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1995 ABEAB 17

Appeal No. 95-006

Preliminary Meeting: June 5, 1995

Adjournment of Appeal: July 28, 1995

Date of Decision: August 23, 1995

IN THE MATTER OF Sections 84, 85, 86 and 87 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

- and -

IN THE MATTER OF an appeal filed by the Lesser Slave Lake Indian Regional Council, the Toxics Watch Society, the Environmental Resource Centre and Ed Graham, with respect to Approval No. 94-IND-223 issued by the Director, Chemicals Assessment and Management Division, Alberta Environmental Protection to Chem-Security (Alberta) Ltd. for the operation of the Ford, Bacon and Davis rotary kiln incineration facility.

DECISION

Cite as: Lesser Slave Lake Indian Regional Council *et al v.* Director of Chemicals Assessment and Management, Alberta Environmental Protection

PRELIMINARY MEETING BEFORE: William A. Tilleman, Chair

Joan C. Copp

Max A. McCann

APPEARANCES:

Appellants - Lesser Slave Lake Indian Regional Council represented Grand Chief Tim Badger, Richard Secord and Karen Buss (counsel).

Toxics Watch Society and Environmental Resource Centre, represented by Myles Kitigawa and Brian Staszewski.

Other Parties -

Director, Chemicals Assessment and Management Division, Alberta Environmental Protection, represented by Silver LAipul, Dr. Robert Huang and William McDonald (counsel).

Chem-Security (Alberta) Ltd., represented by Graham Latonas and Richard A. Neufeld (counsel).

Natural Resources Conservation Board, represented by Dr. Albert van Roodselaar and William Kennedy (counsel).

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L FACTUAL BACKGROUND

This appeal relates to the operation of the Ford, Bacon and Davis (FBD) incinerator Facility at the Alberta Special Waste Treatment Centre (ASWTC) near Swan Hills, Alberta.

On December 16, 1994, the Acting Director of Chemicals Assessment and Management , Alberta Environmental Protection (the Director) issued Approval No. 94-1ND-223 (the Approval) authorizing the operation of the FBD incinerator. The Approval was due to expire on July 1, 1995. Pursuant to section 69(3) of the *Environmental Protection and Enhancement Act (the Act)*, the Director waived notice of the issuance of the Approval It was the first permanent approval for the operation of the incinerator issued pursuant to the Act.

The Director had previously issued permits to construct under s. 3 of the *Clear Air Act* and the *Clean Water Act* on October 22, 1992. A Test Bum Licence for the purposes of testing and commissioning before normal operations commence had previously been issued under s. 4 of the *Clean Air Act* on December 23, 1993.

On January 26, 1995, Ed Graham of Fort Assiniboine filed an appeal of the Approval On February 8, 1995, the Lesser Slave Lake Indian Regional Council, the Toxics Watch Society, and the Environmental Resource Centre (the Appellants) filed notices of objection with the Environmental Appeal Board (the Board). Mr. Graham subsequently withdrew his appeal

The Board advised the Director and Chem-Security (Alberta) Ltd. that the Approval had been appealed, and the Director was asked to provide copies of the application and the Approval On February 9, 1995, the Board wrote to the Natural Resources Conservation Board (NRCB) to confirm that a hearing was held with respect to this matter and to request a copy of the decision that was issued following that hearing.

On February 13, 1995, William Kennedy, Solicitor for the NRCB, advised the Board that the NRCB had "conducted reviews of two reviewable projects in relation to the Alberta Special

Waste Treatment Centre... ". Those reviews resulted in NRCB Decision Report 9101 (April 1992), which dealt with the expansion of the incineration capacity, and NRCB Decision

Report 9301 (November 1994), which dealt with the importation of hazardous wastes from other Canadian jurisdictions.

The Appellants essentially maintain that the December 16, 1994 Approval does not incorporate all of the recommendations made by the NRCB.

II. THE PRELIMINARY MEETING

On June 5, 1995, the Board held a preliminary meeting to identify the issues in this appeal, to determine whether the Board had jurisdiction to hear the issues raised by the Appellants, and to decide how to proceed with this appeal. The Board adjourned the preliminary meeting until July 28, 1995, so that the parties could make written submissions about the Appellants' claims that new information was now available which was not before the NRCB. The Appellants assured the Board that the new information was: 1) relevant and material to the issues in these appeals, and 2) not available to the parties at the time of the NRCB hearings or reviews. The Board received the *new* documentary information for the purpose of making this ruling about its jurisdiction to hear these appeals.

