

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – May 22, 2008

**IN THE MATTER OF** sections 91, 92, 95, and 97 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 Judy Stewart, the Cochrane Environmental Action Committee, and Suzanne Lazorko-Connon with respect to Approval No. 00239780-00-00 issued on October 29, 2007, under the *Water Act* to Green Drop Ltd. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Stewart et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: Green Drop (22 May 2008), Appeal Nos. 07-136, 137, & 138-D (A.E.A.B.).

**BEFORE:** Dr. Steve E. Hrudehy, Chair.

**SUBMISSIONS BY:**

**Appellants:** Ms. Judy Stewart; Cochrane Environmental Action Committee, represented by Ms. Judy Stewart and Mr. Tim Giese; and Ms. Suzanne Lazorko-Connon.

**Approval Holder:** Green Drop Ltd., represented by Mr. Bradley Gilmour and Ms. Allison M. Sears, Bennett Jones LLP.

**Director:** Mr. Kevin Wilkinson, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Erika Gerlock, Alberta Justice.

## **EXECUTIVE SUMMARY**

Alberta Environment issued an Approval under the Water Act to Green Drop Ltd. for construction works associated with the disturbance and filling of unnamed wetlands in the Town of Cochrane, Alberta.

The Board received Appeals from Ms. Judy Stewart, the Cochrane Environmental Action Committee, and Ms. Suzanne Lazorko-Connon, appealing the Approval and Ms. Judy Stewart and the Cochrane Environmental Action Committee requested a Stay. Green Drop agreed not to start work under the Approval until the Board made its decision on whether any of the appellants were directly affected.

The Board received written submissions from the participants on the issue of directly affected, and after reviewing the arguments and evidence presented, the Board determined Ms. Stewart, the Cochrane Environmental Action Committee, and Ms. Lazorko-Connon were not directly affected by the issuance of the Approval. The Board found they did not present sufficient information to demonstrate any interest that would be directly affected by the work. Further, as the work was to be completed on private lands, access to the wetland by Ms. Stewart, the members of the Cochrane Environmental Action Committee, and Ms. Lazorko-Connon was minimal.

The Board dismissed the appeals.

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## **I. BACKGROUND**

[1] On October 29, 2007, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00239780-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Green Drop Ltd. (the “Approval Holder”) for construction works associated with the disturbance of five unnamed wetlands (the “Wetlands”) located on NE 27-25-4-W5M in the Town of Cochrane, Alberta (the “Town” or “Cochrane”). The Approval allows for works and fill of four of the five Wetlands, specifically 0.48 ha of Class II wetlands and 0.645 ha of Class III wetlands.<sup>1</sup>

[2] On November 5, 6, and 8, 2007, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Ms. Judy Stewart, Mr. Tim Giese on behalf of the Cochrane Environmental Action Committee (the “CEAC”), and Ms. Suzanne Lazorko-Connon, (collectively the “Appellants”) appealing the Approval. Ms. Stewart and the CEAC also requested a Stay.

[3] On November 6 and 8, 2007, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals and Stay request. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals. The Participants were asked to provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[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 November 6, 2007, the Board asked Ms. Stewart and the CEAC to answer the following questions regarding the Stay request:

“1. What are the serious concerns of Ms. Stewart, and Mr. Giese and the

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<sup>1</sup> See: Alberta Environment, *Provincial Wetland Restoration/Compensation Guide*, February 2007 at page 5.

Cochrane Environmental Action Committee that should be heard by the Board?

2. Would Ms. Stewart, and Mr. Giese and the Cochrane Environmental Action Committee suffer irreparable harm if the Stay is refused?
3. Would Ms. Stewart, and Mr. Giese and the Cochrane Environmental Action Committee, suffer greater harm if the Stay was refused pending a decision of the Board, than the Green Drop Ltd. would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?"

[6] Ms. Stewart and the CEAC provided their submission on November 9, 2007. On November 9, 2007, the Board notified the Participants that a *prima facie* case was made by Ms. Stewart and the CEAC for the Board to consider granting a Stay. The Board asked for response submissions from the Approval Holder and the Director and a final rebuttal submission from Ms. Stewart and the CEAC. The Board granted a temporary stay of the Approval until November 19, 2007. On November 14, 2007, the Board extended the Stay to November 21, 2007, in order to accommodate prior commitments of Ms. Stewart.

[7] The Approval Holder and Director submitted their responses on November 14, 2007. Ms. Stewart's and the CEAC's rebuttal submission was received November 19, 2007.

[8] On November 21, 2007, the Approval Holder notified the Board that it was precluded from conducting any work on the lands until the Town's Subdivision Development Appeal Board had rendered its decision. The Approval Holder confirmed its undertaking not to start any work related to the Approval until the Board considered and ruled on the issue of standing. On November 26, 2007, the Board acknowledged the Approval Holder's undertaking, and as the Approval Holder did not intend to proceed under the Approval until after the Board had made its determination on directly affected, the Board did not make a ruling on the Stay application and the temporary Stay was vacated. The Board instructed the Approval Holder to notify the Board if any of the circumstances changed.

[9] On December 5, 2007, the Appellants provided their submissions on the issue of directly affected. Response submissions were received from the Director and the Approval

Holder on December 10, 2007. Rebuttal submissions were received from the Appellants on December 13, 2007.

[10] On December 21, 2007, the Board notified the Participants that none of the Appellants were directly affected, and therefore, the appeals were dismissed and the Stay request could not be considered. The following are the Board's reasons.

## **II. SUBMISSIONS**

### **A. Appellants**

#### **1. Ms. Judy Stewart**

[11] Ms. Stewart explained the development involves stripping and grading a 22 hectare parcel of land which consists primarily of the Wetlands and associated riparian lands. Ms. Stewart stated a development permit allowing the stripping and grading was appealed to the Town's Subdivision Development Appeal Board, but the appeal was dismissed because she was found not to be an affected person under the *Municipal Government Act*, R.S.A. 2000, c. M-26. Ms. Stewart believed there was no need to run a road through the Wetlands and the proposed road conflicts with the Town's wetland policy. She stated there has been no opportunity for public input as to how the lands should be developed considering the Wetlands.

