified.

[50] It appears many of the Appellants' concerns relate to the industrial use of water. This leads the Board to believe that the Appellants, although they have a genuine concern regarding the use and availability of Alberta's water, are equally concerned about unwanted industry being allowed into the area. There are other appeal or judicial mechanisms available to express these concerns to the proper authorities at the proper time.

V. CONCLUSION

[51] Pursuant to section 95(5)(a) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeals of Mr. Douglas A. Hudson (02-093), Mr. Cameron and Ms. Elaine Snoble and Ms. Clara Snoble (02-094), Mr. Marvin and Ms. Pat Loberg (02-102), Mr. David and Ms. Sharon Volker (02-103), Ms. Shirley Hogg (02-122), Mr. L. Bozarth (02-127), Mr. Gerald H. and Ms. Judith E. Bozarth (02-128), Mr. R. Wayne and Ms. Kerri Badger and family (02-129), the County of Grande Prairie No. 1 (02-134), and Ms. Nellie Sterr (02-135) as their appeals are either moot, not properly before the Board, or without merit.

[52] Further, pursuant to section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act*, the Board also dismisses the appeals of Mr. Douglas A. Hudson (02-093), Mr. Marvin and Ms. Pat Loberg (02-102), Mr. Gerald H. and Ms. Judith E. Bozarth (02-128), Mr. R.

³¹ See: Ms. Shirley Hogg's Submission, dated March 17, 2003, and the Notices of Appeal filed by Ms. Shirley Hogg, L. Bozarth, Mr. Cameron, Ms. Elaine, and Ms. Clara Snoble, and Mr. David and Ms. Sharon Volker.

Wayne and Ms. Kerri Badger and family (02-129), and Ms. Nellie Sterr (02-135) for failing to respond to a written request of the Board.

Dated on August 1, 2003, at Edmonton, Alberta.

William A. Tilleman, Q.C.
Chair