

**ALBERTA  
ENVIRONMENTAL APPEAL BOARD  
  
DECISION**

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**Preliminary Meeting: September 23, 1997  
Date of Decision: September 26, 1997**

**IN THE MATTER OF** Sections 84, 85, 86 and 87 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E13.3 as amended);

**- and -**

**IN THE MATTER OF** an appeal filed by Nick Zon; Balder Von Hohenbalken; Charles Spilsted; Stu Chase; Blair Carmichael, Dwayne Zon; Gary Gylytiuk; The Summer Village of Kapasiwin and Donna Thomas; The Summer Village of Point Alison and Gwen Bailey; James Paron; David Doull; and Bradley Scott Cowley, with respect to Approval No. 10323-01-00 issued by the Director, Air and Water Approvals Division, Alberta Environmental Protection to TransAlta Utilities Corporation.

Cite as: Nick Zon *et al.* v. Director of Air and Water Approvals Division, Alberta Environmental Protection.

**PRELIMINARY MEETING BEFORE** Dr. William A. Tilleman, Chair  
Dr. Ted W. Best  
Dr. Steve E. Hrudehy

**APPEARANCES**

Appellants Mr. Nick Zon represented by Mr. A.O. Ackroyd, Q.C.; Dr. Balder Von Hohenbalken; Mr. Charles Spilsted; Mr. Stu Chase; Mr. Blair Carmichael; Mr. Dwayne Zon; Mr. Gary Gylytiuk; Ms. Gwen Bailey and the Summer Village of Point Alison, represented by Mr. K.F. Bailey; Mr. James Paron, represented by Mr. Samuel Kravinchuk'; and Mr. David Doull<sup>2</sup>.

Other Parties Mr. David Spink, Director, Air and Water Approvals Division, Mr. Ernie Hui, Mr. Clement Ng, Alberta Environmental Protection, represented by Mr. Stan Rutwind.

Mr. Fred Lindsay, Mr. John Watt, Mr. Simon Emms, Mr. John Tapics, and Ms. Hermien Plumiers, TransAlta Utilities Corporation, and Ms. Stella Swanson of Golder Associates, represented by Mr. Steven Femer.

**BACKGROUND**

On March 27, 1997, the Director of Air and Water Approvals, Alberta Environmental Protection (Director) issued Approval 10323-01-00 (Approval) to TransAlta Utilities Corporation (TransAlta) for the Wabamun thermal electric power plant.

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<sup>1</sup> Mr. K.F. Bailey represented Ms. Gwen Bailey and the Summer Village of Point Alison and Ms. Donna Thomas and the Summer Village of Kapasiwin. Upon his departure from the meeting, Mr. Kravinchuk then represented the Summer Villages of Point Alison and Kapasiwin as well as G. Bailey and D. Thomas.

<sup>2</sup> Mr. David Doull also represented Mr. Bradley Scott Cowley.

On April 16, 1997, Mr. Richard Secord filed an appeal on behalf of Mr. Nick Zon for the Approval with the Environmental Appeal Board (Board). Further appeals were filed by Dr. Balder Von Hohenbalken, Mr. Charles Spilsted, Mr. Stu Chase, Mr. Blair Carmichael, Mr. Dwayne Zon, Mr. Gary Gylytiuk, Mr. Dennis R. Thomas (on behalf of Ms. Donna Thomas and the Summer Village of Kapasiwin), Mr. James Paron, Mr. K.F. Bailey (on behalf of Ms. Gwen Bailey and the Summer Village of Point Alison), Mr. David Doull and Mr. Bradley Scott Cowley.

The Board advised the Director and TransAlta that the Approval had been appealed, and asked for copies of all related correspondence, documents and materials. On May 8, 1997 and May 15, 1997, the Board wrote to the Natural Resources Conservation Board (NRCB), and the Alberta Energy and Utilities Board (AEUB) asking whether the matter was the subject of a public hearing or review under their Boards.

Response from the NRCB was negative, but the AEUB documented the history of the Wabamun plant in earlier ERCB proceedings.'

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3 On May 23, 1997, the AEUB stated:

"Further to your letters to us of 8 May 1997 and 15 May 1997, the ERCB first approved the construction and operation of Calgary Power Ltd.'s (Calgary Power) Wabamun Power Plant in the 1970s, pursuant to Approvals No. HE 7307, HE 7307A, HE 7606 and HE 8104, copies of which are attached. Also enclosed are ERCB report 76-D and decision report 81-6, at which hearings concerns were raised similar to those stated in the Notices of Appeal you provided us.