[12] Ms. Stewart explained she has lived in Cochrane since 1980 and her residence is approximately six kilometres north of the Wetlands. She stated she has been a member of the CEAC since the 1990s, and her interest in the Wetlands is highly personal and connected to her work both as a community volunteer and lawyer. She stated her sense of self-esteem and value as a community contributor is directly connected to her work to protect the Wetlands.

[13] Ms. Stewart argued she has a discernible unique and special interest not shared by most Albertans. She explained she provided volunteer and professional services directly related to the protection of the Wetlands from impacts of development. She stated that, as Town councilor and mayor, she ensured environmental issues concerning the Wetlands and riparian lands were considered or included in policy documents or in joint area structure plans for newly

annexed sections of lands, and she assisted in developing land use bylaws that were adopted by council in 2005 to protect wetlands and riparian lands from the impacts of development. Ms. Stewart explained she has been a member of the Bow River Basin Council, a watershed planning and advisory council, and was involved in producing land use bylaw provisions for the Town. She explained she assisted in the drafting of the wetland policy for the Town that was adopted by council in September 2006. She stated she notified Alberta Environment when unauthorized drainage of the Wetlands was taking place, and she appealed the development permit to the development appeal board. Ms. Stewart stated she provides advice to provincial agencies, including Alberta Environment and Sustainable Resource Development, concerning water management and land use management, and she worked with Alberta Environment and Sustainable Resource Development to ensure the Wetlands were not drained and filled without authorization.

[14] Ms. Stewart argued her discernible unique and special interest that will be affected by the Approval is supported by the *Water Act*. She explained she does not use the Wetlands in a traditional way and her interest is not related to land ownership or economic gain. She explained her on-going interest is "...private arising out of a deep personal commitment to protect these wetlands and riparian lands from the impacts of subdivision and development."<sup>2</sup> She stated this interest motivates her to act within her community, regionally, and provincially. She explained her use of the Wetlands is to have it retained as a functioning aquatic environment.

[15] Ms. Stewart submitted the Board should exercise flexibility in determining whether she is directly affected, because laws have been enacted and policies adopted to recognize individual public members as active partners to the Alberta government in water and natural resource management. Ms. Stewart argued the partnership expectations for persons such as the Appellants have arisen since the Board adopted the directly affected tests as described in *Kostuch*.<sup>3</sup> She stated she is recognized as a valuable partner providing expert advice and

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<sup>2</sup> Ms. Stewart's and the CEAC's submission, received December 5, 2007, at paragraph 22.

<sup>3</sup> See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017



volunteer services directly to government agencies. She noted the roles and responsibilities of the watershed stewardship groups and watershed planning and advisory councils as advisors to water management planning. She stated she provided advice regarding water management planning and decision making and takes her partnership role with the government very seriously.

[16] Ms. Stewart stated she has a personal interest based on her position as a public-at-large partner with Alberta Environment pursuant to the *Water for Life: Alberta's Strategy for Sustainability* ("Water for Life"). She argued that, if the Director expects to partner with the Appellants in the future, he must acknowledge their contributions when water resources within their community are being eliminated. She stated she would suffer a loss of self esteem as a volunteer and professional if the Approval is upheld. She stated the issuance of the Approval has had a direct effect on her desire to continue to volunteer and participate as a partner with Alberta Environment. She argued her interest, and that of the CEAC, to protect the Wetlands surpasses the common interest of all residents who may be affected by the Approval. Ms. Stewart argued that to say she does not have a special interest in the Wetlands or that she is not directly affected does not recognize her personal loss and sense of failure that she would experience if she cannot protect the Wetlands through appropriate legal and institutional processes after all her work. She questioned how she could encourage children and others to participate as partners and volunteers in environmental protection if her work is deemed irrelevant. Ms. Stewart argued the loss of the Wetlands would result in resignation because "...no matter how hard a person works or contributes, unless they own land next door to important or sensitive landscape, their efforts to protect or enhance those lands are rendered meaningless."<sup>4</sup>

[17] Ms. Stewart explained she has lived in Cochrane for 28 years and protecting wetlands and riparian areas from the impacts of urban development has become her life work. She stated she has embraced the purpose of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") and the *Water Act* where Alberta residents have a shared responsibility for the conservation and wise use of the environment and water resources. Ms. Stewart stated she uses the Wetlands as a case study in her ongoing research and presentations.

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(A.E.A.B.). See also: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

<sup>4</sup> Ms. Stewart's and the CEAC's submission, received December 5, 2007, at paragraph 29.

She stated her "...use of the waters and beds and shores of the wetland complex is no less important than (*sic*) a person who uses it to bathe or fish or drink (if that were possible)."<sup>5</sup> She argued her use is as real as the traditional physical use and when the Wetlands are gone, she would be just as directly affected as a person who uses the beds and shores in the traditional sense. Ms. Stewart noted the term "use" is not defined in the *Water Act*, and aesthetics, bird watching, and the peace and joy people experience when being close to wetlands are recognized uses of water in several policy documents, including *Water for Life*. Ms. Stewart argued adjacency to the lands should not have so much weight when determining directly affected because directly affected is not necessarily only about property values or money earned or lost by people who live in adjacent properties.

[18] Ms. Stewart argued the Director should have ensured the hydrology and hydrogeology of the lands were properly investigated prior to issuing the Approval. She stated the only scientific study provided was a terrestrial report, not a water or aquatic environment report. Ms. Stewart stated there are alternatives available that would allow the development to proceed while accommodating the Wetlands.

[19] Ms. Stewart stated her volunteer work, and that of the CEAC, stemmed from personal convictions to protect the environment giving them personal satisfaction and increasing their sense of community contribution through water management and water resource protection.

