1998 ABEAB 42 **Appeal No. 98-230-D**

ALBERTA
ENVIRONMENTAL APPEAL BOARD

DECISION

Preliminary Meeting: September 10, 1998
Date of Decision: October 19, 1998

IN THE MATTER OF Sections 84, 85 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 Mr. Brian Bildson with respect to Approval No.'s 11929-00-12 and 11933-00-05 issued by the Acting Director of North Eastern Slopes Region, Alberta Environmental Protection to Smoky River Coal Limited.

Cite as: Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, *re: Smoky River Coal Limited.*

PRELIMINARY MEETING BEFORE		Dr. William A. Tilleman, Chair Dr. Steve E. Hrudey Dr. Ted W. Best
APPEARANCES	Appellant:	Mr. Brian Bildson
	Department:	Mr. Grant Sprague, counsel, Alberta Justice, representing Mr. Chris Powter, Mr. Neil Chymko, Alberta Environmental Protection
	Other Parties:	Mr. Raymond Bodnarek, counsel, Ogilvie and Company, representing Mr. Vern Albush and Mr. Darin Stepaniuk, Smoky River Coal Ltd.
		Ms. Tania Donnelly, counsel, Alberta Energy and Utilities Board; Mr. Ken Banister, Alberta Energy and Utilities Board
		Mrs. Deana Bildson

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BACKGROUND

[1] This appeal concerns two approvals, issued by the Acting Director, North Eastern Slopes Region, Alberta Environmental Protection ("the Director"), under section 65 of the *Environmental Protection and Enhancement Act* ("the Act"), S.A. 1992, c.E-13.3.[1] The Approvals allow Smoky River Coal Ltd. ("Smoky River Coal") to extend an existing surface coal mine to a new area, known as the "B-2 pit." More specifically, Approval No. 11929-00-12 amends an existing approval by allowing Smoky River Coal to construct and operate the B-2 pit; Approval No. 11933-00-05 amends a second existing approval concerning wastewater discharges from the mine.

[2] The Director's two approvals resulted from a "coordinated process" involving the Alberta Energy and Utilities Board ("EUB"). The EUB issued an amended permit for the same project under the *Coal Conservation Act*, R.S.A. 1980, c.C-14, based upon its finding that the project was in the "public interest."

[3] The B-2 pit is located in a relatively remote portion of the Rocky Mountain foothills, roughly twenty kilometres northwest of Grande Cache, Alberta. The pit lies on the eastern slope of an alpine area known as Caw Ridge and at the headwaters of Beaverdam Creek, a secondary tributary of the Kakwa River which flows into the Smoky River, all within the Peace River drainage. The area encompassing both Caw Ridge, and the waters flowing from its flanks, is prized for its fish and wildlife values. Caw Ridge itself is an unusually accessible alpine area which offers considerable scenic vistas. The area is also prized for its coal resources. Hence, the present conflict. The Appellant, Mr. Brian Bildson, believes the Approvals fail to adequately address the wildlife and water quality impacts of mining at the B-2 pit.

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1 The Board notes at the outset its confusion as to the proper identity of the Acting Director who issued the approvals at issue. The approvals' cover page contains the signature of Chris Powter as Acting Director. However, on May 20, 1998, Acting Director L.K. Brocke signed a letter notifying Mr. Bildson, the Appellant in this appeal, of Mr. Brocke's decision to issue the approval. Accordingly, Mr. Bildson's appeal notice refers to Mr. Brocke, not Mr. Powter.

[4] Section 84(1)(a) of the Act authorizes the Board to hear appeals of approvals issued by an Alberta Environment Director under the Act. However, section 84(1)(a), together with other related sections, impose several hurdles which must be passed before the Board can consider the merits of an appeal.[2] In a June 30, 1998 letter, the Director's counsel urged the Environmental Appeal Board ("Board") to dismiss this appeal, based on three of those hurdles. Two of the three hurdles cited by the Director are the requirements in section 84(1)(a)(iv) of the Act, that Mr. Bildson must have filed a timely "statement of concern" prior to the Director's issuance of the Approvals; and that Mr. Bildson must be "directly affected" by the Approvals. The third hurdle is contained in sections 87(2)(a) and (5)(b)(1), which prohibit the Board from considering matters raised by an appellant if those matters were "adequately dealt with" by the EUB in a different permit proceeding which an appellant either "received notice of or participated in or had the opportunity to participate in . . ." such proceedings.

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2 This statement is an oversimplification because, in some instances, the Board must consider the merits at least somewhat in order to decide whether the hurdles have been overcome.

