

**1995 ABEAB 9**

**Appeal No. 95-002**

**May 11, 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-

**LN THE MATTER OF** the notices of objection filed by John E. Logan, Randall Lawrence and EcoCity Society, and members of the Hazeldean Community League with respect to Amending Approval No. 94-IND-125A issued to Zeidler Forest Industries Ltd by the Director of Air and Water Approvals, Alberta Environmental Protection.

## **DECISION**

**Cite as: Hazeldean Community League and two citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection**

**BEFORE: William A. Tilleman, Chair**

**Joan C. Copp**

**Max A. McCann**

**REPRESENTATIONS:**

**John E. Logan, *Appellant***

**Randall Lawrence and EcoCity Society, *Appellants***

**Hazeldean Community League members, represented by Cornelia Boldt, *Appellant***

**Zeidler Forest Industries Ltd., represented by Dennis R. Thomas, Q.C.**

**Director of Air and Water Approvals, represented by William McDonald, Esq.**

0 Printed on Recycled Paper

**L      FACTUAL BACKGROUND**

On January 10, 1995, Randall Lawrence filed a notice of objection with the Board on behalf of himself and EcoCity Society. The notice of objection appealed the decision of the Director of Air and Water Approvals, Alberta Environmental Protection (the "Director") to issue Amending Approval No. 94-IND-125A (the "Approval") to Zeidler Forest Industries Ltd. ("Zeidler") in response to Application No. RS0889. This Approval authorized Zeidler to add a new emission source, a veneer dryer, to its existing operating approval. The Director issued the Approval on November 28, 1994, and the notice of his decision was advertised on December 13, 1994 in the Edmonton Journal

On January 12, 1995, the Board received a second notice of objection regarding the Approval, from John E. Logan. On the same day, the Board notified the Director and Zeidler that the appeals were filed. The Director was asked to provide the Board with a copy of the application and the Approval. These documents were received shortly thereafter.

Before the Board had begun consideration of the two appeals, a telephone inquiry was received on January 27, 1995 from Cornelia Boldt on behalf of the Hazeldean Community League (the "Community"). Members of the Community had heard talk of an expansion at the Zeidler plant, but they were unaware of any formal notification. Ms. Boldt was informed of the newspaper advertisement that appeared on December 13, 1994, and she was advised to write a letter to the Board if the Community wished to request permission for a late appeal. Such a request was received on February 2, 1995 and she stated: "Unfortunately the public notice in the newspapers on December 13th, 1994 was not seen, and no information was sent to the Community League directly, so we were not able to respond earlier. It wasn't until, by coincidence, concerned residents requested information on a possible expansion at Zeidler's of which they had heard rumors on about January 20th." The Board considered the request pursuant to section 84(5) of the *Environmental*

*Protecnon and Enhancement Act* (the "Act") and concluded that there were sufficient grounds to permit the Community to file a late appeal. The completed notice of objection was filed by the Community on February 23, 1995.

Subsequently, the Board wrote to all parties asking several questions concerning the Approval, including (1) how Randall Lawrence and EcoCity Society, John E. Logan and the Hazeldean Community League (the "Appellants") were directly affected by the issuance of the Approval, and (2) the extent of past health and odour complaints about the Zeidler plant, particularly involving the local health authorities. All parties provided their responses to the Board. Zeidler's response was limited. It stated "the fifteen points on which representations are sought involve very extensive requests for information which we respectfully decline to provide at this stage of the proceedings . . . . a full and complete response would impose an unnecessary expense on our client.". The Zeidler response was further limited stating:

- that Zeidler is reserving its right to provide any information relating to the appeals at a later date,
- that none of the appellants is directly affected within the meaning of the Act, and
- that Zeidler is not conceding the validity of any of the notices of objection, and
- that Zeidler is not waiving any of its rights to object to the validity of the purported appeals.

## **IL ISSUES**

**The Board has considered the following matters:**

- 1. Which Appellants, if any, are directly affected by the Approval?**
- 2. Should the Board decide to proceed to a hearing in this matter, what issues will be considered in the hearing?**

**Are the Appellants directly affected?**

The Board has reviewed the submissions of the three appellants and has concluded that only the Community has raised sufficient evidence to conclude that it is directly affected by this Approval. The members of the Community have satisfied the Board that they are directly affected for a number of reasons. "Directly affected" is not defined in the Act; it has been left by the Alberta Legislature to be defined by the Board. It is not an absolute principle of law because the determination must be flexible. The determination of directly affected must be founded on the facts of each appeal. As stated by this Board in *Wessley*<sup>1</sup>, "[We believe] that the definition of which persons are 'directly affected' is flexible and will depend upon the circumstances of each case".