These documents confirm that discharge of heated water from the Wabamun Power Plant into Lake Wabamun has been a charged subject of debate between Calgary Power/TransAlta Utilities and the surrounding residents of Lake Wabamun for more than twenty years. Although dated, I hope that these materials will assist the Environmental Appeal Board (EAB) somewhat with its deliberations concerning the immediate appeal.

A review of our Wabamun Power Plant files reveals that none of the named individuals on the Notices of Appeal sent to the EAB were notified of or participated in the ERCB decision and report attached. Therefore, we are enclosing the attached information only for the purposes of providing the EAB with background and historical information regarding the issues raised in the Notices of Appeal." (Emphasis added.)

## **THE PRELIMINARY MEETING**

The Board held a preliminary meeting on September 23, 1997, in order to determine which Appellants were directly affected, who should be granted party status, and which matters contained in the notices of objection should become the basis for the hearing that will occur on October 7, 1997.

## **SUBMISSIONS BY THE PARTIES**

### **Standing**

The Board first addressed the issue of party status. The Appellants ("Group 1") that requested standing include:

- Mr. Dwayne Zon
- Dr. Balder Von Hohenbalken
- Mr. Nick Zon
- Mr. Charles Spilsted
- Mr. Stu Chase
- Mr. Gary Gylytiuk
- Mr. James Paron (represented by Mr. Samuel Kravinchuk)
- Mr. David Doull
- Mr. Blair Carmichael
- Mr. Brad Cowley<sup>4</sup>

All of these individuals submitted that they were directly affected by the Approval, and therefore that they should be granted full party status at the hearing. The Department did not take a position on the standing issue. TransAlta did submit that not all of the Appellants were directly affected by all

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<sup>4</sup> Mr. Brad Cowley also submitted a notice of objection to the Approval. The Director raised the point that his submission was filed beyond the 30 day time limitation pursuant to section 84(4)(c) of the Act, and the Board agreed. Mr. Cowley also failed to respond to the Board's request for written information, as required by section 85 of the Act. Mr. Cowley did not appear at the preliminary meeting but he asked Mr. David Doull to represent him.

issues, leaving by implication the understanding that all of the Appellants were directly affected, but some may be affected to a lesser extent, on some of the issues.

The second group ("Group 2") was comprised of persons who responded in writing to the Board's notice of hearing to potential intervenors.' This group, none of whom were present at the preliminary meeting, includes:

- Mr. John Briegel, Local Union 254, International Brotherhood of Electrical Workers
- Mr. William Purdy, Mayor, Village of Wabamun
- Dr. E.A. Dale Allen
- Mr. Terry Bean
- Mr. B. Beil, Principal, Wabamun School
- Mr. Al Hiebert, President, Lake Wabamun Enhancement and Protection Association<sup>6</sup>

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5 Sections 7 and 9 of the Environmental Appeal Board Regulation, Alta. Reg. 212/96, states in part, that:

7(1) Subject to section 87(2) and (5) of the Act, where the Board makes a determination to proceed with a notice of objection, it shall ...

(b) where the Board decides to conduct the hearing of the appeal on the basis of written submissions,

(i) give written notice to the parties stating that the hearing of the appeal will be conducted on the basis of written submissions, and setting out the date by which the parties must file their written submissions with the Board, and

publish a notice under subsection (2) in any manner that the Board considers appropriate.

(2) A notice under subsection 1(a)(iii) or (b)(ii) shall contain the following:...

(c) a statement that any person wishing to make representations on the subject matter of the notice of objection must submit a request in writing to the Board; ...

9(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of objection and shall give the person written notice of that decision.

<sup>6</sup> The Lake Wabamun Enhancement and Protection Association was represented at the preliminary meeting by Mr. Ackroyd, Q.C.

The Board also entertained discussion regarding the status of the Summer Village of Point Alison, Gwen Bailey, the Summer Village of Kapasiwin, and Donna Thomas. These individuals and/or organizations had filed notices of appeal, had timely filed written submissions, and had participated in the Board's mediation process that was held pursuant to their appeal.