[5] The Board gave all parties opportunities to file written submissions in response to, or in support of, the Director's June 30, 1998 letter.[3] The Board then decided to hold a preliminary meeting on the first two dismissal grounds raised by the Director, but to defer its decision on the Director's third ground pending further development of the record as to whether the EUB "adequately dealt with" the wildlife and water quality issues raised in Mr. Bildson's appeal to the Board.[4] The Board held roughly an 8 hour preliminary meeting on September 10, 1998, at which it received additional evidence, including live testimony, and additional argument on the first two of the Director's three dismissal grounds. Following its review of the parties' written and oral presentations, the Board issued a letter on September 28, 1998, denying the Director's dismissal request on those two grounds and stating that written reasons for its decision would follow "in due course." This Decision provides the written reasons for the rulings in the Board's September 28, 1998 letter.

MR. BILDSON'S FAILURE TO FILE A TIMELY STATEMENT OF CONCERN

[6] As relevant here, section 84(1)(a)(iv) of the Act provides that an appeal may be filed by a person "who previously submitted a statement of concern in accordance with section 70" of the Act. Section 70(1), in turn, authorizes citizens to file "written statement[s] of concern setting out . . . [their] concerns with respect to" a proposed project, before the Director decides whether to approve the project. However, section 70(2) provides that statements of concern must be submitted to the Director within 30 days after the Director's publication of notice of the project.

[7] The facts are undisputed that Mr. Bildson submitted a statement of concern roughly three weeks after the close of the thirty-day period in section 70(2). The Director's staff nevertheless sent Mr. Bildson a letter "[t]hank[ing]" him for his submission and assuring him that his "concerns will be considered" in the staff's review of Smoky River Coal's application.[5] The staff sent Smoky River Coal a copy of this letter, and of Mr. Bildson's written submission, so that the company would be "advised" of Mr.

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3 Board's letter dated July 10, 1998, addressed to Mr. Brian Bildson and copied to the Department and Smoky River Coal.

4 August 26, 1998 letter from the Board.

5 August 25, 1997 letter to Mr. Brian Bildson from Mr. Dennis Eriksen, Environmental Protection.

Bildson's concerns.[6] There is no evidence that the company ever objected to Mr. Bildson's late-filed statement or to the Director's acceptance of the statement.

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6 *Ibid.*

[8] After deciding to issue the Approvals, the Director sent Mr. Bildson a letter notifying him of the Director's decision, summarizing the content of the Approvals' terms, and notifying Mr. Bildson that he "may" have a "right" to appeal the Director's decision to the Board.[7] Presumably, the Director sent this notice letter in order to comply with section 71(1)(e) of the Act, which requires the Director to give notice of his decision to issue an approval to every person who submitted a statement of concern "in accordance with section 70." Thus the Director, at that time, must have considered Mr. Bildson to be in compliance with the governing procedures.

[9] In short, the facts are clear that, despite Mr. Bildson's tardiness, the Director accepted Mr. Bildson's statement of concern and treated the written statement as if it had been filed "in accordance with section 70." The Director's approach was laudable and understandable, given the Act's recognition of the value of public participation,[8] and because Mr. Bildson's delay was relatively short and there was no apparent need in the Director's mind for him to adhere strictly to the thirty-day deadline.

[10] Despite the Director's apparent view that Mr. Bildson's late-filed statement of concern was "in accordance with section 70," for purposes of the Director's own approval process, the Director now argues that Mr. Bildson's statement was not "in accordance with section 70" for purposes of the Board's appeal process. The Board believes that the Director's strict reading of section 84(1)(a)(iv) is unreasonable, because it precludes Mr. Bildson's appeal based upon a minor procedural error which occurred in the Director's own decision proceeding and which the Director himself, and Smoky River Coal, both chose to ignore. In the Board's view, if the Director chooses to accept and process a late-filed statement of concern, then the statement should be treated as having been submitted to the Director "in accordance with section 70" for purposes of the appeal requirement in section 84(1)(a)(iv). This interpretation of that phrase is consistent with the Act's broad environmental objectives and its emphasis on

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7 May 20, 1998 letter to Mr. Bildson from L.K. Brocke, Acting Director, Environmental Protection.