III. ISSUES

In the case before it the Board considers that the following issues go to its jurisdiction:

1. Does section 243 of the Act (the transitional provisions) apply to the Approval?
2. Pursuant to s. 87 (5XbXi) of the Act, did the Appellants participate in the NRCB hearings or reviews leading to Decision Reports 9101 or 9301?

3. If so, were the matters raised in their notices of objection also considered in the NRCB reviews?
4. Are the Appellants "directly affected" by the Approval?

IV. DECISION

The Board proposes to deal with the second *issue* first. Section 87(5XbXi) of the Act states:

The Board shall dicmiss a notice of objection if in the Board's opinion the person submitting the notice of objection received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the Natural Resources Conservation Board Act or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of objection were considered... .

As the Board noted in the *Carter'* decision, this section was intended to avoid duplication in the hearing process. In *Carter*, the Board said:

The jurisdiction of the Board to become involved in a 'review' of ERCB decisions that led to approvals which are eventually appealed here -- is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence.'

Carter Group v. Director of Air and Water Approvals, Alberta Environmental Protection (December 8, 1994), Appeal No. 94-012 (Alta. E.A.B.). An application for judicial review of this decision was heard in the Court of Queen's Bench in Grande Prairie, by Wilkins J. on May 25 and 26, 1995. The decision is pending.

² *Ibid* at 9.

With respect to this statutory authority, the Board further stated:

The Board interprets s. 87(5XbXi) of *Environmental Protection and Enhancement Act* to prevent re-litigation of issues which have been decided and have substantially remained static, both legally and factually. The Board believes the ERCB decision operates as a barrier to a related appeal to ow Board, in these circumstances: 1) where the appeal involves the same people who participated or had an opportunity to participate in the ERCB hearing or review; 2) where the matters appealed are identical; 3) were actually argued to the ERCB; 4) were essential to its judgement and material to its decision; and 5) properly relied upon by the Director.'

This Board has carefully reviewed the NRCB Decision Reports with respect to Applications 9101 and 9301 regarding Chem-Security (Alberta) Ltd. The Board has also read the written submissions and deliberated upon the oral submissions that all parties make to this Board. We believe that these appeals must be dismissed pursuant to s. 87(5XbXi) of the Act.

In the Carter appear, the Board stated:

...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB.'

The Appellants have not rebutted this presumption. It is clear that the Appellants did participate in the NRCB hearings and the Board is of the opinion that all of the matters raised in these appeals were also considered by the NRCB.

The Board has also reviewed the additional information which the Appellants provided at the close of the preliminary meeting on July 28, 1995, which they say is relevant to the issues in these appeals and was not available to the parties at the time of the NRCB hearings or reviews. It is entitled: *Health Assessment Document for 2,3,7,8 -Tetrachlorodibello-p-*

³ *Ibid* at 10-11.

***Supra*, note 1.**

***Supra*, note 1 at 10-11.**

Dioxin (TODD) and Related Compounds`. Although this information might be relevant, we cannot give any weight to it in its present form.

All volumes of the reports that we received have the following disclaimer on the first page:

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Accordingly, the *new* information will not be used by the Board. Having decided to dismiss the appeals, it is unnecessary for the Board to decide transitional questions (the effect of s. 243 of the Act). It is also unnecessary to rule on whether or not one or more of the Appellants is directly affected by the Approval, but the Board accepts without deciding, that any person who has a right to use and does use lands or resources within the vicinity of the ASWTC may have an increased likelihood of being directly affected by its operation.

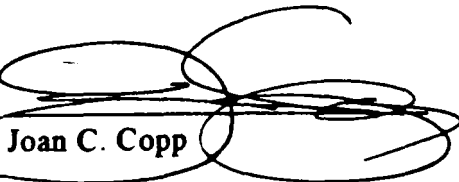
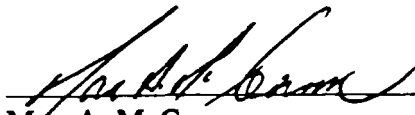
6 United States Environmental Protection Agency: (EPA/600/BP-92/00/c August 1994, External Review Draft).

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The appeals by the LSURC, the Toxics Watch Society and the Environmental Resource Centre are dismissed pursuant to section 87(5XbXi) of the *Environmental Protection and Enhancement Act*⁷

Dated on August 23, 1995, at Edmonton, Alberta.



William A. Tilleman, Chair
Joan C. Copp

Max A. McCann

⁷ Due to the temporary nature of the approvals being appealed, it is the Board's opinion that this decision does not affect future rights to file an appeal that these or any other parties might have with respect to the issuance of further approvals relating to the ASWTC.

