
ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Report and Recommendations – July 14, 2017

IN THE MATTER OF sections 91, 92, 94, 95 and 99 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 Robert and Linda Morgan, Lawrence Rogoza, Patrick Timms, Audrey Laschuk, Bill Bogdan, Jason Senetza, and Randy and Diana Sawchuk with respect to the decision of the Director, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Approval No. 00378428-00-00 and *Water Act* Licence No. 00360885-00-00 to William and Audrey Trenchuk.

Cite as: *Morgan et al. v. Director, Lower Athabasca Region, Alberta Environment and Parks*, re: *Trenchuk* (14 July 2017), Appeal Nos. 16-010-023-R (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair;
Dr. Nick Tywoniuk, Board Member; and
Dr. Brenda Ballachey, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Denise Black, Board
Secretary; and Ms. Marian Fluker, Associate
Counsel.

SUBMISSIONS BY:

Appellants:

Mr. Robert and Ms. Linda Morgan; Mr.
Lawrence Rogoza; Mr. Patrick Timms; Ms.
Audrey Laschuk; Mr. Bill Bogdan; Mr. Jason
Senetza; and Mr. Randy and Ms. Diana
Sawchuk.

Approval Holders:

Mr. William and Ms. Audrey Trenchuk,
represented by Mr. Ron Kruhlak, Ms. Jessica
Proudfoot, and Ms. Jessica Kruhlak,
McLennan Ross LLP.

Director:

Mr. Michael Lapointe, Director, Lower
Athabasca Region, Alberta Environment and
Parks, represented by Ms. Vivienne Ball,
Alberta Justice and Solicitor General.

WITNESSES:

Appellants:

Mr. Robert Morgan; Mr. Lawrence Rogoza;
Ms. Audrey Laschuk; Mr. Bill Bogdan; Mr.
Jason Senetza; and Mr. Joe Stepaniuk.

Approval Holders:

Mr. William Trenchuk; Mr. Rolf Aslund,
Advisian WorleyParsons Group; and Dr. Joao
Kupper, Advisian WorleyParsons Group.

Director:

Mr. Michael Lapointe, Director, Lower
Athabasca Region, Alberta Environment and
Parks; and Mr. Yaw Okyere, Regional
Hydrologist, Alberta Environment and Parks.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval and Licence under the *Water Act* to Mr. William and Ms. Audrey Trenchuk (the Approval Holders) for the construction of a dugout and the diversion of water from the dugout allowed under the Approval and a previously existing dugout. The source of water for the licence is surface water collected by the two dugouts.

Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk (the Appellants) filed appeals to the Environmental Appeals Board (the Board) regarding AEP's decisions to issue the Approval and Licence.

The Board received and reviewed the written submissions, assessed the oral evidence and arguments presented at the hearing, and reviewed the AEP record on the following issues:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needs the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder's operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

The Board recommended the Approval be confirmed as issued and the Licence varied. The Approval and Licence were issued based on the speculation the soils at the site of the Approved dugout are clays that would be impermeable to groundwater movement, but no specific data were collected for the site. Therefore, the Board recommended the Licence be amended requiring the Approval Holders to install groundwater monitoring wells adjacent to the Approved dugout to confirm there is no groundwater influence from the operation of this dugout. The Board also recommended the Licence be varied requiring the Approval Holder to install groundwater monitoring wells adjacent to the existing dugout to assess impacts to the groundwater, if any, from this dugout as well. The monitoring wells for both dugouts are to

remain operational for a minimum of two years. The data collected are to be provided to the Director and the Appellants. If after two years, there are no concerns with impacts to groundwater the Director can authorize the monitoring to be discontinued.

The Approval Holders are required to post meter readings on water usage onto the AEP website, but this information is not currently available to the public. The Board recommended the Licence be varied to require the Approval Holders provide the data directly to the Appellants on a quarterly basis until the data become easily accessible to the public on the AEP website.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's report and recommendations in respect of appeals of Approval No. 00378428-00-00 (the "Approval") and Licence No. 00360885-00-00 (the "Licence") issued to Mr. William and Ms. Audrey Trenchuk (the "Approval Holders"). Alberta Environment and Parks ("AEP") issued the Approval and Licence to the Approval Holders under the *Water Act*, R.S.A. 2000, c. W-3.

[2] Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk (collectively, the "Appellants") appealed the decision to issue the Approval and Licence.

[3] The Environmental Appeals Board (the "Board") held a hearing to hear submissions and evidence on the following issues:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needs the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder's operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

[4] After reviewing the oral evidence and arguments, written submissions, and the AEP record, the Board is recommending the Approval be confirmed as issued and the Licence varied to provide for additional monitoring. If the monitoring results show an unexpected interference with groundwater, the *Water Act* gives AEP sufficient powers to take action to protect the water rights of the Appellants and other water users.

II. BACKGROUND

[5] On July 11, 2016, the Director, Lower Athabasca Region, Alberta Environment and Parks (the “Director”), issued the Approval and Licence to the Approval Holders. The Approval allows for the construction of a dugout at SW 22-59-16-W4M (“Dugout #2”) in Smoky Lake County. The Licence allows the Approval Holders to divert up to 18,100 cubic metres of water annually from a dugout located at SE 21-59-16-W4M (“Dugout #1”) for the purpose of stock watering and miscellaneous farm use and an additional 10,860 cubic metres annually from Dugout #2 for the purpose of stock watering.

[6] On July 21, 22, and 25, 2016, the Board received Notices of Appeal from the Appellants appealing the Approval and Licence and asking for a stay of the Approval and Licence.

[7] On July 26, 2016, the Board wrote to the Appellants, the Approval Holders, and the Director (collectively, the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holders and Director of the appeals. The Appellants were asked to provide answers to questions regarding the stay request.¹

[8] On July 28, 2016, the Natural Resources Conservation Board (“NRCB”) confirmed it had not addressed the issue of licencing surface and groundwater use in its decisions regarding the Approval Holders.²

¹ The Appellants were asked to answer the following questions:

1. “What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than William and Audrey Trenchuk would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by Alberta Environment and Park’s decision to issue the Approval and Licence to Mr. and Ms. Trenchuk? This question is asked because the Board can only grant a stay where it is requested by someone who is directly affected. Please be advised that if the Board finds that you are not directly affected through this process the Board may dismiss your appeals. Therefore, it is important that the Appellants fully answer the question on how they are directly affected by the Approval and Licence issued to the Trenchuks.” (Emphasis in the original.)

² Under section 95(2)(a) and 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) the Board must dismiss an appeal if the appellant participated in or had the opportunity to

[9] On August 2, 4, and 8, 2016, the Appellants provided their responses to the stay questions.³ On August 17, 2016, the Board notified the Parties the Appellants had not demonstrated a *prima facie* case for granting a stay. The Board found the harm the Appellants were concerned about would not occur during the time it would take to address the appeals. The stay requests were denied.

[10] On October 4, 2016, the Board advised the Parties that, based on the availability of the majority of the Parties, a mediation meeting would be held on November 15, 2016.

[11] The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”). The Record was received on October 21, 2016, and provided to the Appellants and Approval Holders on October 24, 2016.

[12] The mediation meeting was held on November 15, 2016, in Smoky Lake, Alberta. No resolution was reached.

[13] On December 23, 2016, the Board asked the Parties to provide a list of any preliminary motions. The Approval Holders requested the Board set the issues for the hearing.

participate in a proceeding before the Natural Resources Conservation Board. Section 95(2)(a) of EPEA provides:

“Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review....”