8 Section 2 of the Act states that the Act's purpose is to "support and promote the protection, enhancement and wise use of the environment while recognizing," *inter alia*, "the shared responsibility of all Alberta citizens" for achieving that purpose, and "the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. . . ." That section also adopts the "principle of sustainable development." The Board has previously acknowledged a 1995 Alberta Task Force conclusion that the Province should encourage public input in government decisions as one of several steps to implement sustainable development. Cost Decision #2 *re: The City of Calgary (Fay Ash)*, EAB No. 97–032-C-2 (July 2, 1998), at 4-5 (par. 11).

public participation, as noted above.[9]

[11] At the preliminary meeting, the Director's counsel argued that the Director lacked

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9 In a written submission which it filed at the preliminary meeting, Smoky River Coal argued (par. 11) that the Board "does not have any ***inherent*** remedial powers" to extend the deadline in section 70(2). The company's argument misses the point, that the Act itself is a remedial statute which, as such, should be given a "fair, large and liberal construction and interpretation that best ensures the attainment of its objects." *Interpretation Act*, R.S.A. 1980, c. I-7, s. 10. The Board's construction of the phrase—"in accordance with section 70"—is consistent with this rule of statutory construction.

legal authority to extend the thirty-day deadline in section 70(1), except under limited circumstances not applicable here,[10] for purposes of the section 84(1)(a)(iv) requirement that the appellant must have filed a statement of concern "in accordance with section 70." The Director's argument is misplaced. If the Director can waive the filing deadline for purposes of its *own* approval process, then the Board can treat a statement accepted by the Director after the deadline as "in accordance with section 70." The Board has clear authority under section 85.1 to extend the deadlines that apply to steps taken in Board proceedings; given this authority, it would be nonsensical for the Board to dismiss an appeal based on a missed deadline in the *Director's* proceeding, especially, when the Director treated the procedural error as insignificant.

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10 Section 70(1) provides that the Director can designate, in the public notice itself, that statement of concerns may be filed by a certain date after thirty days from publication of the notice. The Director's notice of the proposed B-2 pit lacked any such extension.

[12] In fact, section 85.1 appears to give the Board express authority to extend the 30-day deadline in section 70(1), for purposes of allowing an appeal to proceed, whether or not the Director extended the deadline in his own decision process. Section 85.1 provides that the Board "may . . . extend the time *prescribed in this Part* . . . for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so."[11] The section 70(2) thirty-day deadline is arguably "in this Part," *i.e.* in Part 3 of the Act dealing with Board appeals, even though section 70(2) is physically in Part 2 of the Act, because section 84(1)(a)(iv) incorporates section 70 into Part 3 by reference. It is uncertain when or whether the Board might have "sufficient grounds" under section 85.1 for extending a section 70 deadline, when the Director refuses to extend the deadline. In this case, the Director's own acceptance of Mr. Bildson's late-filed statement of concern, plus the Director's provision of notice of the Approval to Mr. Bildson per section 70(2), provides the Board with "sufficient grounds" to extend the thirty-day deadline in section 70.

[13] This interpretation of the Board's authority under section 85.1 is supported by section 87(5) of the Act. Subsection 87(5)(a) lists several specific grounds for which the Board "may" dismiss an appeal, none of which are relevant here. However, that subsection also includes the catch-all ground in subparagraph (i.2): "any other reason the Board considers" that the appeal is "not properly before it. . ." Subsection 87(5)(b) lists several specific grounds on which the Board "shall" dismiss an appeal; none of these grounds include an appellant's failure to submit a timely statement of concern to the Director. The Legislature's contrasting use of the permissive word "may" and the mandatory word "shall" in subsections 87(5)(a) and (b), respectively, strongly suggests that the Board has discretion to forego dismissing an appeal under any of the circumstances listed in subsection 87(5)(a) where fairness dictates continuing with the appeal, but lacks such discretion in any circumstance listed in subsection 87(5)(b). Of all the dismissal grounds listed in subsections 87(5)(a) and (b), the only one which covers an appellant's failure to submit a timely statement of concern is subparagraph (a)(i.2). Under this logic, the Board would have discretion to forego dismissing Mr. Bildson's appeal if the statement of concern was not filed "in accordance with section 70." As noted above, however, the Board believes that the Director indicated to Mr. Bildson that he satisfied this test.

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11 (Emphasis added). Section 85.1 of the Act states, in its entirety:

> 85.1 The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so.

[14] The Board is concerned that, in response to this Decision, the Director will in the future turn back all late-filed statements of concern, simply to prevent the statements' authors from later appealing the Director's approval decisions. The Board believes that this approach would impose an unfortunate limitation on public participation. Accordingly, the Board hopes that the Director will reject late-filed concerns *only* when the value of public participation is outweighed by the cost of any delay to the Director's decision process.

STANDING - IS MR. BILDSON "DIRECTLY AFFECTED" BY THE APPROVALS?

[15] Section 84(1)(a)(iv) of the Act stipulates that a person who is not the approval holder may appeal an approval if the person is "directly affected" by the Director's decision to issue the approval. This test is commonly referred to as the test for an appellant's "standing" to file an appeal.