The Board has examined the decisions of the Public Health Advisory and Appeal Board ("PHAAB") which has also considered the definition of "directly affected" as it appears in section 4(2) of the *Public Health Act*

"A person who

- (a) is directly affected by a decision of a local board, and
- (b) considers himself aggrieved by the decision

may appeal the decision to the Board."

In *Waste Management of Canada Inc.*<sup>1</sup>, **PHAAB** stated:

"The consideration as to whether an individual is directly affected and therefore has the right to appeal, should not be predetermined, and must be considered in each case based upon the evidence and submissions presented to the Board."

This Board concurs and will consider the facts, evidence and circumstances of each case

---

**EAB 94-001, p.6.**

before it makes its decision for that case. There are not, and cannot be, any hard and fast rules to determine who may be directly affected. Over time it may be possible to develop parameters in this area provided that they do not fetter the discretion of the Board.

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

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same *degree*? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is

unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.

The Board finds that the residents of the Community are directly affected.

With respect to the appellants Lawrence and Logan, there is no evidence to suggest that they are *directly* affected, and the burden, of course, falls upon them to show this.' These two appellants live much further away than the residents of the Community; they have not raised the same persuasive evidence regarding odour, property values, or health concerns as the Community has, and they have not shown that they have any interest beyond a general community interest. Mr. Lawrence's notice of objection was filed jointly with EcoCity Society. In his representation to the Board, he stated that EcoCity has an Edmonton-wide membership with a mandate to protect Edmonton's environment. There is nothing before this Board to suggest that EcoCity Society is directly affected by the Approval Nor has Mr. Lawrence provided any evidence that the EcoCity Society represents any individuals who may be more affected by this Approval than any other citizens of the City of Edmonton.

In reaching the conclusion that Mr. Lawrence, EcoCity Society and Mr. Logan are not directly affected by this Approval, the Board is not rejecting the concerns raised by these appellants. The Act requires this Board to consider whether a person who files a notice of objection concerning an approval is directly affected and, therefore, has standing to appeal the decision. It may be that these two appellants will later apply for intervenor status in

---

<sup>3</sup> In the Environmental Appeal Board's Rules of Practice, section IV(K) on Burden of Proof reads: In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.

this matter to present their concerns to the Board. This application may be made pursuant to the Environmental Appeal Board Regulation and in response to the publication of notice of a hearing of this appeal.

## DI DECISION

The Board concludes that the notice of objection filed by the appellant Community is valid and that the Community is directly affected by the issuance of this Approval. The Board directs that an oral hearing of this notice of objection be held within the City of Edmonton commencing on the 5th day of July, 1995. Having decided that the Appellant Community is directly affected and having given those persons the Board considers appropriate the opportunity to make representations on this issue, the Board will not permit any further representations to be made at the hearing on this issue.

### **What issues will be considered at the hearing?**

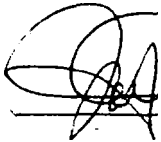
**The Board** has determined the following issues for the hearing:

1. What impact will the Approval have on the residents of the Community?
2. If there is an adverse affect upon these residents because of this Approval, what can be done to ameliorate it?



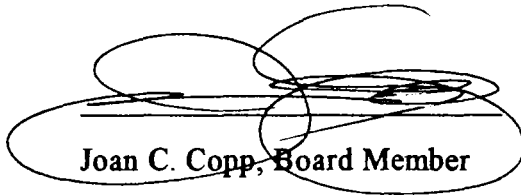
**The Board directs that notice of the hearing to be held in this matter be published in accordance with the Act, the Environmental Appeal Board Regulation and the Board's Rules of Practice.**

**Dated on May 11, 1995.**



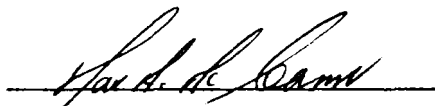
\_\_\_\_\_

**William A Tilleman, Chair**



\_\_\_\_\_

**Joan C. Copp, Board Member**



\_\_\_\_\_

**Max A. McCann, Board Member**