Section 95(5)(b)(i) of EPEA states:

“The Board shall dismiss a notice of appeal if in the Board’s opinion

- (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with....”

See: NRCB Board Decision RFR 2014-04/BA13006 and BA14002 and NRCB Board Decision 2015-02/BA13006 and BA14002.

³ The Board did not receive a response from Mr. Timms.

[14] On January 18, 2017, the Board proposed two issues for the hearing and asked the Parties to advise the Board if they had concerns regarding the issues.

[15] On February 3, 2017, the Approval Holders notified the Board it did not have any concerns regarding the proposed issues. The Appellants expressed concerns with the issues in their responses provided between February 2 and 17, 2017.

[16] On April 26, 2017, the Board notified the Parties the hearing would be held on June 16, 2017.

[17] The Board published the Notice of Hearing in the Smoky Lake Signal. The Board also provided a copy of the Notice of Hearing to the Town of Smoky Lake and Smoky Lake County to place on their public bulletin boards or website. The Notice of Hearing was also placed on the Board website, and a News Release was distributed to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that if any person, other than the Parties, wanted to make representations before the Board, to contact the Board by May 9, 2017. The Board did not receive any intervenor applications.

[18] On May 10, 2017, the Board confirmed the issues for the hearing would be:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needs the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder's operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

[19] The Appellants' submissions for the hearing were provided to the Board between May 17 and 23, 2017.

[20] On May 23, 2017, Mr. Bogdan requested Ms. Breeann Barry, an Environmental Protection Officer from AEP, attend the hearing. The Board asked the Director if he would provide Ms. Barry as a witness voluntarily. The Director indicated he would not.

[21] On May 29, 2017, the Board received submissions for the hearing from Mr. and Ms. Sawchuk. Mr. Rogoza provided his hearing submission on May 26, 2017. These submissions were filed past the deadline of May 23, 2017.

[22] On May 29, 2017, the Board asked Mr. Bogdan to explain how Ms. Barry's attendance at the hearing would be relevant and necessary for the issues at the hearing.

[23] On May 30, 2017, the Director and Approval Holders requested an extension to file their submissions given the late filed submissions from Mr. and Ms. Sawchuk and Mr. Rogoza. On May 31, 2017, the Board notified the Parties that an extension was granted for the Director and Approval Holders to file their submissions. The Board also asked for comments regarding the late filed appeals and whether the Board should accept the submissions.

[24] On May 30, 2017, the Approval Holders requested the Board dismiss Mr. Timms' appeal for failing to respond or file a written submission for the hearing.

[25] On June 4, 2017, Mr. Morgan provided comments regarding the motion to dismiss the appeals of Mr. and Ms. Sawchuk, Mr. Rogoza, and Mr. Timms for filing their submissions for the hearing late. He stated: (1) Mr. Sawchuk had personal reasons for filing late; (2) Mr. Rogoza is in the immediate proximity of the feedlot, is affected by the project, and it is a busy time for a one-man farming operation and trying to keep up with this complex situation; and (3) Mr. Timms may have difficulty with communications due to lag time in receiving mail out of the province.

[26] On June 5, 2017, Mr. Bogdan provided his reasons requesting Ms. Barry attend the hearing. The Board asked the Approval Holders and Director to provide comments on Ms. Barry's attendance at the hearing.

[27] On June 7, 2017, the Approval Holders provided their comments regarding the attendance of Ms. Barry. The Approval Holders stated it did not appear there were sufficient grounds to support having her appear at the hearing based on the identified issues.

[28] The Approval Holders provided their submission on June 7, 2017, and the Director's submission was provided to the Board on June 9, 2017.

[29] On June 8, 2017, the Board received Mr. Timms' submission for the hearing.

[30] On June 9, 2017, the Director provided his response to the Appellants' request to have Ms. Barry attend the hearing. The Director explained Ms. Barry was on leave and not expected to return to work for five weeks, but she would make herself available if subpoenaed by the Board.

[31] On June 14, 2017, the Board notified the Parties that it was requesting Ms. Barry attend the hearing. The Board decided not to dismiss the appeals of Mr. Rogoza and Mr. and Ms. Sawchuk and was accepting their submissions. The Board noted that neither the Director nor the Approval Holders requested the appeals be dismissed, and the extension granted to the Director and Approval Holders to provide their submissions for the hearing provided them with an adequate opportunity to respond to the submissions. None of the Parties suffered prejudice. The Board determined the Parties would not be prejudiced for accepting the June 7, 2017 letter and attached documents from Mr. Timms as his written submission. The Board noted the letter did not contain any significantly complicated legal or technical arguments and the documents attached to the submission were all in the public domain and should be known to the witnesses for both the Approval Holders and Director.

[32] On June 14, 2017, the Board acknowledged a request from the Appellants to receive copies of the reports or file notes that Ms. Barry made during her attendance at the Approval Holders' feedlot operation. The Board requested the Parties provide comments regarding the request.

[33] On June 14, 2017, the Approval Holders stated they have no knowledge as to what documents Ms. Barry may produce or if they contained privileged or confidential information. The Approval Holders believed many of Ms. Barry's documents would pre-date the application, and they were uncertain what relevance the documents would have to the Approval and Licence.

[34] On June 15, 2017, counsel for Ms. Barry notified the Board that Ms. Barry would not be attending the hearing, because AEP had no authority to oblige Ms. Barry to attend during her leave and the Board had not personally served the subpoena to Ms. Barry. Counsel for Ms. Barry stated Ms. Barry would not be available before July 17, 2017, and on the additional records, counsel could not speak to whether Ms. Barry had any further records or whether the records would be producible, relevant, or necessary.

[35] On June 15, 2017, the Board notified the Parties of four motions the Appellants planned to raise at the hearing.⁴

[36] The hearing was held on June 16, 2017, in Edmonton. The issues heard by the Board were:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needs the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder's operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

III. PRELIMINARY MOTIONS

[37] The Appellants raised four motions prior to the hearing, requesting the following:

⁴ The four motions raised were:

1. the Board not close the hearing at the end of the day and, instead, adjourn the hearing until such time as Ms. Barry could be personally served and available to testify;
2. the Board order AEP produce all of Ms. Barry's records in relation to her dealings with the Approval Holders and their agricultural operations, and that these documents be provided in advance of the day Ms. Barry testifies;
3. a hydrogeological report be prepared and filed with the Board prior to the hearing being reconvened to have Ms. Barry testify on the basis the Appellants only received the Advisian/WorleyParson Group report on June 7, 2017, and the Appellants want the opportunity to respond to the report; and
4. the opportunity to make an application for interim costs to pay for the hydrogeologist.

1. the Board not close the hearing at the end of the day and, instead, adjourn the hearing until such time as Ms. Barry could be personally served and available to testify;
2. the Board order AEP produce all of Ms. Barry's records in relation to her dealings with the Approval Holders and their agricultural operations, and that these documents be provided in advance of the day Ms. Barry testifies;
3. a hydrogeological report be prepared and filed with the Board prior to the hearing being reconvened to have Ms. Barry testify on the basis the Appellants only received the Advisian/WorleyParsons Group report on June 7, 2017, and the Appellants want the opportunity to respond to the report; and
4. the opportunity to make an application for interim costs to pay for the hydrogeologist.