[16] In its initial dismissal request, the Director stated that it "appeared" that Mr. Bildson lacked standing because his home, in Grande Prairie, was too far from the mine site. The Director also noted that Mr. Bildson ran a trap line on the north side of the Kakwa River, but stated that this line was "significantly removed from the project geographically" and, thus, could not be "directly affected" by the mine.[12]

[17] In response to these assertions, Mr. Bildson claims, first, that he uses Caw Ridge (next to the mine) and the surrounding low-lands and waters extensively for his own pleasure, family pleasure, and for his family-run "eco-tourism" business. That business involves taking clients out to the back country to watch wildlife, fish, collect shed caribou antlers, and to generally enjoy the natural scenery. Mr. Bildson then claims that the B-2 mine: will impair the aesthetic value of the area; may injure the area's wildlife, especially the "mountain caribou" herd which uses Caw Ridge and migrates through the general area; and, may reduce the area's water quality and, in turn, injure the area's significant fisheries resources. Finally, Mr. Bildson claims that these three sets of

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[12] June 30, 1998 letter from Mr. Grant Sprague on behalf of the Director, at 1.

consequences will diminish his use of the area's resources for both his personal and business purposes.[13]

[13] Mr. Bildson presented his factual claims through his July 6 and 23, 1998 letters to the Board and his and his wife's extensive oral testimony at the September 10, 1998 preliminary meeting, at which they answered numerous, specific questions from the Board as to just how he would be "directly affected" by the approvals. The Board appreciates the Bildsons' candor and stamina at the preliminary meeting, especially, given that they were appearing on their own behalf and, thus, were likely intimidated by the Board's numerous questions.

[18] The Director's primary response to Mr. Bildson's factual claims is on legal rather than factual grounds. According to the Director, Mr. Bildson's factual claims are insufficient because the surrounding lands are Crown lands. According to the Director this means that Mr. Bildson has no "legal right or interest distinct from any other person to this area."[14] In a later submission, the Director asserts, as a general rule, that an appellant must have "some legal right or entitlement that is affected in order to attain standing."[15]

[19] The Board believes that the Director's proposed standing rule is unsupported by the plain meaning of the "directly affected" phrase and by prior Board decisions, and is unwarranted in light of the Act's purposes. The remainder of this Decision addresses the Director's position, and Mr. Bildson's factual claims, in light of the relevant rules regarding proof of standing.

1. The General Rule

14 August 6, 1998 Sprague letter, at 1.

15 September 4, 1998 Submission of the Director, at 4 (par. 12).

[20] The Board has long made it clear that an appellant bears the overall burden of proving, by a preponderance of the evidence, that it is "directly affected" by the decision being appealed.[16] This rule generally has three components: the first, regarding which party bears the burden of proof (the appellant)[17]; the second, regarding the standard of certainty that must be achieved (preponderance of the evidence); and, the third, regarding the substantive standard which must be proven (that the appellant is "directly affected"). There are several aspects of the second and third components which the Board has explained in prior decisions and which are worth repeating and clarifying here.

2. Who Must Be "Directly Affected" In The Test For Standing

[21] Section 84(1)(a)(iv) indicates that the Board should determine an appellant's standing by whether *the appellant* is "directly affected" by the approval being appealed. Thus, an appellant cannot have standing because other people are "directly affected," at least, if the appellant does not prove he is also "directly affected." Similarly, an appellant cannot base his standing on a general interest or desire to prevent any environmental harms resulting from the approved project; the appellant must show that those harms "directly affect" the appellant.[18] Thus, in *Kostuch*, the Board stated that it would not grant standing to an appellant simply because the appellant shared "the abstract interest of all Albertans in generalized goals of environmental protection."[19]

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16 *E.g., Iwaskow v. Director of Air and Water Approvals Division, Alberta Environmental Protection, re: Talisman Energy Inc.* (April 30, 1998), 98-001, at 10; *Ash and Munroe v. Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection* (November 13, 1997), Appeal Nos 97-031 and 97-032, at 11; *Ed Graham et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* [1996] 20 C.E.L.R. (N.S.) 287, 295; *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* [1995] 17 C.E.L.R (N.S.) 246, 258-259.

17 The appellant's burden is related to, but distinct from, Rule 29 of the Board's Rules which provides that a party who offers affirmative evidence to prove a fact bears the burden of proving that fact. As applied here, these rules together mean that, although the Director requested dismissal by claiming that Mr. Bildson was not "directly affected," Mr. Bildson must provide affirmative proof that he is "directly affected" whether or not the Director introduces any affirmative evidence to show that Mr. Bildson is not directly affected. If the Director introduces such evidence, then the Director would have the burden of proving only the specific fact to which the evidence relates. Rule 29 has little significance in this appeal, however, because the Director's primary challenge to Mr. Bildson's standing is on legal, rather than factual grounds. The Director's legal arguments are addressed below.