[20] Ms. Stewart requested the Board find her directly affected and grant her standing to continue her appeal.

## 2. Cochrane Environmental Action Committee

[21] The CEAC confirmed Ms. Stewart is a member of the CEAC, a recognized watershed stewardship group in the Alberta Watershed Stewardship Network. It explained Mr. Tim Giese is president of the CEAC, and he has been recognized for his work as a local environmental volunteer. The CEAC explained Mr. Giese opposed the re-designation of the parcel of land containing the Wetlands because there was no indication the Wetlands would be

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<sup>5</sup> Ms. Stewart's and the CEAC's submission, received December 5, 2007, at paragraph 29.

protected and no environmental impact assessments or other studies were required for the re-designation. The CEAC argued there was the potential for groundwater contamination, and flooding of the development and adjacent lands is likely if the Wetlands are filled in.

[22] The CEAC explained it is a community environmental action group devoted to improving the environment and quality of life for residents of the Town of Cochrane and the Municipal Districts of Rocky View and Big Horn by championing environmental works and funding environmental projects. The CEAC stated it works to protect the local environment from unnecessary impacts of development, and its members are involved in ongoing education activities concerning wetlands, water conservation, and water management. The CEAC stated that it has done considerable work to protect the riparian lands and wetlands, and its membership includes scientists, professionals, biologists, environmental consultants, members of local watershed stewardship groups, and knowledgeable volunteers, but no members live on lands adjacent to the Wetlands.

[23] The CEAC stated it would suffer the same harm as Ms. Stewart, and the cause of the harm would be the elimination of the Wetlands. It argued all of its work would have been for nothing. The CEAC argued it has a discernible and unique interest that would be affected by the Approval, and the causal connection between the Approval and the affect on the CEAC is apparent, not speculative. The CEAC stated it has provided professional advice to the government as members of the watershed stewardship groups and as member of the Bow River Basin Council. It stated its interests are affected because of its volunteer work in the community and members' professional careers promote conservation of wetlands and riparian lands through legal mechanisms, policies, and institutional change. The CEAC argued the Approval undermines the purpose of the *Water Act* and the *Water for Life* partnerships, and the Director had a responsibility to ensure its work with the watershed stewardship group partners was respected and its partnership interests considered. The CEAC argued the Director, at a minimum, should have considered the policies, laws, and administrative guidelines for ensuring the construction work would not have an adverse affect on the hydrological and hydrogeological functions of the Wetlands. The CEAC stated the Director did not require a hydrology or hydrogeological report be prepared by the Approval Holder to ensure the elimination of the

Wetlands would not have an adverse impact on the aquatic environment or groundwater supply in the area. It stated the Approval was issued based on a terrestrial report without requiring a wetland assessment.

[24] The CEAC argued the Director did not ensure the Approval Holder addressed the “efficiency of use” factor in designing the project, because it was possible for the development to be designed around and within the Wetlands. The CEAC referred to the *Wetland Restoration/Compensation Guide*<sup>6</sup> and argued the Approval Holder “...did not attempt to utilize low impact development design or technology to avoid or mitigate damages to the wetland complex, but requested drainage and infill and compensation instead, which is the least preferred option.”<sup>7</sup>

[25] The CEAC argued the definition of directly affected should be broad enough to encourage community volunteers with professional expertise to come forward when wetlands in their community are scheduled to be destroyed without proper scientific studies. The CEAC submitted the precautionary principle supports an expansion of who is directly affected. It stated provincial laws, policies, and emerging strategies to make decisions on a watershed basis need community partners who work locally. The CEAC argued the precautionary principle should be used to ensure the Wetlands are not connected to Cochrane’s water supply and in determining whether there is an adverse effect on the aquatic environment.

[26] The CEAC requested the Board find it directly affected and grant it standing to continue its appeal.

3. Ms. Suzanne Lazorko-Connon

[27] Ms. Lazorko-Connon explained she has lived in Cochrane for 16 years, and her residence is located approximately five kilometers from the Wetlands by vehicle. She stated there is a direct link between the Wetlands and her home. She stated she lives adjacent to Mitford Park, and she enjoys the wildlife that frequents the park and the river valley. Ms.

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<sup>6</sup> See: Alberta Environment, *Provincial Wetland Restoration/Compensation Guide*, February 2007.

<sup>7</sup> Ms. Stewart’s and the CEAC’s submission, received December 5, 2007, at paragraph 31.

Lazorko-Connon explained the Wetlands are not located in the river valley, but they form part of the ecosystem in which wildlife thrive.

[28] Ms. Lazorko-Connon stated that surface water allocations in the South Saskatchewan River basin are reaching their maximum, and therefore, groundwater sources need to be protected. She explained wetlands are one type of groundwater recharge area and they act as filters to various contaminants.

[29] Ms. Lazorko-Connon argued the proposed development is not very forward-thinking regarding the protection of wetlands, and given the unknown effects of climate change on water resources, she would attempt to protect the valuable resource water.

[30] Ms. Lazorko-Connon argued she is directly affected, because she wants to protect the water supply in Cochrane.

## **B. Approval Holder**

[31] The Approval Holder explained the Approval allows for the construction of works associated with the disturbance and filling of approximately 0.48 ha of Class II unnamed wetlands and 0.645 ha of Class III unnamed wetlands associated with the development in the Town. The Approval Holder explained the Wetlands are on private property and the land is zoned highway/commercial. The Approval Holder stated the Town issued a development permit for the stripping and grading of the parcel.

[32] The Approval Holder noted none of the Appellants live in proximity to the Wetlands; Ms. Stewart and Ms. Lazorko-Connon live six and five kilometres from the site, respectively, and no members of the CEAC live on lands adjacent to the Wetlands.

[33] The Approval Holder stated the Legislature expressly curtailed the right of appeal to a limited class, as the person must have a personal rather than a community interest in the matter.

