A recent decision of the Environmental Appeals Board (EAB) has brought into question Alberta Environment’s approach to regulating groundwater diversions for oilfield injection purposes. Several points make this decision a significant one for the oil industry and persons concerned with the use of freshwater for oilfield injection. The Board confirmed the relevance of intended use in the decision to issue a licence, and ruled that guidelines for surface water diversions should apply to groundwater as well. The Board also commented on the need for much greater scrutiny of oilfield injection uses, and for a comprehensive provincial policy on this issue.

Background
In July, 2003, Alberta Environment issued a Preliminary Certificate under the Water Act to Capstone Energy Ltd. ("Capstone") for the diversion of water from the Red Deer River for oilfield injection purposes. The effect of a Preliminary Certificate is to assure the applicant that once it has met all regulatory requirements, a license to divert water under specified conditions will be issued. The decision to issue the Preliminary Certificate was appealed to the EAB by the City of Red Deer, the Mountain View Regional Water Services Commission, and three landowners: Gerald Oxtoby, Terry Little and Kelly Smith.

Intended use of the water
Alberta Environment argued that the intended use of diverted water plays a very limited role in the decision to grant a licence under the Water Act. Rejecting this argument, the Board found that, in order to fully consider and implement the relevant provisions of the Act, the Director was required to consider the purposes of the proposed allocation. The Board focused on the fact that oilfield injection does not return water to the hydrological cycle, and indicated that the intended use was of critical importance in determining the long-term effects on the aquatic ecosystem.

The Board also pointed out that the use of water for oilfield injection purposes was specifically allowable under Water Act regulations. However, the EAB found that it was implicit in the Water Act that any use of water which effectively removes water from the hydrological cycle, as oilfield injection does, should undergo “much greater scrutiny”, and that proponents of such projects should conduct a comprehensive alternatives analysis before being granted a licence.

Analyzing alternatives
The Board found Capstone’s investigation of alternatives to surface water injection insufficient, especially in regards to non-potable water options. In stressing the need to consider available alternatives, the Board set out a two-step approach that would
provide a more complete analysis. The first step is to fully consider the technical, economic and regulatory feasibility of alternatives to fresh water. Only after it is concluded that no other feasible option exists would fresh water be considered. Secondly, the Board’s approach requires the proponent to show that any proposed fresh water allocation would be used efficiently.

The Board recommended that a condition be added to the Certificate requiring Capstone to provide the Director with a more detailed and complete analysis of alternatives before a licence would issue.

**Surface vs. ground water**

The Board found that the *Groundwater Evaluation Guideline*, which addresses oilfield injection uses, also applied to allocations of surface water due to the expansive definition given to the term groundwater in the *Water Act*. This finding results in the striking out of parts of the Guideline that are inconsistent with the *Water Act* definition. Furthermore, in the Board’s view there was no reasonable basis to distinguish between surface water and groundwater, given that the overall environmental effects are the same and in light of the growing demand on all of Alberta’s water resources.

**Policy vacuum**

The Board expressed concern throughout its decision with the lack of a comprehensive policy to guide decisions regarding the use of fresh water for oilfield injection. On this basis, the Board recommended that the proposed licence be issued for a one-year term and be revised to comply with the terms of any relevant future policy. The Board went on to recommend that, if a policy is not available to the Director at the time of renewal, the proposed licence should only be renewed for a second one-year term. Finally, the Board recommended that, if an applicable guideline is still not in place after this second one-year term, any further renewal should not exceed three years until a policy framework is “better established.”

**Conclusion**

Ultimately, the Board upheld the Preliminary Certificate, subject to several changes. The total volume of water allocated was reduced and may be further reduced subject to a comprehensive alternatives report. The Board also varied the required minimum residual flow level, adding on an additional safety margin of 10 percent to provide supplementary protection for other water users and the aquatic environment. The Board’s recommendations were accepted by the Minister of Environment by Order dated May 18, 2004.

The Capstone decision introduces a more precautionary approach to water allocation in Alberta, especially for uses that effectively remove water from the hydrological cycle. The policy which the Board encourages the Government to create will, hopefully, reflect the realization that, as submitted by the Appellant, Mountain View Regional Water Services Commission, “there are alternatives to oil but no alternative for water.”

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4. *Ibid* at paras. 165-166.
5 Ibid at para. 236.
6 Ibid at para. 185.
7 Ibid at para. 186.
9 Supra note 2 at para. 175.
10 Ibid.
11 Ibid at para. 177.
12 Ibid at para. 214.
13 Ibid.
14 Ibid at paras. 188-191.
15 Ibid at para. 203.
16 Ibid at para. 93.