18 *E.g., Kostuch*, *supra* note 16, at 257.

19 *Ibid.*

[22] The Director has attempted to further limit the "directly affected" test by arguing that an appellant has standing only if it can show that it is "directly affected" in a way that is "unique or different than that of any other Albertan."[20] This limitation simply does not follow from the Board's comment, in *Kostuch*, that an appellant's "abstract interest" in environmental protection, like that of "all Albertans," is an insufficient basis for standing. The Board actually made it clear in *Kostuch* that it would be "illogical" "[t]o deny standing to certain individuals on the basis that many other individuals will also be directly affected. . . . It would mean that widespread pollution events that generate direct effects on groups of individuals (or worse yet, an entire community) could be questioned by nobody."[21] In a more recent appeal, the Board made it clear that it did not intend its reference to the "abstract interest of all Albertans," in *Kostuch*, to imply that an appellant's injury must be "unique in kind or magnitude in order to warrant standing."[22] The point is that the *appellant* must be directly affected; others may or may not be directly affected as well. The direct effects claimed by Mr. Bildson are probably unique in kind or magnitude compared to other people. However, that differentiation is not a prerequisite to standing.

[23] Moreover, the Director's position is unsupported by the plain language of section 84(1)(a)(iv) which grants standing to an appellant if the appellant is "directly affected," whether or not one, or five, or five hundred, or for that matter, thousands of other people are similarly affected. Under the Director's interpretation, the Board would likely not have granted standing to any of the citizen appellants in the numerous appeals which the Board has considered in its five year history.[23]

[24] In short, Mr. Bildson's factual claims satisfy the "who" component of the "directly affected" test. Although he testified frankly about his general interest in environmental protection, Mr. Bildson also provided extensive testimony purporting to show how he personally was "directly affected" by the mine, including testimony that he drinks water downstream of the mine. Mr. Bildson need not prove that these personal effects are "unique or different" than "that of any other Albertan" or even than that of any other user of the Caw Ridge area. He *does* need to prove that he is personally directly "affected." And, for reasons set out below, he did.

3. The Meaning Of "Affected"

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20 September 4, 1998 Written Submission of the Director, at 3 (par. 9(c)).

21 *Kostuch, supra* note 16, at 261. The Board's explanation was based on a prior decision in *Hazeldean Community League v. Director of Air and Water Approvals, Alberta Environmental Protection* (July 6, 1995), Appeal No. 95-002.

22 *Iwaskow*, *supra* note 16, at 9 (par. 25).

23 Likely recognizing the weak basis of the Director's extreme position, Smoky River Coal argues that Mr. Bildson must prove that he has a "'personal interest' in the Caw Ridge area *that is any greater than the general population that frequents the Caw Ridge area for similar purposes*." Submission of Smoky River Coal Ltd. Respecting Preliminary Meeting on Jurisdiction, at 7 (par. 19) (emphasis added). Although the company's comparison group is much more limited than that used by the Director, the company's use of a target group for comparison purposes is still unsupported by the plain meaning of "directly affected" and does not follow from the Board's rule in *Kostuch*, that the abstract interest of all Albertans in environmental protection is an insufficient basis for standing. Whether Mr. Bildson is uniquely affected or is one of several users of Caw Ridge who are similarly affected is simply irrelevant to the issue at hand, namely, whether Mr. Bildson *himself* is "directly affected."

[25] Webster's College Dictionary (1991) ascribes three meanings to the word "affected," the second of which--"harmed or impaired"--would appear to have been that intended by the Legislature in choosing the word as part of its test for standing.[24] Thus, in order to show that it is "affected," an appellant generally must prove that it will be "harmed or impaired" (hereinafter, simply "harmed") by the activity authorized by the approval being appealed.[25]

[26] On its face, the word "affected" does not distinguish among various *sources* of harm, or among various *kinds* of harm which are caused by those sources. Nor does the word "affected," on its face, indicate the *magnitude* of the harm that must result from an approved activity to establish the appellant's standing. Given these three open-ended characteristics of the word "affected," the Board made it clear, at a very early stage in the Board's history, that it must determine on a case-by-case basis whether an appellant is sufficiently "affected" to have standing.[26]

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24 The other two meanings provided by Webster's Dictionary are: (1) "acted upon; influenced"; and (2) "(of the mind or feelings) impressed; moved." Because anyone could claim that they were "influenced" or "impressed" by an approved project, defining "affected" by these terms would effectively render the Act's standing requirement meaningless.