A. Motions 1 and 2

Submissions

[38] Prior to the hearing and at the hearing, the Board asked the Parties to provide comments on the four motions. On the first motion regarding the attendance of Ms. Barry, the Appellants believed she would bring important evidence regarding the feedlot site and the operations since she was at the site from the beginning of the application for the Approval and Licence. The Appellants believed Ms. Barry could clarify how the feedlot is operated. The Appellants wanted Ms. Barry to produce her records because they believed the documents would provide more information about the operation and how much water it needs to operate. The Appellants stated they could not tell how relevant the documents would be unless they saw them. The Appellants believed Ms. Barry had information regarding the Licence.

[39] The Approval Holders stated a delay in the proceedings would be prejudicial to them since they have deferred constructing Dugout #2 until after the Minister issues her decision. The Approval Holders questioned the benefit of having Ms. Barry appear since she was investigating the construction of Dugout #1, which had been built without an approval, but once the application was filed she had no further involvement. The Approval Holders did not know what information Ms. Barry had in her records, and the investigation files would not be open to disclosure. The Approval Holders said the water is required and more water is needed. They

noted the Licence has strict limits and if they contravene the conditions of the Licence, then AEP enforcement would investigate. They stated the number of cattle allowed in the feedlot was dealt with by the NRCB. The Approval Holders were not sure there was anything Ms. Barry could provide.

[40] The Director stated any evidence Ms. Barry could provide would be irrelevant and not necessary for the Board to make its recommendations. Although the Director did not support adjourning the hearing, he suggested the Board listen to the evidence before making a decision on whether the hearing should be adjourned for Ms. Barry to attend. The Director stated Ms. Barry and her notes were not necessary to determine the issues. The Director noted Ms. Barry works for the compliance side of AEP, would have limited knowledge of the operation, would have little contact with the Approval Holders, and would have nothing to do with the Licence. The Director stated that anything relevant would be presented by the witnesses at the hearing, and the Appellants could make a freedom of information request to obtain Ms. Barry's records.

[41] The Director stated Ms. Barry should not be required to attend the hearing because: (1) she had no direct evidence relevant to the issues; (2) any evidence Ms. Barry might provide was not necessary to the Board's determination of the issues; (3) as an Environmental Protection Officer, Ms. Barry had little contact with the Approval Holders, had limited knowledge of the operation, and was not involved in the processing of the applications or issuance of the Approval or Licence; and (4) technical evidence relevant to the issues would be provided at the hearing by expert witnesses.

[42] The Director explained Ms. Barry forwarded the applications for the Approval and Licence to AEP approvals and requested the applications be processed. The Director stated his staff asked Ms. Barry if the information submitted by the Approval Holders was consistent with her knowledge of the operations, and following the request, she inspected the operation to confirm the current water source for the feedlot, confirm the location of Dugout #2, and identify any potential compliance issues under the *Water Act*. The Director said Ms. Barry did not conduct any technical assessments of soil, water quality, or water requirements for the operation and did not consider availability or sustainability of water supplies. The Director explained Ms.

Barry was copied on emails to keep her updated on the review of the applications. Ms. Barry advised the Director that compliance closed its file without the need of any enforcement action being taken.

Decision

[43] After reviewing the submissions and hearing comments from the Parties, the Board chose to wait until it heard all of the evidence from the Parties on the substantive issues before making a final decision on Ms. Barry's participation in the proceedings. After hearing the evidence, the Board determined it would not require Ms. Barry to attend the hearing. The Board believed Ms. Barry would not provide any further evidence relevant to the issues before the Board that would assist the Board in adjudicating the issues and making appropriate recommendations. Based on the evidence it heard, the Board found it had sufficient information to make its recommendations to the Minister, pending final closing arguments.

[44] Since the Board did not require Ms. Barry to attend, Ms. Barry's records were not required.

[45] The Board dismissed the two motions regarding Ms. Barry.

B. Motions 3 and 4

Submissions

[46] The Appellants stated they needed a hydrogeologist to review the reports provided and explain the discrepancies between the reports prepared for the Approval Holders and AEP's analysis and conclusions of the site. The reports in question include the Advisian/WorleyParsons Group report entitled "Surface Water Runoff Volumes to Dugouts #1 and #2," dated June 6, 2017, the Advisian/WorleyParsons Group report entitled "Assessment of the Likelihood of Groundwater Communication with Dugout #1 and Dugout #2," dated June 6, 2017, and the Nichols Environmental Report entitled "Limited Geotechnical Investigation LSD: NW ¼ 21-59-16 W4M Smoky Lake, Alberta," dated October 7, 2013, (the "Nichols Report") and received by the Board on June 12, 2017. The Appellants also noted they received the Advisian/WorleyParsons Group ("Advisian") reports shortly before the hearing.

[47] The Approval Holders opposed adjourning the hearing since the Appellants had sufficient time to retain a qualified consultant. The Approval Holders argued that adjourning the hearing to give the Appellants a chance to respond to the Advisian reports would be prejudicial to the Approval Holders. The Approval Holders explained the Advisian reports were prepared in response to the Appellants' submissions for the hearing. The Approval Holders noted they asked for an adjournment to address other applications currently before the Director concurrently, but the Appellants opposed the adjournment.

[48] The Director explained the Nichols Report was not the basis of his decision, and he only used certain of the borehole data from the Nichols Report to assess soil type and depth. The Director said a hydrogeologist report is not required. He added the Appellants had time to retain a consultant and produce a report. The Director stated receiving the Advisian reports as part of the Approval Holders' submission does not give the Appellants the right to start something new.

Decision

[49] The Board determined a further hydrogeological report was not required for it to prepare its recommendations. The experts for the Approval Holders and the Director and the AEP hydrologist provided sufficient data and explanations of the water regime in the area, even though they relied upon data developed and used by the Approval Holders' experts and the AEP hydrologist, as well as their explanations, differed significantly. The Board has dealt with experts with competing viewpoints in the past and the hydrologists at the hearing had different approaches. The Board appreciates the Appellants' concerns with the differences in approach taken by the experts and the challenges in rationalizing the results. However, the Board believes it has sufficient evidence before it to make appropriate recommendations to the Minister and, accordingly, the Board dismissed the motion.

[50] Since the Board dismissed the motion to adjourn the hearing for the Appellants to retain a hydrogeologist, the motion regarding interim costs to retain such an expert was moot.

IV. SUBMISSIONS

A. Appellants

[51] Mr. Randy and Ms. Diana Sawchuk explained they live approximately two miles from the feedlot. The Sawchuks said they did not know how much water the feedlot operation uses, and if the operation requires more water than the Licence provides, if the water shortfall would come from groundwater. The Sawchuks stated there were no studies provided to show the groundwater is not entering the operation. The Sawchuks explained they rely on their shallow water well for all of their domestic water, and they questioned whether there was sufficient water in the basin for the feedlot operation without affecting their well. The Sawchuks wanted assurances they would have sufficient water for today and the future. The Sawchuks requested the Licence be suspended until a proper assessment of all existing water supplies and systems on the feedlot is done as well as a full assessment of how much water there is in the basin. The Sawchuks stated that, until the technical assessments are complete, no other authorizations should be issued.

[52] Mr. Lawrence Rogoza explained he lives next to the feedlot, and his main concern was whether his operation would have water in the dry years. He said his household depends on runoff water. Mr. Rogoza stated no study was done to see if there is enough water for all the users in the basin. He said there was no indication of the amount of water the feedlot needs or the amount of water held in dugouts to see if there was sufficient water in the basin. Mr. Rogoza said approvals were not issued for all of the Approval Holders' projects.