[34] The Approval Holder stated none of the Appellants have a legal right or entitlement to the lands adjacent to the project, and therefore, they must establish some personal interest above and beyond a community interest in the Wetlands. The Approval Holder

submitted that none of the Appellants established an actual use of the Wetlands. The Approval Holder stated the Wetlands are not a source of drinking water for any of the Appellants, and because the Wetlands are located on private lands, the Wetlands are not accessible for recreational use by the Appellants.

[35] The Approval Holder explained that the most significant of the five wetlands, Wetland 1, is being preserved and not subject to the disturbance under the Approval.

[36] The Approval Holder argued the Appellants' interest is nothing more than the public's interest in the Wetlands. The Approval Holder argued Ms. Stewart's and the CEAC's history of environmental advocacy respecting wetlands in the Cochrane area does not entitle them to be considered directly affected. The Approval Holder stated the CEAC is a community group that champions environmental works and funds environmental projects, and Ms. Stewart's deep personal convictions to protect the environment are insufficient to establish a directly impacted personal interest.

[37] The Approval Holder stated the personal actions referenced by Ms. Stewart to support her directly affected position were undertaken in furtherance of civic duties or in the capacity as a public or community representative. With respect to Ms. Stewart's argument that she uses the Wetlands for research purposes, the Approval Holder noted the Wetlands are on private property and the most significant of the Wetlands is being preserved.

[38] The Approval Holder submitted the Board's flexibility in determining directly affected "...cannot be extended to render what are community interests in environmental protection into interests of a personal nature."<sup>8</sup> The Approval Holder argued the Appellants' reasoning would suggest any environmental advocate who has taken a special interest in an approval would have standing and the curtailment of the appeal right would be meaningless.

[39] The Approval Holder noted Ms. Lazorko-Connon resides on the opposite side of the Bow River, at least five kilometres from the Wetlands, and her residence is several hundred feet below the elevation of the Approval Holder's site. The Approval Holder stated there is no connection through Mitford Park from Ms. Lazorko-Connon's residence to the Wetlands, and the

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<sup>8</sup> Approval Holder's submission, dated December 10, 2007, at paragraph 17.

only link is the Highway 22 bridge and walkway tied to the bridge. The Approval Holder argued Ms. Lazorko-Connon did not present any evidence to suggest the wildlife in Mitford Park would be affected by the approved disturbance of the Wetlands.

[40] The Approval Holder stated the Appellants provided only general statements of concern that the draining and filling of the Wetlands will affect community water supply, water storage, and water quality, and no data were submitted to support "...these purely speculative assertions."<sup>9</sup> The Approval Holder noted the Appellants admitted that their concern with groundwater is that, even though it is not the only available water supply available now, it may be the only available water supply for future generations. The Approval Holder argued this is clearly a community issue, not a personal issue.

[41] The Approval Holder submitted the Appellants failed to provide evidence they will be directly affected by the work associated with the Approval and therefore, the Approval Holder requested the appeals be dismissed.

### **C. Director**

[42] The Director argued the Appellants are not directly affected by the Approval. The Director submitted that, to be directly affected, the person must have a substantial interest in the outcome of the approval that surpasses the interest of all residents affected by the approval, and they must show the action of the Director will cause a direct effect on that interest that is not speculative.

[43] The Director argued the Appellants failed to show a personal direct effect, and the Appellants' interest in riparian areas and wetlands in the Town of Cochrane is not a personal direct effect.

[44] The Director argued the statements made by Ms. Lazorko-Connon are general statements related to land use planning and wetlands and the value of wetlands, water, and the use of the Town's park system and river corridor. The Director stated Ms. Lazorko-Connon did

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<sup>9</sup> Approval Holder's submission, dated December 10, 2007, at paragraph 22.

not provide an indication of a personal and direct connection to the Wetlands impacted by the Approval.

[45] The Director noted there was no indication that any of the Appellants, including CEAC members, live adjacent to or in close proximity of the Wetlands. The Director stated the CEAC and Ms. Lazorko-Connon did not provide evidence of their use of the lands. With respect to Ms. Stewart, the Director explained Ms. Stewart claimed to use the Wetlands as a case study in her professional and voluntary activities, but she did not provide details of how this extended beyond an awareness of the Wetlands and a general interest in protecting the Wetlands and riparian areas in the Town. The Director noted the Wetlands are on private lands with no physical access by the Appellants.

[46] The Director explained there will not be a complete loss of the Wetlands on the lands because the largest wetland will remain intact.

[47] The Director argued the Appellants did not establish an interest greater than the generalized interest of all Albertans in protecting the environment, and they did not demonstrate more than an affect on the public at large.

[48] The Director argued the CEAC failed to demonstrate how its membership satisfies the criteria for group standing enumerated by the Board in its previous decisions. The Director stated the CEAC did not establish that it was akin to the Lake Wabamun Environmental Protection Association (“LWEPA”)<sup>10</sup> or the Hazeldean Community Association,<sup>11</sup> because these were defined groups of residents living in close proximity to the proposed activity and the groups were formed specifically in response to the proposed activities under EPEA.

[49] The Director stated the CEAC’s mandate is similar to the Southern Alberta Environmental Group<sup>12</sup> and Ms. Martha Kostuch<sup>13</sup> in that the CEAC had multi-faceted concerns

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<sup>10</sup> See: *Re: TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

<sup>11</sup> See: *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.).

<sup>12</sup> See: *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: *St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.).

<sup>13</sup> See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995),



and are involved to meet a general environmental goal, but these goals do not meet the Board's test. The Director noted the CEAC is involved in a wide breadth of activities and areas of involvement. The Director stated there is no information on the membership of the CEAC other than the listed names appended to the submission nor was any information provided on how the individual members are personally and directly affected by the Director's decision to issue the Approval.