25 In a prior decision, the Board cited a definition of "affect," in Black's Law Dictionary, which included "injur[y]." *Kostuch, supra* note 16, at 255. The Board considers "injury" as analogous to "harm."

26 *E.g. Fred J. Wessley v. Director, Alberta Environmental Protection* (February 2, 1994), Appeal No. 94-001, at 6; *see also e.g., Kostuch, supra* note 16, at 254.

[27] As noted above, the Director nevertheless wants the Board to impose a *per se* rule that the only kind of harm which suffices for standing purposes is a harm to an appellant's "legal right or entitlement;" conversely, the Director argues that harm to a person's "hunting or recreational use" of a natural resource fails, as a matter of law, to render the person "affected" by an approved project which injures that resource.[27] The Board disagrees. The Director's *per se* rules on the types of harms which can and cannot qualify for standing purposes cannot reasonably be supported by the open-ended nature of the plain meaning of "affected." Nor is the Director's position supported by the Court of Queen's Bench decision, in *Kostuch v. EAB*, on which the Director relies. That court addressed Ms. Kostuch's hunting and recreation, not by establishing a generic rule that those activities were *per se* insufficient, but simply by affirming the Board's findings with respect to those activities.[28] The Board's decision, itself, was based on the failure of Ms. Kostuch to prove that those uses would be affected, *as a matter of fact*.[29] If anything, the Board acknowledged that injury to hunting and recreational uses could suffice to prove standing, if sufficiently proven, by noting that Ms. Kostuch's "personal use" of the area near the proposed plant was "potentially relevant to the standing issue."[30]

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27 September 4, 1998 Submission of the Director, at 3 (par. 9(d)).

28 *Kostuch v. Environmental Appeal Board, et al.,* [1996] 21 C.E.L.R. (N.S.) 257, 264. "The EAB further considered . . . [Ms. Kostuch's] . . . use of the area adjacent to the proposed plant for hunting and recreation and concluded the test for standing had not been met by [Ms. Kostuch].".

29 *Kostuch, supra* note 16, at 246, 262-263.

30 *Ibid.*

[28] Nothing in either the Court of Queens Bench's review of the Board's *Kostuch* decision, or the Board's *Kostuch* decision, itself, supports the Director's position that only harms to an appellant's "legal right or entitlement" qualify for standing purposes. The Director seizes on the reference, in those standing decisions, to the Board and court's use of the word "interest." According to the Director, the dictionary definition of that term is: a "legal concern, title, right, (in property). . . .[31] The Director's citation to only a portion of the dictionary definition of interest is self-serving, since the full definition includes meanings other than a legal right or entitlement. In fact, even the selected portion of the dictionary definition of "interest" cited by the Director includes a "pecuniary stake."[32] Mr. Bildson, and particularly Mrs. Bildson, demonstrated that each have such a "pecuniary stake" through their eco-tourism business, and that this stake will be affected, even if not completely eliminated, by the mine.

[29] Moreover, the Board's particular use of the word "interest" shows that the Board never intended the word to be limited to a legal right or entitlement or, more generally, to limit standing to injuries to legal rights or entitlements.[33] For example, in *Ash*, the Board granted standing to an appellant to appeal an approval to use pesticides on public lands near open waters in Calgary. The Board premised the appellant's standing on proof of the potential injury to her use of those public lands.[34] Both the Director and Smoky River Coal suggest that, even if it is not distinguishable, the Board's decision in *Ash* is an aberration from prior Board decisions which have required appellants to show an injury to a legal right or entitlement in order to have standing. Again, the Board disagrees.

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31 September 4, 1998 Submission of the Director, at 3 (par. 11) (citing the Oxford Dictionary).

32 *Ibid.* at 3 (par. 11) (citing the Oxford Dictionary).

33 *See, e.g., Kostuch*, *supra* note 16, at 246, 255 (standing requires a "personal or private interest (economic, environmental, or otherwise) that will be impacted . . . by the Approval in question.").

34 *Ash and Munroe, supra* note 16, at 11-12. At the preliminary meeting, the Director's counsel attempted to distinguish the Board's decision in *Ash* on the ground that Ms. Ash owned a home in Calgary and, thus, she had a legal right or entitlement. This distinction is misplaced because, whether or not Ms. Ash owned a home, the Board believed she had standing because of her extensive use of the public lands adjacent to open waters in Calgary; the Board's decision made no mention of her home ownership. Given Ms. Ash's use of Calgary's public lands, it would not have mattered whether Ms. Ash owned a house in Calgary, or rented one, or simply lived for free in a house owned by a relative or friend, or even lived outside of Calgary.