[53] Ms. Laschuk asked if a water study had been completed to determine if there was enough water to supply the Approval Holders and other people in the area. She stated the Approval Holders received approvals for dugouts even when the neighbours asked that no approval for the dugouts be given to ensure the neighbours will not be short of water. Ms. Laschuk said the Approval Holders had explained they did not need a lot of water because they provided silage for their cattle, but now they want more dugouts and diversions.

[54] Mr. Jason Senetza stated the Approval Holders' feedlot can feed 9,500 beef feeders 365 days per year and can feed an indeterminate number of cows, bred heifers, and

cow/calf pairs in temporary pens. Mr. Senetza said the operation would need more water than the Licence can provide. He did not believe the Approval and Licence were properly issued to ensure there was no impact to neighbours' water supplies. Mr. Senetza stated there was a lack of information and clarity about the water application and uncertainty that there was enough water in the area. Mr. Senetza said the operation needs the water in the Licence and more since water consumption exceeds what the Licence can provide. Mr. Senetza said there was no published study of water consumption of beef feeders, and he questioned how the amount of water required for the feedlot was calculated. Mr. Senetza asked where the water to sustain the operation was coming from since he calculated there was a significant shortfall. Mr. Senetza was concerned the operation would deplete the water supply for the neighbours. Mr. Senetza questioned whether there was enough water in the basin for all parties involved given there was no study done by the Approval Holders and little investigation done by the Director to verify how much surface water actually flows to the dugout and whether groundwater enters the dugout. Mr. Senetza questioned why the required volume of water for the feedlot operation dropped during the application process. He noted a hydrologist from AEP stated the potential surface runoff was less than the requested volume for the operation. Mr. Senetza questioned where the water was coming from to make up the shortfall for the operation if Dugout #1 was not receiving groundwater. Mr. Senetza believed a full geotechnical report should have been completed as part of the applications.

[55] Mr. Senetza noted the Licence requires the Approval Holders to install a measuring device on Dugout #1, but there has been no data recorded or information that can be retrieved. Mr. Senetza questioned if the holding capacity of Dugout #1 was verified, and he questioned why the capacity for Dugout #2 is 18,200 m³, but the Licence is for 10,860 m³ annually. Mr. Senetza asked whether Dugout #1 was properly lined to prevent groundwater contamination from feedlot runoff entering the dugout. He expressed concern on the likelihood the dugout would leak and affect nearby well users. Mr. Senetza summarized his concerns as: (1) whether there was enough surface water collected in the dugouts to meet the water demands of the feedlot operation; (2) if groundwater would be used to make up the shortfall; and (3) whether there was enough water in the basin for all of the neighbours. He stated the Appellants want to make sure they will have water today and in the future, and he does not agree with an

operation “robbing the water bank” without considering all neighbours in the area. Mr. Senetza asked the Board to suspend the Licence until a proper assessment of all water supplies and systems is completed for the feedlot and a full assessment completed of how much water there is in the basin.

[56] Mr. and Ms. Morgan said it was up to the Approval Holders to determine the availability and requirements of water as it relates to the feedlot operation and the volume of cattle. Mr. and Ms. Morgan stated there is less water in the basin than the Approval Holders require based on their initial request for 12 million gallons of water annually. They noted a hydrologist in AEP determined 6.3 million gallons were available, and this amount was assigned to the Approval Holders but did not take into account present and future requirements of neighbouring users. Mr. and Ms. Morgan explained two of the Appellants, Mr. Bogdan and Mr. and Ms. Morgan own five parcels of land downstream of the feedlot site. Mr. and Ms. Morgan noted that, in an email between AEP staff, the hydrologist commented that drainage from adjacent property contributes to the water in the dugout, which would affect Mr. Rogoza. Mr. and Ms. Morgan noted the initial dugout plan indicated a depth of 7.3 metres, but the condition in the Approval limits the depth to 5.5 metres. Mr. and Ms. Morgan stated that, since the borehole logs indicated no groundwater at a depth of 6.1 metres, and if the dugout is 1.8 metres deeper than approved, there is a possibility of groundwater seepage within the 1.7 metre difference. Mr. and Ms. Morgan noted the Licence and Approval were issued until 2041. They stated there will be dry years when water supplies will be low, and an AEP hydrologist was confident the licenced amount of water would be available 50 percent of the time. Mr. and Ms. Morgan said adjacent landowners may want to do a similar development and be restricted in water availability due to the Licence. Mr. and Ms. Morgan said the Licence would affect properties downstream on the White Earth Creek as well given the source of water is stated on the Licence as “Surface Runoff (accessed by Dugout #1 and Dugout #2) tributary to White Earth Creek.” Mr. Morgan noted there are other downstream users, not just forested area as stated by the Director, that have registered, licenced, and household uses.

[57] Mr. Bogdan stated the lack of information and clarity in the applications created uncertainty as to what was applied for, how the water was allocated, and if there is enough water

for all the purposes in the area. Mr. Bogdan agreed the water in the Licence was required plus more, given the feedlot operates all year. He stated it appeared the runoff volume may not meet the Licenced amount. Mr. Bogdan noted the feedlot is to operate from November to May according to the livestock water requirements worksheet submitted with the Licence application. Mr. Bogdan noted an AEP hydrologist indicated there was only 10,800 m³ available for Dugout #2 when the Approval Holders requested 27,300 m³. Mr. Bogdan believed the application was incomplete and noted the application indicated Dugout #1 did not receive groundwater but the diagrams show a well pumping into the dugout. Mr. Bogdan said published studies show higher volumes of water are required for feedlot cattle than what was claimed by the Approval Holders in their application. He also expressed concern regarding possible groundwater contamination. Mr. Bogdan questioned whether the Director conducted an analysis that clearly indicated there was enough water for all existing users in the water basin plus the feedlot. Mr. Bogdan expressed concern regarding the 25-year term of the Licence and Approval. Mr. Bogdan noted the plans for Dugout #2 do not specify dimensions, slopes, or the system that will be used to remove the water. He also noted the dugout has the capacity to hold 18,200 m³ but the Licence is for 10,860 m³. Mr. Bogdan said there were no monitoring or reporting conditions for Dugout #2. Mr. Bogdan noted the Licence requires the Approval Holders to install a water meter on Dugout #1 and record water volumes used monthly, but the information is unavailable. Mr. Bogdan requested the Board suspend the Licence and Approval until a full assessment is completed to determine: (1) existing water supplies and systems used by the Approval Holders' operation; (2) water needs of the feedlot operation; (3) an accounting of water in the basin, including neighbours; and (4) whether there will be enough water for the Appellants, neighbours, and the Approval Holders.