[50] The Director submitted the concerns of the CEAC and the uses made by the members of the CEAC of the area are similar to those in *Jericho*,<sup>14</sup> in that the members are concerned about the general state of the environment in the area and the impact on their uses of the area.

[51] The Director argued that, even though the CEAC may be a volunteer watershed stewardship group, it is insufficient to establish standing. The Director stated the same applies to the participation of the CEAC or its members in the Bow River Basin Council or one of its sub-committees. The Director explained the Bow River Basin Council may be invited to provide policy advice, but the provision of general advice does not fall into the definition of directly affected. The Director stated the individual's contribution of time and perspective is welcome in the broad policy context, but it is not professional advice or advice regarding operational decisions. The Director explained the decision making and regulatory authority for all water management decisions remains with Alberta Environment and the Director.

[52] The Director argued the involvement in general volunteer activities is not sufficient to show that a group or an individual is directly affected by the proposed activity. The Director argued that, even though the Appellants are committed and interested in protecting the environment in general and wetland and riparian areas in the Town of Cochrane, they are not directly affected within the meaning of the *Water Act*.

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17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

<sup>14</sup> See: *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: *St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.) ("*Jericho*").

[53] The Director submitted that any municipal land use/development issues and decisions made by other government departments cannot be dealt with by the Board. The Director stated the land use approval of the development is not subject to the *Water Act* and was not before the Director when he issued the Approval.

[54] The Director submitted the Appellants should not be granted standing on the basis they are not directly affected.

#### **D. Appellants' Rebuttal Submissions**

[55] Ms. Stewart submitted a rebuttal submission on behalf of herself and the CEAC. She argued the individuals and groups in previous Board decisions are distinguishable from her and the CEAC. She submitted the tests used by the Board to determine directly affected should be applied with flexibility.

[56] Ms. Stewart argued her interests and those of the CEAC are unique and personal to them individually and collectively, and they are not the same interests as those shared by the general public within the community, regionally, or provincially. She stated the differences from the general public arise out of their unique volunteer and professional actions in Cochrane and their commitments to partnership relationships as members of recognized watershed stewardship groups and the Bow River Council. She explained their "...works and work products are unique works directly related to wetland and riparian land protection in order to sustain the aquatic environment and water resources for current and future generations..."<sup>15</sup> She stated they were not expected to create these works, but they spent time and energy creating policies, legal provisions, and providing expert advice because of their acceptance of their responsibility as partners to protect and conserve water resources. Ms. Stewart stated their motivation to continue to participate as partners arise from the riparian lands and wetlands in Cochrane where the

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<sup>15</sup> Ms. Stewart's and the CEAC's submission, dated December 12, 2007, at paragraph 7.

Appellants live, work, and play. She stated people are connected to the landscapes where they live and work, and particular landscapes are needed for water, air, and food supplies.

[57] Ms. Stewart argued the Wetlands, an environmentally significant wetland complex in the community, will be needlessly destroyed. She stated the Wetlands "...indicate a high water table that may be connected to significant groundwater supplies that the community will rely on for future growth,"<sup>16</sup> but she noted the Approval Holder and the Director did not provide evidence that was conclusive in that regard.

[58] Ms. Stewart explained she and the CEAC worked to protect the Wetlands and the riparian lands for several years, and to destroy the Wetlands would destroy their motivation to act. She argued their "use" of the Wetlands is contained in the *Water Act*, the protection of the aquatic environment, but the use would no longer be available if the Approval is upheld.

[59] Ms. Stewart explained she provided expert advice to the South Saskatchewan River Basin Management Plan (the "SSRB Management Plan"), and although the Director must consider the SSRB Management Plan when deciding whether an approval should be issued, there is no indication in the Record he considered the SSRB Management Plan before the Approval was issued.

[60] Ms. Stewart stated all of the volunteer hours spent with government agencies ensuring that matters impacting the aquatic environment or hydrology of the Wetlands would be considered by the Director would have been for nothing if the Approval is not reversed. She argued the Director should have also considered economic efficiencies, including new technologies and strategies to avoid the Wetlands or to mitigate impacts of development as required by provincial policy. Ms. Stewart noted the Record does not include any hydrology or hydrogeological report, and none of the documents provided by the Approval Holder is conclusive concerning the matters the Director must consider.

[61] Ms. Stewart reiterated that her interests and those of the CEAC are not abstract or general, but are personal, specific, and the Approval will have an effect on those interests. She stated her interests have already been harmed by the issuance of the Approval and by her

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<sup>16</sup> Ms. Stewart's and the CEAC's submission, dated December 12, 2007, at paragraph 6.

appealing. Ms. Stewart commented that her self esteem and her willingness to partner with government agencies have suffered through negative local press reports. She stated she has suffered a sense of loss and failure to be able to protect important local water resources and the natural environment even though policies were adopted by Town council. She argued they should not have to appeal decisions on approvals to ensure resources are sustained for future generations who may need them to recharge groundwater.

[62] Ms. Stewart argued there will be discernible effects on her interests as well as the CEAC's interests, and there is an unbroken connection between their personal interests and the harm caused to those interests by the Approval.

[63] Ms. Stewart argued her and the CEAC's personal interests in protecting the aquatic environment are supported by the policies underlying the *Water Act* and the policies, goals, and strategies identified in the *Water for Life* strategy. She stated that, as a member of the Bow River Basin Council, she contributed to the development of the strategy to protect the aquatic environment and the framework for water management planning.

[64] Ms. Stewart argued their interests support the underlying policy considerations of the *Water Act* including protecting the integrity of the environment, human health, economic growth, sustainable development, and management of water resources. She stated the CEAC and she have embraced the goals and strategies in *Water for Life* and the *Water Act*, and their appeals demonstrate their willingness to commit time and energy to continue to work towards the goal of healthy aquatic ecosystems. She argued the Director had a responsibility to her and the CEAC to ensure their work as partners was respected and their partnership interests were considered seriously, and at a minimum, the Director should have considered the policies, laws, and administrative guidelines for ensuring the work would not adversely affect the hydrological and hydrogeological functions of the Wetlands. Ms. Stewart argued the issuance of the Approval is contrary to the strategy to protect the aquatic environment, whereas her interests and those of the CEAC are completely consistent and supportive of the strategy and framework created pursuant to the *Water Act*.