Finally, letters were also filed from individuals and groups who did not want to appear before the Board, but who wished to express their position regarding the Approval. The Board noted that these letters can be responded to by any party who wishes to do so, and will be filed as part of the Board's record.

### **Matters**

The last issue to be determined by the Board was that of *matters* that would be included in the hearing of the appeal. Based exclusively on the written submissions of the Appellants, the Board raised five general issues and allowed comment from all parties before finalizing the *matters*.

These *matters* were:

- water quality (particularly with respect to thermal considerations, chemistry, and effects on fish),
- air quality,
- lake level,
- weeds, and
- winter ice.

Once questioned, the Appellants seemed satisfied that these issues encompassed their concerns. However, the Department was concerned that "lake level" was not within the jurisdiction of the Board, but rather the level, *per se*, is under the jurisdiction of the Minister of Environmental Protection and of the Controller of Water Resources. The Department also submitted that the full hearing would be unnecessarily prolonged if the Board fully addressed the issue of lake level. Director's counsel indicated that a longer hearing addressing issues outside the jurisdiction of the Director of Air and Water Approvals, would unduly "tie up" other Directors who have other work

commitments.

Mr. Ferner, on behalf of TransAlta, also expressed his concerns about the lake level matter. He further submitted that the issues as summarized by the Board (air, water, etc.) were too broad and that he would have difficulty preparing his submissions for the hearing unless there were more specific parameters regarding environmental media.

## **DECISION**

### **Participation by the Summer Village of Point Alison et al.**

The Board has decided that Ken Bailey should be allowed to appear at the hearing on behalf of the Summer Village of Point Alison and Gwen Bailey in order to speak to the agreement that may/not be signed between these individuals or groups and TransAlta Utilities. Such an agreement, if it exists, may be tendered at the hearing and Mr. Bailey will have the opportunity to speak to the agreement, and defend it if necessary.<sup>7</sup> The Board has also decided that this group<sup>s</sup> should have the opportunity to file written submissions, and should it elect to do so, these must be filed by October 2, 1997<sup>9</sup>. The same applies to Mr. Thomas' clients, Donna Thomas and the Summer Village of Kapasiwin.

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7 Indeed, if an agreement is presented, the Board will allow all parties to comment on the agreement before deciding what status the agreement has and how it affects the Board's Report and Recommendations to the Minister.

8 Their representative at the time this issue was addressed by the Board was Mr. Kravinchuk, who did not disagree that their participation should be precluded.

9 Written submissions were originally due September 30, 1997, but this date was extended to accommodate TransAlta's request for a time extension. On September 25, 1997, TransAlta Utilities advised the Board that due to an untimely death in the family of their counsel, they requested that the written submission due date of all parties be extended to October 2, 1997. The Board granted this request and a copy of the letter was forwarded to all parties.

## Parties to the appeal

Given the fact that all remaining Appellants own property either on the lake or, in one case, one lot away from the lake, and all use the environmental amenities of the lake, the Board has decided that all remaining Appellants are, in some manner, directly affected by the TransAlta Approval and can proceed to the appeal.<sup>10</sup>

With respect to Group 2 (those people who responded in writing to the Board's request for participation) the Board has decided that they should be given the opportunity to participate through the mechanism of full **written** arguments, that are to be filed by the same date as all other parties -

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<sup>10</sup> The status of directly affected is often difficult to determine, and the issue of when in the proceedings the Appellant must discharge the burden of proof that he or she is directly affected was discussed in this Board's decision of *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (August, 1995), No. 94-017 (Alberta Environmental Appeal Board), which cited a passage from the Alberta Court of Appeal decision, *Leduc (County No. 25) v. Local Authorities Board* (1987), 54 Alta. L.R. (2d) 396 (C.A.):

If the section is to be construed as requiring the person proposing to intervene to show with certainty that his rights *will* be affected, how is he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will involve.

The only certain way to determine that would be to require each person to call evidence on the point. In the present case, Mr. Zajes would presumably be forced to call enough evidence to establish the potential for a serious effect on him if the annexation takes place. That would be to force him to succeed on the principal issue in the hearing before he has a right to appear in it, which in our view would be applying the statute to bring about an absurd conclusion. On the other hand, if the Board were required to wait until the petitioning city had called evidence as to the effect of annexation and that had been answered by the other parties, the hearing would be virtually completed before the preliminary question of who are to be parties could be answered. Meanwhile, would those seeking status be permitted to take part?