[58] Mr. Joe Stepaniuk provided a written submission and appeared at the hearing as a witness on behalf of the Appellants. He stated the Approval and Licence should be rescinded and an assessment done to determine the impact to groundwater and surface water users due to the current Licence and any future requests for approvals or licences by the Approval Holders. Mr. Stepaniuk stated the Approval does not protect groundwater rights for adjacent landowners since the allowed depth of Dugout #2 is below the level of the groundwater found in Mr. Bogdan's well, thereby allowing groundwater to seep into Dugout #2. Mr. Stepaniuk said that,

at a minimum, Dugout #2 should have a compacted clay liner. He noted the Approval does not require a monitoring well by Dugout #2 to monitor groundwater and determine if there is seepage when water is diverted from Dugout #2. Mr. Stepaniuk stated the Appellants are concerned the cumulative effects to groundwater and surface water usage were not addressed. He questioned what the cumulative effect would be to the recharge in the area given the feedlot is located in a recharge area. Mr. Stepaniuk stated the Approval failed to protect groundwater due to contamination. He noted no monitoring wells were required in the feedlot area or near the manure holding pond to analyze for contamination. Mr. Stepaniuk said the Approval Holders did not provide third party verification of the depth of Dugout #1, and it appeared Dugout #1 is in communication with groundwater and, therefore, should be lined with clay as recommended by an AEP hydrologist. Mr. Stepaniuk said the Approval Holders did not provide affected residents with a description of the feedlot operation, its impacts on the community, or the actions that will be taken to mitigate impacts on affected landowners. Mr. Stepaniuk stated the Approval Holders should provide a detailed map indicating location of surface developments and their elevations, including the location of all producing and abandoned wells, test holes, dugouts, and other developments within 1.5 km from the edge of the Approval Holders' lands. Mr. Stepaniuk stated the Approval Holders did not provide a clear forecast of animals at the feedlot for the year and, therefore, the Appellants can only assume there will be 9,500 cattle every day of the year, which would use 15,600,000 to 20,806,000 gallons of water per year. He noted the Approval Holders originally underestimated the feedlot water requirements. Mr. Stepaniuk said the Approval Holders then requested approximately 12,000,000 gallons of water but were only given a Licence for 18,100 m³ (3,982,000 gallons) from Dugout #1 and 10,860 m³ (2,389,200 gallons) for Dugout #2. He questioned where the other sources of water to make up the difference were coming from to meet the water needs of the feedlot. Mr. Stepaniuk noted the Approval Holders did not provide a response plan for years of drought or during periods of heavy rain. Mr. Stepaniuk stated the Approval Holders failed to protect groundwater rights in Dugout #1 and failed to protect groundwater rights of the landowner in the east half of section 22 from impacts of Dugout #2. Mr. Stepaniuk noted the Appellants' concern that cumulative water usage was not addressed.

B. Approval Holders

[59] The Approval Holders explained they operate a feeder operation, and in the last 20 years, they have increased the size of their operations. The Approval Holders said they received an approval from the NRCB for new feedlot pens, two new catch basins, and to increase the animal numbers from 3,950 to 9,500 beef feeders. The Approval Holders noted the NRCB was satisfied sufficient information was obtained through the application process to protect surface and groundwater quality.

[60] The Approval Holders stated that none of the Appellants filed evidence to indicate there was not a need for the amount of water as set out in the Licence. The Approval Holders noted that many of the Appellants indicated the specified water amount was necessary for the Approval Holders' operations, and some of the Appellants did not address this issue. The Approval Holders stated that, based on their operations, they require the amount licenced and are seeking an additional licence to divert water to have sufficient water stored to use in dry years. The Approval Holders said they have applications pending to construct and divert water from a third dugout and two new groundwater wells.

[61] The Approval Holders stated the Appellants did not provide any evidence, merely speculation, on how the Licence would actually affect the quantity of water in the basin for other users. The Approval Holders said the Appellants failed to provide any substantive evidence in support of the issue of whether the amount of water is available in the basin for the Licence Holder's operation and other water users.

[62] In respect of the issue of whether there is a connection between the groundwater and surface water in the dugouts, the Approval Holders noted: (1) the excavated pit did not fill with water during construction; (2) Dugout #1 did not fill until surface water from precipitation events and snowmelt; and (3) the soil in Dugout #1 is impermeable clay. The Approval Holders explained they modified Dugout #1 to accommodate the volume of water under the Licence. They said the water was removed from Dugout #1 for a few days until the dugout was modified, and the water was then returned to Dugout #1. During the excavation of Dugout #1, the Approval Holders found the soils were impermeable clays.

[63] The Approval Holders stated the volume of water flow between Dugout #1 and Dugout #2 with the groundwater zone will be low. They said the influence zone would be, at a maximum, 20 metres indicating a negligible impact on groundwater resources.

[64] The Approval Holders submitted they provided the Director with all of the information required at the time they applied for the Licence.

[65] The Approval Holders said the terms and conditions were sufficient to protect the local water supply, the environment, and other water users.

[66] The Approval Holders confirmed they have been submitting the data regarding the volume of water diverted from Dugout #1 to the Director.

C. Director

[67] The Director explained that, generally, the construction, maintaining, or filling in of a dugout are exempt from requiring an approval, except if one or more of the enumerated grounds in the *Water (Ministerial) Regulation*, Alta. Reg. 205/98 (the “*Regulation*”) exist, such as when the dugout has a capacity greater than 2,500 m³.⁵ In addition, licences to divert water from dugouts are required when conditions under the *Regulation* occur, including where a dugout has a capacity greater than 12,500 m³ or the total diversion from a dugout is greater than 6,250 m³ per year.⁶

⁵ Section 2(1) of the *Regulation* states:

“The following activities are exempt from the requirement for an approval: ...

- (l) placing, constructing, maintaining or filling in a dugout except where the dugout
 - (i) is located in a watercourse frequented by fish or in a lake or a wetland,
 - (ii) is located in a watercourse, lake or wetland in an area that is subject to a reservation by order of the Minister under section 35 of the Act or that is subject to a Director’s decision under section 53 of the Act,
 - (iii) would change the flow of water on an adjacent parcel of land,
 - (iv) has a capacity greater than 2500 cubic metres in volume,
 - (v) is located in the same watercourse and parcel of land as an existing dugout, or
 - (vi) is restricted by an approved water management plan....”

⁶ Section 1(c) of Schedule 3 Diversions of Water or Operations of Works that are Exempt from the Requirement for a Licence of the Regulation states:

“The following diversions of water and any operations of works associated with those diversions do not require a licence...

- (c) a diversion of water from a dugout except where

[68] The Director stated he is required to issue a licence for an agricultural purpose with an expiry date of 25 years.⁷

[69] The Director said the possibility of non-compliance with the Licence or Approval is not an appropriate consideration for him to consider when deciding to issue or refuse to issue either authorization.

[70] The Director noted the NRCB issued a permit under the *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, to the Approval Holder on October 17, 2014.

[71] The Director explained that, in making his decision to issue the Approval and Licence, he considered: (1) hydrological effects; (2) hydrogeological effects; and (3) effects on household users and agricultural users.

[72] The Director stated that whether or not the Approval Holders need the water included in the Licence for their operation is for Approval Holders to establish. The Director said he processed the applications submitted by the Approval Holders on the information they provided.

[73] The Director said he was satisfied the Approval Holders required the water based on the supporting documents provided, including: (1) permits for the feedlot operation issued by the NRCB allowing a total of 9,500 beef feeders; (2) calculations of volumes of water in their

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- (i) the dugout is located in a watercourse frequented by fish or in a lake or a wetland,
 - (ii) the dugout is located in a watercourse, lake or wetland in an area that is subject to a reservation by order of the Minister under section 35 of the Act or that is subject to a Director's decision under section 53 of the Act,
 - (iii) water is pumped into the dugout,
 - (iv) the dugout has a capacity greater than 12 500 cubic metres in volume,
 - (v) the total diversion of water from the dugout is greater than 6250 cubic metres per year, or
 - (vi) the diversion of water is restricted by an approved water management plan."