[65] Ms. Stewart stated the issue of *Water for Life* partnerships and the personal interests that attract those partners being used to attain directly affected status have not been

determined by the Board. She stated the important factor is that the CEAC is a recognized partner of the watershed stewardship group, and as she is a member of the CEAC, she is a member of the partnership as well.

[66] Ms. Stewart argued the Director failed to consider factors in the SRRB Management Plan, and she questioned who would hold the Director accountable if partners in watershed planning and watershed stewards are not allowed to.

[67] Ms. Stewart submitted that the precautionary principle and statements from the courts that everyone has a responsibility to protect the environment needs to be considered by the Board. She argued the Appellants have shown a willingness to take responsibility and should be given a chance to have the merits of the appeals determined to ensure the Approval was properly granted. Ms. Stewart requested the interpretation of directly affected be stretched to allow their appeals to be heard.

[68] In her rebuttal, Ms. Lazorko-Connon explained the response she received regarding her Statement of Concern was general and did not address the concerns she raised. She noted examples, including whether the ecological inventory was adequate considering the inventory was completed over a three day period in fall, providing limited information in a snapshot in time. She argued the Town should have consulted with the residents on how the development on the site should proceed given the Town's policy to conduct a wetland inventory. Ms. Lazorko-Connon stated no response was provided regarding the hydrogeological connection between the five wetlands, and if the four wetlands that will be disturbed are supporting wetlands, how will the proposed project affect the remaining wetland. Ms. Lazorko-Connon also noted that consideration was being made to replace the Wetlands with other wetland projects, but she argued wetlands are being lost to development at an alarming rate, and the wildlife, including aquatic life, cannot simply relocate. She stated that "If wetlands are lost, the wildlife they support is lost along with their aesthetic value which I greatly value."<sup>17</sup> Ms. Lazorko-Connon stated the wildlife she sees in Mitford Park frequent the Wetlands area, a part of the Bow River ecosystem and environs of Cochrane.

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<sup>17</sup> Ms. Lazorko-Connon's submission dated December 13, 2007, at page 3.

[69] Ms. Lazorko-Connon stated the Approval Holder should work to incorporate the Wetlands into the development.

### **III. ANALYSIS OF STAY APPLICATION**

#### **A. Directly Affected Test**

[70] The Board has discussed the issue of directly affected in numerous decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

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

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

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

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

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a

project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

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

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area’s wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson’s factual proof.

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

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”<sup>18</sup>

[72] Justice McIntyre concluded by stating:

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<sup>18</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) (“*Court*”). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v.*

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”<sup>19</sup>

[73] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that it is directly affected.<sup>20</sup>

[74] The Court of Queen’s Bench in *Court*<sup>21</sup> stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[75] The effect does not have to be unique in kind or magnitude.<sup>22</sup> However, the effect the Board is looking for needs to be more than an effect on the Alberta public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.<sup>23</sup> Under the *Water Act*, the Legislature chose to restrict the right of

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*Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.) (“Vetsch”).

<sup>19</sup> *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

<sup>20</sup> See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

<sup>21</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

<sup>22</sup> See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

<sup>23</sup> See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017



appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision, it intended it be something narrower.

[76] To be found directly affected by the Director's decision to issue the Approval, the Appellants must be able to demonstrate a direct effect on a personal interest or right. The more remote the connection, the less likely the Appellants will be found to be directly affected.

## **B. Analysis**

### **1. Ms. Judy Stewart**

[77] Ms. Stewart provided the submissions on behalf of herself and the CEAC and most of the issues and concerns raised applied to both of these Appellants.

[78] None of the members of the CEAC, including Ms. Stewart, live adjacent to the Wetlands. Although this can be an important factor, it is not the sole basis on which the Board makes its decision on whether an appellant is directly affected.

[79] The Board acknowledges the efforts Ms. Stewart has undertaken personally and as a member of the CEAC during the past years to protect the Wetlands. She has done this through volunteer time and as a member of Town Council. She argued her interest is more than a general interest of any other Albertan, and she had a personal interest in the Wetlands. She was a member of the Bow River Basin Council and worked with Alberta Environment in the development of the SSRB Management Plan. She argued all of her time invested would be for naught if these Wetlands are destroyed. Ms. Stewart's interests appear to be the protection of wetlands in Cochrane and in the surrounding area, not specifically these Wetlands. The Board understands that the lost Wetlands will be replaced by the creation of three fold greater area of

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(A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

wetlands at another location in the watershed, but the new wetlands will not be within the boundaries of Cochrane. If her concern is the loss of wetlands in the vicinity, but not necessarily these specific Wetlands, then her concerns should be directed to the adequacy and effectiveness of the wetland compensation program or to Alberta Environment to revisit its wetland policies.

[80] Ms. Stewart made reference to her efforts to ensure the Wetlands would be considered in any area structure plans developed for newly annexed lands. She explained no area structure plan had been developed yet for the lands on which the Wetlands are located. As to whether or not area structure plans have been developed or what is included in the plans is not a matter this Board can consider. Even if the plans were in place, Town Council has the ability to override any plans and allow development to proceed, but again, it would be an issue that would have to be brought before Town Council, not this Board.

[81] The Board does not believe Ms. Stewart's volunteer work in the partnerships have been irrelevant. The contributions described by Ms. Stewart are vitally important. This Province needs more individuals willing to take the time and effort to support the protection of the environment and its resources. The Board understands the aesthetic value of wetlands and the solace people can receive by preserving natural areas, including wetlands and riparian areas. However, the legislation requires for the purpose of standing before this Board that a substantial personal interest tied to these specific Wetlands be directly affected by the issuance of the Approval. Respectfully, the arguments presented by Ms. Stewart do not meet this test.