[30] For example, in *Hazeldean*, the Board found that a community organization had standing to appeal an amended approval for a wood processing plant. The Board granted the organization standing based on its members' potential exposure to the plants' odours and possibly toxic air emissions. The Board noted that the members lived adjacent to the plant, but this fact was relevant only because it helped demonstrate that they were likely to be exposed to the plant's emissions. The Board noted that the members were "residents" of the area but, as in the *Ash* appeal, the Board never considered whether they owned their homes, rented them, or lived for free in homes owned by relatives or friends.[35]

[31] In another appeal, the Board granted standing to an appellant to appeal an approval for a hazardous waste facility. The Board noted that the appellant lived near the proposed facility and owned land in the "buffer zone" between the facility and the surrounding community. But the basis for the Board's decision was "concerns about water quality, noise . . . smells . . . and toxic spills."[36] The Board was clearly concerned with the effects of these factors on the appellant herself; it nowhere indicated that these factors were relevant only to the extent they diminished the value of the appellant's legal right to her land in the buffer zone or to her residence (the Board did not even specify what legal interest the appellant had in her residence).[37]

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35 *Supra* note 21, at 4-5. Under the logic of the Director's approach, the Board would grant standing to a person who owned or leased a home adjacent to the plant, if the person could show that the plant's emissions diminished the value of the home. Yet, the Board never considered diminished home values in *Hazeldean*. Moreover, the Director would have the Board deny standing to the same person's 85 year old mother, who also lived in the person's house but who had no legal interest in it, and even if the mother's health was more at risk from exposure to the plant's emissions than that of her child. This outcome is patently absurd and will only foster widespread public disenchantment with environmental regulators.

36 *Lorraine Vetsch, et al, v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* [1997] 22 C.E.L.R. (N.S.) 230, 242-244.

37 *See also Nick Zon et al. v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (September 26, 1997), at 8 (Appellants had standing to appeal approval for a power plant which affected a nearby lake, because the appellants lived on the lake and "use[d its] . . . environmental amenities . . .").

[32] Similarly, in *Kostuch*, the Board denied the appellant standing based on her failure to prove as a *factual* matter that her hunting and recreational uses of public resources would be injured by the approved cement plant. The Board's factual inquiry would have been unnecessary had the Board believed that those non-legal uses were insufficient, per se, for standing purposes; in fact, the Board specifically observed that the appellant's hunting and recreational uses were "potentially relevant" to her standing.[38] The Board has denied standing to appellants in several other cases based upon the appellants' failure to prove, as a factual matter, that the public resources which they used for recreation or aesthetic enjoyment, would be harmed by the projects of concern.[39] Once again, the Board's factual bases for its denial of standing in these appeals implies that the Board considered those uses to be valid uses for standing purposes, despite the appellants' lack of legal right or entitlement to the natural resources of concern. In one of these appeals, the Board specifically noted that injury to an appellant's "aesthetic enjoyment of a natural resource might be sufficient, if adequately proven, to demonstrate that the appellant has standing. . . ."[40]

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[38] *See also Graham supra* note 16, at 298 (two individuals would have standing based on injury to their personal use of natural resources near the approved hazardous waste facility, but the individuals were not valid parties to the appeal because they did not file notices of appeal).

[39] *E.g. Iwaskow*, *supra* note 16; *Vetsch, supra* note 36; *Graham, supra* note 16.

[40] *Iwaskow*, *supra* note 16, at 9 (par. 24).

[33] The Board does not intend its discussion above to mean that injury to a legal right or entitlement is irrelevant to an appellant's ability to demonstrate standing, because it *is* relevant. The point is simply that it is not a prerequisite to standing nor even, as Smoky River Coal's fall-back position would suggest, "an extremely significant factor," in demonstrating standing. What is "extremely significant" is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing.[41] Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question. Indeed, the logical conclusion of the Director's position is that someone can be physically affected by a project to the point of death, but still lack standing to appeal an approval for the project if the person does not own land, or have a lease, or licence that is also affected by the project. At the preliminary meeting following questions from the Board, the Director's counsel actually implied that a person fatally injured from direct exposure to a project's pollution would not be "affected" by the project, for purposes of the standing requirement in section 84 of the Act, although counsel admitted that the person would be "affected" in the common sense of the word. The Board believes this distinction is unwarranted--the word "affected" in section 84 should be construed by its plain meaning.