⁷ Section 12(3)(a) of the *Regulation* states:

"Notwithstanding subsection (2), if there is no applicable approved water management plan, order of the Minister or water guideline that specifies what an expiry date of a licence should be or how an expiry date of a licence should be determined, the Director must issue a licence for a municipal, agricultural, irrigation or implementing a water conservation objective purpose with an expiry date of (a) 25 years...."

silage used for feed; and (3) indications the Approval Holders intended to expand their operations in the future.

[74] The Director stated that, based on the information provided, it was determined the initial water demand for the feedlot operation was 21,594 m³, or higher, based on the number of cattle reported, water needs, and the time of year for watering. The Director concluded the allocation in the Licence plus some of the water held under the traditional agricultural registration from the existing well on the Approval Holder's property could partly meet the Approval Holders' water needs.

[75] The Director explained Mr. Okyere evaluated the expected surface water runoff from the delineated catchment basins for each dugout based on annual surface water yield for the basin. The Director said he allocated surface water based on median yield, which is the annual surface water runoff volume that will be present as the middle number for a range of annual surface water runoff volumes for the years of data used rather than maximum runoff that had been observed for the years of record.

[76] The Director explained the catchment area for Dugout #1 was 1.5 km², and the estimated median surface water runoff yield for the catchment area was 18,000 m³, which was the allocation limit given in the Licence for Dugout #1. The Director stated the catchment area for Dugout #2 was determined to be 0.9 km², and the estimated median surface water runoff yield for the catchment area was 10,600 m³, which was the allocation limit set in the Licence for Dugout #2.

[77] The Director stated the total amount of water used by the Approval Holders is outside the scope of the appeals. If the Approval Holders require more water, they are restricted to the allocation limits specified in the Licence for this source of water, and would require another licence before they could take more water.

[78] The Director noted the Licence does not, nor is it required to, satisfy all of the water needs for the operation. The Director stated that, if required, the Approval Holders would have to apply for additional sources of water to meet their needs.

[79] The Director explained the Approval was granted for Dugout #2 to have a greater volume than the Licenced volume for water with the intent Dugout #2 could provide storage during wet years to hold water for years of drought.

[80] The Director stated there is no significant connection between groundwater and Dugout #1 or Dugout #2.

[81] The Director said Dugout #1 is an existing dugout, and based on borehole logs, low permeability silty clay soil is found in the bottom six metres of the dugout. Therefore, according to the Director, no clay lining was needed to act as a barrier between the dugout and groundwater.

[82] The Director noted Dugout #2 is approved to be constructed to a depth of 5.5 metres, and the nearest borehole log indicated the soil was silty clay from a depth of 0.3 metres to at least 6.0 metres. The Director said this suggested low permeability of the soil and, therefore, a clay lining was not required.

[83] The Director stated that, even if there was limited interaction between groundwater and the dugouts, the Licence was reduced to a volume that would be sustainable by catchment of surface water and should not draw from groundwater.

[84] The Director said he considered the information provided by the Approval Holders as sufficient given the nature of the Approval and Licence requested and was consistent with expectations for other approvals and licences for dugouts.

[85] The Director stated it was appropriate to reduce the volume of water to be diverted from the dugouts to levels he considered sustainable based on of surface water catchment. The Director explained that, had the Approval Holders requested diversion volumes above those considered sustainable from surface water sources, they would have been required to provide further hydrological and hydrogeological studies to justify the water requested. The Director stated a consultant's study is not required in applications for dugouts unless there is a reason to make an exception, such as requesting more water than is sustainable from surface water sources.

[86] The Director explained he tries to balance what supporting documents are required from an applicant for a dugout approval and licence against identified risks. The Director considered the issuance of a Licence to divert water from surface water to be low risk of impact on groundwater sources. Therefore, the Director did not request additional studies from the Approval Holders.

[87] The Director stated the terms and conditions of the Approval and Licence are sufficient to protect local water supplies and the local environment. The Director said he issued the Licence for less than the volume of water requested by the Approval Holders to address concerns regarding potential impacts on local water supplies. The Director explained the diversion limits set in the Licence were based on:

1. determining the contributing catchment area of each dugout and quantifying the expected annual surface yield for each dugout;
2. considering any existing dugouts and *Water Act* licences issued within the contributing catchment area for each dugout; and
3. considering any immediate downstream users of surface water in the same catchment areas.

[88] The Director stated the amount of water allocated in the Licence will have no effect on lands downstream of Dugout #1 and Dugout #2. He said there are no downstream water users of the surface water that drains into either dugout. The Director stated that none of the lands owned by the Appellants draws from the same surface water catchment basin as Dugout #1 and Dugout #2. The Director explained this was confirmed by reviewing AEP records for *Water Act* licences issued and aerial photographs. The Director stated that, since there were no *Water Act* licences within the contributing catchment areas for the dugouts or immediately downstream of the dugouts, he did not have to consider if there were any licences that might have priority or to consider lowering the allocation to account for other diversions of surface water. The Director said that he did not have to withhold 50 percent of the median yield of surface water sources into either dugout when determining the allocation limit for the Licence because there were no downstream water users.

[89] The Director explained the surface water that is the subject of the Licence flows into a tributary of White Earth Creek, but the contributing catchment area for the two dugouts is

approximately 0.24 percent of the catchment area of the entire White Earth Creek basin. The Director determined the amount allocated under the Licence would have no significant impact on the flows of White Earth Creek.

[90] The Director explained that, should he become aware of non-compliance with the Approval or Licence, the compliance program would follow up and, if necessary, investigate.

[91] The Director asked the Board to confirm the Approval and Licence were properly issued, and the terms and conditions are sufficient to protect local water supplies and the local environment.

V. ANALYSIS

[92] The issues before the Board were:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needs the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder's operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

[93] Under section 99(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board must provide the Minister with its recommendations regarding the issues in these appeals.⁸

[94] The Appellants appealed the issuance of the Licence and Approval because they were primarily concerned about whether there was sufficient water in the water basin to meet the

⁸ Section 99(1) of EPEA states:

"In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

needs under the Licence without interfering with the water resources on their properties and those of neighbouring landowners.

[95] The Board understands the confusion the Appellants had interpreting the data presented regarding water flows from the Approval Holders' lands given the different analyses completed by the Director and Approval Holders' consultants. The Director used a system of plotting elevations based on aerial photographs and hand mapping. The Director used the median rainfall amounts based on levels measured at White Earth Creek. The Director used a ratio of the total catchment area for the White Earth Creek and the catchment area of the dugouts to calculate available surface runoff for each of the dugouts. Advisian, the consultants for the Approval Holders, used LIDAR technology and a computer-generated program to map elevations and potential water flow in the catchment basins in the area of the feedlot. LIDAR elevations are plotted at 15 metre intervals, providing a reasonable depiction of the local elevation profile. The Board finds the Advisian mapping a more accurate depiction of the elevations in the area of the basin. Based on the Advisian mapping, submitted as Exhibit 2 at the hearing, it appears there may be a connection of the surface water flows between the feedlot site and adjacent lands south of the feedlot. Advisian could not state with certainty there is no connection to surface water flows from the feedlot lands and the lands owned by Mr. Lawrence Rogoza to the south.