[82] Many of the arguments presented by Ms. Stewart, and the CEAC, related to land use planning. What is allowed onto the site and how it is configured is an issue that needed to be addressed by Town Council or by the Subdivision Development Appeal Board. The Board notes the efforts taken by Ms. Stewart and the CEAC in appearing before the Subdivision Development Appeal Board, the proper route to take to voice these concerns. This Board cannot override the decision of the Subdivision Development Appeal Board. This Board can only deal with the jurisdiction of the Director and his role under the *Water Act*.

[83] The CEAC raised an argument that its role of being a member of the watershed partnership should entitle it to have standing before the Board. However, in determining whether

the Appellants are directly affected, the Board looks at whether the harm to the natural resource will affect the Appellants' use. As stated in *Court*:

“Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing.”<sup>24</sup>

[84] The Wetlands are located on private lands, therefore access to the Wetlands by the Ms. Stewart or members of the CEAC is restricted. The Board does not doubt the Appellants receive a general environmental benefit from the Wetlands, but in this case, it is insufficient to find Ms. Stewart and the CEAC directly affected because there is no actual use of the Wetlands. It appears the Approval Holder has restricted public access to the site. The Approval Holder can continue to do so because it is private property. The courts have accepted that the legislation requires an appellant to show their personal use of the natural resource will be affected. The Appellants did not describe a specific use that would be affected other than knowing that the Wetlands exist. Without access to the Wetlands, the Board does not see how the interests of the Appellants will be directly affected because they do not have a “use” of the Wetlands nor did Appellants show how the Wetlands have any connection to other wetlands in the area that they do use.

[85] The Approval allows for the Wetlands to be filled, so undoubtedly the Wetlands will be adversely impacted. What the Appellants failed to show in their submissions was the effect the loss of the Wetlands would have on lands beyond the private lands where the Wetlands are located. The Appellants needed to demonstrate a more tangible connection between the effect on the resource and their personal interests or use. If the effect is only on private land, it is difficult to draw the connection between the affected resource and the impacted interest. If the Appellants had been able to show there would be an effect on them personally outside of the private property, there would have been a stronger argument for finding them directly affected.

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<sup>24</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 69, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[86] Ms. Stewart argued she is directly affected because the loss of these Wetlands would affect her own self esteem and she would be personally frustrated with the loss of the Wetlands. The Board acknowledges this would be a personal affect, but the effect on self esteem is too subjective a basis for a regulatory process, including being found directly affected for the purposes of an appeal under the *Water Act*. The Board expects the Director to value the constructive and committed input of volunteers who participate in the growing variety of public consultation processes about environmental management. The value the Director should accord such volunteers should assure they can recognize that the Director has carefully considered their constructive input to a regulatory decision-making process. However, despite the tangible value provided by such volunteer input, that investment cannot guarantee “directly affected” status over any related decision, strictly based on time investment.

[87] Ms. Stewart mentioned the Wetlands were a case study that she used in her graduate studies at the University of Calgary. While this “use” had the potential to establish a tangible “use” of the Wetlands, Ms. Stewart did not provide details on this use sufficient to make her case for directly affected. It does not appear from her submissions that she is actually using the Wetlands; it appears she is only using the Wetlands as a case study. In other cases the Board has been presented with evidence and arguments about how other researchers use the natural resources. For example, in *Jericho*, the Board heard evidence from researchers conducting studies on hummingbirds and spiders at the site in question.<sup>25</sup> While insufficient information was provided in that case, these more tangible, physical connections that were presented are more likely to establish a directly affected finding than the generic “legal” studies that Ms. Stewart raised. Specifically, no information was provided about how the preservation of the Wetlands was critical to the viability of the specific case study. By definition, a case study is a study of an actual outcome; the study should not determine the outcome. Without more of a connection, the Board finds it difficult to find the requisite linkage between the effect on the natural resource and the Appellants’ use of that resource.

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<sup>25</sup> *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: *St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.).

[88] As the courts have stated, an appellant does not have to provide all of their substantive arguments to prove they are directly affected. What the Board needs is some indication how the appellant's use of the natural resource will potentially be affected by the issuance of the approval having an affect on a natural resource.

[89] Ms. Stewart raised the issue of groundwater and how filling in of the Wetlands could affect groundwater for use as a water source for the Town in the future. At this time, using groundwater sourced from the Wetlands is purely speculative with no grounding in fact, and the Board cannot grant standing on purely speculative arguments. Further detailed arguments would be needed to meet the *prima facie* test as described in *Court*<sup>26</sup> as opposed to the simple assertion presented in this case.

[90] The Board has concerns with Ms. Stewart's and the CEAC's request to have the interpretation of directly affected "stretched." The Board has always viewed each approval on its own merit and determined directly affected by the specific circumstances. The Board must remain cognizant of the restraints put in place by the legislators who expressly limited those who can file an appeal to persons who are directly affected. To "stretch" who may be found directly affected would result in the Board surpassing its jurisdiction. Although Ms. Stewart and the CEAC raised an interesting argument as to the role of watershed groups in the appeal process, generalized commentary on protecting wetlands in the region does not demonstrate an interest above that of most Albertans. Without additional information of the personal effect of the Approval, the required connection between the Approval and the Appellants' use of the Wetlands has not been established and the appeals must be dismissed.

## 2. CEAC

[91] In addition to the directly affected test described above, a group has additional obligations to demonstrate it is directly affected.

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<sup>26</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) ("*Court*").

[92] There are two pivotal cases in which the issue of a group filing an appeal was addressed - *Hazeldean*<sup>27</sup> and *Graham*.<sup>28</sup> In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. Two other appeals were also received in the *Hazeldean* case, the first on behalf of an individual and an environmental association, and the second from an individual. The approval holder objected to the appeals on the basis that none of the participants that had filed an appeal were directly affected.