In our view, the legislature cannot have intended that degree of certainty in this definition. The overriding purpose sought to be attained by the Administrative Procedures Act is fairness in the administrative process. The board must ensure that those persons with a serious interest in the proceedings are fairly heard. At the same time, it must protect itself, and the legitimate parties to the hearing, from having the whole proceeding complicated and made more expensive by those with no real interest at stake. The board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing. (*Ibid.* at 399-400.)



October 2, 1997. There will be no oral submissions made by this second group. However, if the original Appellants wish to cross-examine the people who filed written submissions, they can notify the Board by October 2, 1997, of their desire to do so and their reasons for requesting this right. The Board will then make a determination as to whether attendance and/or cross-examination of the parties in Group 2 will be permitted.

### **Matters to be included in the hearing of the appeal**

The following matters may be addressed by the parties at the hearing, but the scope" of evidence and argument must be limited to the specifics pertaining to the grounds of appeal raised in their notices of appeal:

- water quality (with respect to thermal input, chemistry and effects on fish), weeds,
- air quality,
- lake level, and
- winter ice.

With respect to air emissions, the parties must limit the scope of their submissions to specifics pertaining to fallout of black substance from air emissions. For example, the notice of objection submitted by Nick Zon states that "Their smoke stacks emit a black substance that is layered in the

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<sup>11</sup> This Board discussed the **scope** of evidence that a party may lead in *Walker and Haugen et al. v. Director of Standards and Approvals* (May 1994), No. 93-005 (Alberta Environmental Appeal Board):

...the test is not to rule out the environmental effects of all pre-Act facilities, as a matter of law, simply because there is a pre-Act facility involved. This is potentially unfair because there *may* be a link between the existing facility and the new facility sought by the amendment. In other words, the existing facility may indeed have environmental effects that are tied synergistically or antagonistically to the new facility....

Where transitional matters arise between old and new facilities, the resolution must come by way of a factual determination of *how* the existing plant's activities are directly linked to the new approval -from an environmental effects perspective. If, for example, the appellants raise a *prima facie* case that pre-existing emissions from ongoing activities compound the emissions given by a new approval, the Board would hear all of the evidence because it is relevant to the environmental acceptability of the *new* Approval. (at 7).

snow."

With respect to the lake level, the Board is only interested in receiving submissions that establish the nexus between the operations of the Power Plant and other environmental changes occurring at the lake. The Board is not concerned with historical levels of the lake, nor about what the level of the lake "should be". The Board will be making a factual determination as to whether or not the terms of the Approval, if they relate to lake levels, impact the integrity of the Wabamun Lake ecosystem, and how they relate to the health of those parties directly affected by the Approval. If Appellants wish to raise the matter of lake levels in any other context than the possible interplay between lake levels and the other environmental impacts which they allege TransAlta causes to the lake, the Appellants must identify with specificity those provisions or *bona fide* omissions of the Approval that affect lake levels per se.

### **Timing**

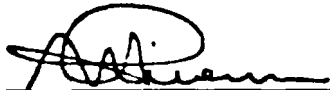
The Board notes that there are a number of Appellants who raise similar environmental concerns. The Board strongly encourages these parties to combine their submissions, where possible, to avoid repetitiveness. The Board intends to complete the hearing on October 8th and we believe the evidence and argument can be combined and led through spokespersons where at all possible. Of course, individual factual differences can be stressed in individual written submissions and responded at the hearing as necessary and appropriate.

### **CONCLUSION**

1. All Appellants listed on page 4 of this decision are directly affected by Approval No. 1032301-00.
2. Pursuant to section 87(4) of the Act, the only matters that may be discussed at the hearing are those on page 9, *supra*, and limited exclusively to issues raised in these notices of appeal and tied directly to Approval No. 10323-01-00.

3. Pursuant to section 87(5)(ii), primarily for the failure to respond to the Board's request for written submissions, the appeal of Mr. Brad Cowley is dismissed.
4. Written submissions from all parties are due October 2, 1997.

Dated on September 26, 1997, at Edmonton, Alberta.



Dr. William A. Tilleman, Chair



Dr. Ted W. Best



Dr. Steve E. Hrudey