[96] Based on the acceptance of the Advisian mapping process, which the Board believes to be more accurate, the Board finds the Appellant, Mr. Lawrence Rogoza, has the potential for being adversely affected by the issuance of the Approval and Licence. If the Approval Holders comply with the Licence and there is an adverse effect on Mr. Rogoza, the Director can require the Approval Holders to take the necessary steps to mitigate the impacts.

[97] Although the Director and the Approval Holders used different approaches to assess surface water availability for the dugouts, their conclusions were similar in that there is sufficient water available to allow water to be withdrawn at a rate of 18,100 cubic metres of water annually from Dugout #1 and 10,860 cubic metres annually from Dugout #2. Where the analyses differ is in the direction of the surface water flows and if there is a connection between the feedlot site and, in particular, the location of Dugout #1 and adjacent lands.

[98] On Dugout #2, Advisian made the assumption the soils where the dugout will be built are blue clays. This was based on the comments made by the Approval Holders that they encountered blue clays when they were burying cleared, burned trees one metre deep, and based on one borehole drilled metres away from the site of Dugout #2. There were no borehole samples taken directly at the dugout site to confirm impermeable clays will extend the full depth of the dugout. The Director assumed the soils will be clays in the area, reducing the possibility of connectivity to the groundwater through the essentially impermeable clay soils.

[99] There was evidence presented that indicated there are variable soils in the area, including sand lenses and a sand and gravel pit that operated for 60 years near the site of Dugout #2. Given there were no specific data collected for the site of Dugout #2, the Board considers it appropriate that monitoring wells are placed by Dugout #2 to take measurements to determine whether or not there is connectivity between the dugout and groundwater. This should compensate for the lack of adequate borehole data to provide assurances there is limited connection between the dugout and groundwater.

[100] To provide substantive data to determine if there is connectivity between the either Dugout #1 or Dugout #2 and groundwater, the Board recommends the Licence be varied to require the Approval Holders to install monitoring wells by Dugout #1 and Dugout #2. Monitoring of the water levels in both dugouts will also be required. The Approval Holders must retain the services of a qualified hydrogeologist or hydrologist to prepare a monitoring plan to measure the impacts of the dugouts on groundwater. The plan must be provided to the Director and, once approved, the Approval Holders must implement the plan, including providing the data collected to the Director and the Appellants regularly for at least two years. Over the course of two years of monitoring, the Director will be able to establish and assess whether there is any connection between either of the dugouts and groundwater, whether or not connectivity, if present, is a problem, and whether further amendments to the Licence, if any, may be warranted. If required, the Director can advise the Approval Holders if further or continued monitoring beyond two years is required at that time. If no connection is demonstrated, the Director can authorize the monitoring to be discontinued.

[101] The Appellants expressed concerns regarding the possibility of contaminants running off from the Approval Holders property and running into nearby dugouts. In the context of these appeals, the Board does not have the jurisdiction to consider the potential for contamination leaving the Approval Holders' property. The NRCB is responsible for ensuring waste management is handled correctly at the feedlot. If the Appellants can show release of contaminants onto adjacent properties is occurring, they should contact the NRCB.

[102] The Appellants were concerned the Licence as issued would not be sufficient to meet the water demands of the Approval Holders' operations. The Board is not questioning the Appellants' calculations of water requirements and it did not doubt the Approval Holders' evidence that they have been able to meet their current water needs with the Licences and Registrations they currently hold. The Approval Holders also stated they were applying for another dugout as well as two groundwater wells to have additional water stored for times when there is less precipitation and snowfall to fill the existing dugouts.

[103] It is important for the Appellants to understand the Licence issued is not required to meet all of the Approval Holders' requirements. It provides some of the water the Approval Holders need to run their operations. The Licence is just one source of water for the Approval Holders to use. It is also up to the Approval Holders to ensure they comply with all of the Licences, Approvals, and Registrations they hold, whether they have been issued by AEP, the NRCB, or municipal approvals. If the Approval Holders do not have sufficient water to operate their operations at full capacity, then it is the Approval Holders' responsibility to alter their operations to comply with the Licence. If they do not comply with the Licence or Approval, AEP can take enforcement actions against the Approval Holders.

[104] The Appellants had concerns about the amount of water the Approval Holders are withdrawing from the Dugout #1. The Licence requires the Approval Holders to place a meter on the wet well to measure the amount of water being pumped from the dugout. The meter is placed between the location where the water is drawn out of the wet well and the location to where the water is delivered and used. The Board notes a similar requirement is in place for Dugout #2 when it is built. Although the Approval Holders have been providing the data collected from the existing volume meter to AEP, there is currently no way the general public

can access the information. The Director confirmed the information is public information, but the current reporting system used by AEP does not provide public access. Since this information cannot be accessed by the Appellants, the Board considers it appropriate to recommend the Licence be amended to require the Approval Holders provide the Appellants with the monthly data collected from the volume meter readings on a quarterly basis for two years. Since many of the Approval Holders do not have email access, the Board suggests the quarterly reports be mailed to the Appellants.

[105] The Appellants questioned the dimensions of Dugout #2 as specified in the Approval and if the Director would verify the dimensions of Dugout #1 and Dugout #2 when completed. Dugout #2 can only be dug to the depth allowed for under the Approval. Although initial drawings may have indicated a deeper dugout, the Director chose to limit the depth to 5.5 metres. To dig further would be in contravention of the Approval, which could lead to enforcement actions being taken to ensure compliance.

[106] The Appellants were concerned the Approval and Licence were issued without proper assessments done of the groundwater and surface water resources in the area. They also expressed concern the issuance of the Licence to the Approval Holders, and potentially additional licences in the future, will prevent neighbouring landowners from expanding their operations. Licences issued under the *Water Act* are issued as “first in time, first in right.”⁹ The Approval Holders applied for and obtained a Licence for their feedlot operation based on the data currently available and the water available. The Director is not in a position to speculate as to what other landowners may want to apply for a licence in the future. If the neighbouring landowners need additional water in the future, they can file an application with the Director and he will make his decision based on the data submitted with the application. The Director is not in a position to deny the Approval Holders’ application based on potential applications that may or may not occur.

[107] The Licence and Approval were issued for 25 years. The legislation requires the Director to issue a licence or approval for 25 years if it is for agricultural purposes. The Director

⁹ For more information about “first in time, first in right,” see Appendix “A” attached to this Report and Recommendations, entitled “Alberta’s Water Priority System – Fact at Your Fingertips.”

does not have the discretion to issue for shorter periods, except for under very specific circumstances, which do not apply in this case. There is no applicable approved water management plan, order of the Minister or water guideline in place that specifies what an expiry date of a licence should be or how an expiry date of a licence should be determined. It is important for the Appellants to understand the Approval was issued for the construction of Dugout #2, but also the maintenance and operation of the dugout. It requires the Approval Holders to ensure the dugout is maintained in a manner that continues to protect the water resources in the area. If the dugout is not operated or maintained according to the terms and conditions of the Approval, enforcement action may be taken.

[108] Based on the submissions and evidence provided and a review of the Record, the Board recommends the Approval be confirmed as issued. However, the Board is also recommending the terms and conditions of the Licence be varied to accommodate the inclusion of monitoring wells, for two years, around Dugout #1 and Dugout #2 to ensure there is no adverse impact on groundwater in the area. Also, the Board recommends the Licence be varied to require the Approval Holders provide monitoring data and meter readings to the Appellants for two years or until the data are available on the AEP website and easily accessible by the public.