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

“The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person

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<sup>27</sup> *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.) (“*Hazeldean*”).

<sup>28</sup> *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection*, (1996) 20 C.E.L.R. (N.S.) 287 (“*Graham*”). This case was judicially reviewed and then taken to the Court of Appeal. See *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1997), 22 C.E.L.R. (N.S.) 141 (Alta. Q.B.) and (1997) 23 C.E.L.R. (N.S.) 165 (Alta. C.A.).

would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.”

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

[95] The *Graham* case involved appeals filed by three organizations. Mr. Graham filed his appeal on behalf of the Alberta Trappers Association. The other two organizations that appealed were the Lesser Slave Lake Indian Regional Council and the Toxics Watch Society (which later withdrew its appeal). The appeals related to an approval granted to the hazardous waste treatment facility located at Swan Hills. In *Graham*, the Board ruled that only one individual represented and specifically identified by one of the organizations was directly affected. This individual, Mr. Charlie Chalifoux, was a trapper who regularly trapped adjacent to the facility. The appeal proceeded accordingly.

[96] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 115 of the *Water Act*, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be shown that individual members of the organization are individually and personally impacted by the project.<sup>29</sup>

[97] It has been the exception rather than the general rule to have a group deemed to be directly affected. Another exception was the Lake Wabamun Environmental Protection Association (“LWEPA”). LWEPA has appeared before the Board in relation to issues occurring at Lake Wabamun, west of Edmonton. This association “...was created for the express purpose

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<sup>29</sup> See also: *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: *St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.).

of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which the (*sic*) many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process.”<sup>30</sup> In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to and use of the lake, been determined to be directly affected.

[98] In comparing the CEAC with LWEPA, LWEPA was formed in order to engage in the regulatory process. The membership is confined to the individuals who live around Lake Wabamun, an area surrounded by intense industrial activity. It is obvious all the residents within this confined area around Lake Wabamun would be affected by the Director’s decision in relation to the industry in the area. In the present appeals, the information provided regarding the membership of the CEAC shows none of its members are in close proximity to the Wetlands, nor was evidence of specific use of the Wetlands by any member of the CEAC provided. The Board recognizes the efforts made by the CEAC to promote wetlands in the Cochrane area through, amongst other things, its educational programs and participation in the watershed stewardship group and policy development. The CEAC promotes wetlands in the Cochrane region; it is not solely intent on protecting the Wetlands affected by the Approval. Because the Approval called for a three-fold greater area of wetland compensation in the watershed, there was a need to show how these specific Wetlands were used by the CEAC. The general interest in promoting wetlands is insufficient to base standing on for a hearing of the substantive matters for these Wetlands.

[99] In its Notice of Appeal, the CEAC questioned who would have the right to file an appeal if no adjacent landowner is able to submit a Statement of Concern and Notice of Appeal. The Board has raised the concerns of not having an adjacent landowner to property that an approval attaches.<sup>31</sup> However, if there was an adjacent landowner to the Wetlands, there was

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<sup>30</sup> Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

<sup>31</sup> See: *Castle-Crown Wilderness Coalition, Re 60 Admin. L.R. (4th) 72 (Alta. Env. App. Bd.)*, (*sub nom.*



nothing preventing him from participating in the approval process or the appeal process. They also had the option of filing an individual appeal and having the CEAC or some other organization present his issues.

[100] Other than Ms. Stewart, individual members of the CEAC did not file Notices of Appeal and no additional information was provided about the members to demonstrate how they would be directly affected by the issuance of the Approval. The CEAC provided its membership list but did not provide additional information that would indicate how any specific member would be directly affected by the Director issuing the Approval. The membership list does not indicate where the members reside in relation to the Wetlands, other than they do not live adjacent to the Wetlands. There is no indication of any direct connection between the Wetlands and their residences or that their residences are actually in Cochrane. There was no indication how the members use the Wetlands, other than Ms. Stewart. Given the Wetlands are located on private property, public use would not be expected.

[101] The purpose of the CEAC is commendable because it supports and defends the protection of wetlands in and around Cochrane, not just the Wetlands specified in the Approval. However, based on the wording of the legislation, the Board needs to find a direct affect on the CEAC's use of the Wetlands, but the submission did not provide any evidence of a use by the CEAC. Therefore, the Board must dismiss the appeal.

3. Ms. Suzanne Lazorko-Connan

[102] Ms. Lazorko-Connan referred to an interconnection between the Wetlands and the area behind her residence. She also mentioned the wildlife that use the Wetlands and her enjoyment of seeing wildlife behind her home. What Ms. Lazorko-Connan did not do was demonstrate a direct link between the Wetlands and the area behind her home. She did not elaborate on the interconnectedness of the Wetlands with her use. There was no indication in her submission, other than a brief statement, that wildlife seen behind her residence also use the Wetlands and that by altering the Wetlands, the wildlife will be affected. Given the five

kilometre separation of her residence from the Wetlands, some specific information was needed to support this claim.

[103] Without a clear linkage between the Appellant and the natural resource affected, the Board must dismiss the appeal. The Board does not expect an appellant to provide their substantive arguments at the preliminary stage, but enough information has to be provided to show the Board the appellant's use of the natural resource affected by the issuance of an approval will also, potentially, be affected.

#### **IV. DECISION**

[104] The Board finds the Appellants did not provide sufficient information to demonstrate a direct connection between the effect on the Wetlands authorized under the Approval and the Appellants' use of the Wetlands. Therefore, the Board finds the Appellants are not directly affected by the decision of the Director to issue the Approval to Green Drop Ltd., and the appeals are dismissed.

Dated on May 22, 2008 at Edmonton, Alberta.

*“original signed by”*

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Dr. Steve E. Hrudehy, FRSC, PEng  
Chair