[109] The Board is of the view that, with these recommendations in place, the Licence, as varied, and the Approval will be sufficient to protect local water supplies and the environment.

VI. RECOMMENDATIONS

[110] The Board recommends the Minister confirm the Director's decision to issue the Approval and vary the Licence as follows:

1. Add the following immediately after condition 3.10:

“3.11 The Licensee shall retain a qualified consultant to prepare a monitoring plan that includes the installation of monitoring wells adjacent to Dugout #1 and Dugout #2 to measure the impacts of the dugouts on groundwater.

- 3.12 The monitoring plan referred to in 3.11 shall be provided to the Director and will be implemented by the Licensee when the Director approves the plan.
 - 3.13 The monitoring plan shall remain in effect for a minimum of two years and will continue thereafter if directed by the Director in writing.”
2. Add the following immediately after condition 4.3:
 - “4.4 The Licensee shall provide the data from the monitoring wells specified in 3.11 to the Director on a monthly basis for a period of two years, starting from the first day the Licensee begins monitoring the water levels in accordance with the monitoring plan.
 - 4.5 The Licensee shall provide the data from the monitoring wells specified in 3.11 directly to Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk on a quarterly basis while the monitoring plan is in effect.
 - 4.6 The Licensee shall provide the data from each dugout using the meter(s) specified in 3.7(a) directly to Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk on a quarterly basis or until, in the Director’s opinion, the data are easily accessible to the public on the Alberta Environment and Parks website.”

[111] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and the decision of the Minister, be sent to the following:

1. Mr. Robert and Ms. Linda Morgan;
2. Mr. Lawrence Rogoza;
3. Mr. Patrick Timms;
4. Ms. Audrey Laschuk;
5. Mr. Bill Bogdan;
6. Mr. Jason Senetza;
7. Mr. Randy and Ms. Diana Sawchuk;

8. Mr. Ron Kruhlak, McLennan Ross LLP, on behalf of Mr. William and Ms. Audrey Trenchuk; and
9. Ms. Vivienne Ball, Alberta Justice and Solicitor General, on behalf of the Director, Lower Athabasca Region, Alberta Environment and Parks.

[53] The Board notes Mr. and Ms. Morgan reserved their right to ask for costs. A process for the costs application will be established after the Minister makes her decision in these appeals.

Dated on July 14, 2017, at Edmonton, Alberta.

- original signed -

Mr. Eric McAvity, Q.C.
Panel Chair

- original signed -

Dr. Nick Tywoniuk
Board Member

- original signed -

Dr. Brenda Ballachey
Board Member

APPENDIX "A"

Alberta's water priority system

FACTS AT YOUR FINGERTIPS

First in time, first in right' (FITFIR) has been a key principle of granting and administering water allocations in Alberta since 1894.

In all situations where a water shortage occurs, the *Water Act* has provisions to allow water users to assert their priority to water and/or to share water via an assignment agreement or water transfer.

Priority system

Alberta's water priority system is based on seniority. Each licence (or registration) is given a priority number that corresponds with the date that a complete application was received. A licence which has an earlier priority date is considered to be a more senior licence than another licence which has a later priority date (junior licence)

The priority system does not apply to some types of allocations which do not need a licence.

Each licence is composed of five components:

- priority
- maximum annual water volume
- maximum diversion rate
- source and location
- purpose for use

All licences other than household use are ranked according to seniority, not according to purpose for use.

This 'First in time, first in right' (FITFIR) system has been a key principle of granting and administering water allocations in Alberta since 1894. The Alberta government is responsible for enforcing FITFIR, under the *Water Act*

A seniority (priority) call is usually made only when there is not enough water to meet all of the licensee needs in a particular basin. For example, during water short periods, a licensee with a more senior licence has the right to divert all its allocation, subject to its licence terms and conditions, before another licensee that is more junior.

Managing during water shortages

Managing water during a water shortage requires identification of the limits of water and how water is managed by each user.

In all situations where a water shortage occurs, the *Water Act* has provisions to allow water users to either "call priority" (Section 30) to assert their priority to water and/or "share" water (Section 33) via an assignment agreement, or transfer (Section 81) which is either:

- Seniority-based (identifying the most senior licence, followed by the next most senior, etc.);
- Sharing-based (distributing existing licensed allocations between licensees through the use of assignment agreements);
- Transfer (temporarily or permanently transferring an allocation to another licensee or new water user) or a
- Combination of the priority, sharing and transfer

Note that transfer provision has only been enabled in the South Saskatchewan River Basin as part of the approved water management plan.

What is meant by water mastering?

Water mastering is the monitoring and enforcement of the *Water Act*'s "first in time, first in right" priority allocation system.

Under water mastering, water licensees with low priority are told to cease or limit diverting water in order to satisfy the water requirements of licences held by senior licensees.

Water allocation decisions are based on, but not limited to, historical available water supply, river system modeling, and current environmental flow needs. Water management orders may be issued to selected licensees to stop diversions of water and withdrawals are monitored by regional approvals staff, compliance staff, and the Director.

More information

For more information about Alberta's water priority system, call 310-0000 (toll-free) and ask for the Alberta Environment regional office nearest you.



ALBERTA

ENVIRONMENT AND PARKS

Office of the Minister

Minister Responsible for the Climate Change Office

MLA, Lethbridge-West

**Ministerial Order
37/2017**

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12;

and

Water Act
R.S.A. 2000, c. W-3.

**Order Respecting Environmental Appeals Board
Appeal Nos. 16-010-023**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 16-010-023.

Dated at the City of Edmonton, Province of Alberta, this ___31___ day of ___July___, 2017.

-original signed by-
Shannon Phillips
Minister

Order Respecting Environmental Appeals Board Appeal Nos. 16-010-023

With respect to the decision of the Director, Lower Athabasca Region, Alberta Environment and Parks (the “Director”), to issue Approval No. 00378428-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to William and Audrey Trenchuk, I, Shannon Phillips, Minister of Environment and Parks, order that the decision of the Director to issue the Approval is confirmed.

With respect to the decision of the Director to issue Licence No. 00360885-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to William and Audrey Trenchuk, I, Shannon Phillips, Minister of Environment and Parks, order that the decision of the Director to issue the Licence is varied as follows:

1. The Licence is amended by adding the following immediately after condition 3.10:
 - “3.11 The Licensee shall retain a qualified consultant to prepare a monitoring plan that includes the installation of monitoring wells adjacent to Dugout #1 and Dugout #2 to measure the impacts of the dugouts on groundwater.
 - 3.12 The monitoring plan referred to in 3.11 shall be provided to the Director on or before October 31, 2017 and will be implemented by the Licensee when the Director approves the plan.
 - 3.13 The monitoring plan shall remain in effect for a minimum of two years and will continue thereafter if directed by the Director in writing.”
2. The Licence is amended by adding the following immediately after condition 4.3:
 - “4.4 The Licensee shall provide the data from the monitoring wells specified in 3.11 to the Director on a monthly basis for a period of two years, starting from the first day the Licensee begins monitoring the water levels in accordance with the monitoring plan.
 - 4.7 The Licensee shall provide the data from the monitoring wells specified in 3.11 directly to Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk on a quarterly basis while the monitoring plan is in effect.

- 4.6 The Licensee shall provide the data from each dugout using the meter(s) specified in 3.7(a) directly to Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk on a quarterly basis or until, in the Director's opinion, the data are easily accessible to the public on the Alberta Environment and Parks website."