[34] The Board believes that its past use of the term "interest" in defining the bases for standing may have been somewhat confusing, given the multiple meanings of the term including, now, the legal meaning on which the Director relies. In truth, standing need not be defined in terms of an "interest" that only lawyers could define. There is nothing in section 84, or in its context within the Act, or in the overall context of the Act as illuminated by the section 2 Purposes, to indicate that the legislature intended to import the legal concept of "interest" into the standing requirement. The important point is that, in order to have standing, an appellant must be directly "affected"--i.e. harmed, impaired, or injured—by the approved project. Clearly, this may occur whether or not the appellant has identified something that may be characterized as a legal right or entitlement, which is affected by the project.[42]

4. The Meaning Of "Directly"

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41 *Carter Group, v. Director of Air and Water Approvals, Alberta Environmental Protection* (December 8, 1994), Appeal No. 94-012, at 13.

42 As shown in the example in the previous paragraph, an appellant might become deathly ill from ingesting noxious fumes from an approved project while walking on public lands adjacent to the project. The appellant would clearly be "impaired" by the project and thus "affected" by it, even though the appellant lacked a "legal interest" in the public land or the airshed above it.

[35] The Board has long interpreted the term “directly” to mean that there must be an unbroken chain of causation between the project in question and a harm to the appellant.[43] Obviously, the stronger the links in the chain--i.e. the greater the proof that the appellant will be harmed and that the harm stems from project in question--the more likely the Board will find that an appellant has standing. However, the Board has not construed “directly” so narrowly as to preclude standing simply because there are intermediate links between the project and the appellant’s harm. Thus, for example, an appellant whose health was at risk from consuming fish that were exposed to pollution from a project, might have standing to appeal an approval for the project, even though the appellant was not exposed “directly” by personally drinking the effluent or breathing the emissions from the project.

[36] As noted in paragraphs 17 and 24 above, Mr. Bildson has presented several chains of causation to show that, on the whole, he will be “directly affected” by the B-2 mine, if the mine has a detrimental effect on the aesthetic value of the area and especially on the health of the area’s waters and wildlife. The Board believes that those chains are not particularly attenuated and, in particular, that Mr. Bildson uses fish, wildlife, water, and alpine resources which are proximate to the B-2 pit.

[37] In his written submission, the Director argues that Mr. Bildson has not established the requisite “causal connection,” in part, because the Director mistakenly believes that the connection must be to a “unique” interest.[44] In a section of his submission entitled “Causal Connection,” the Director asserts the causal connection rule, but makes no real attempt to rebut or discredit Mr. Bildson’s factual claims and, in fact, raises legal issues wholly unrelated to the causal connection component of standing.[45] In its written submission, Smoky River Coal similarly asserts that Mr. Bildson’s evidence “fails to demonstrate . . . that he will suffer specific harm . . . that is directly attributable to approvals under appeal.” However, the company’s submission provides no evidence to support, nor even makes any attempt to explain, this conclusory assertion.[46]

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43 *E.g., Kostuch*, *supra* note 16, at 257 (“‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.”).

44 September 4, 1998 Written Submission of the Director, at 3 (par. 10(e)).

45 *Ibid.* at 4 (pars. 16-19).

46 Submission of Smoky River Coal Ltd., at 7 (par. 19).

[38] At the preliminary meeting, a company representative testified that the B-2 mine did not represent an actual increase in coal production; it was meant simply to replace other pits nearby which the company had already retired, or would soon retire.[47] It does not necessarily follow, however, that the B-2 pit will not present any new or additional environmental harm or risk of harm beyond that posed by the existing pits. The B-2 pit is clearly a new area and, together with the roads leading to the pit, increases the area that will be affected by the company's overall mining operation and may, in turn, increase the volume of pollution discharged from, and the hydrological changes caused by, Smoky River Coal's overall mining operation.[48]

5. The Level Of Certainty Of Proof Of Harm

47 Before and during the preliminary meeting, the parties provided several maps of the area and the company, in particular, provided photos of the area from Caw Ridge. Although helpful to the Board, those exhibits did not detract from Mr. Bildson's proof of standing.

48 *See* Alberta Environmental Protection's April 2, 1998, "Submission" to the EUB, at 1 (par. 1) ("potential for the project to affect caribou migration"); 1 (par. 6) ("Additional mining activity in the headwaters of Beaverdam Creek increases the potential for adverse effects on fisheries and aquatic resources in the creek."); 2 (par. 9) (recommending that the settling pond be increased to handle "runoff from both the existing and the proposed B2 development"); 2 (par. 10) (if the company's predictions regarding surface water flows "fail to materialize, the aquatic resources could be affected as a result of increased peak flows, reduced flow during critical time periods and the loss of groundwater upwellings, a critical component for the production of bull trout."); 3 (par. 13) ("There is limited hydrometric data in the vicinity of the project area to quantify the potential impacts on surface water flows. . . . Changes in surface water flows . . . have the potential to impact fisheries resources."); 3 (par. 14) (need for monitoring "[g]iven the potential impacts to fisheries downstream of the project. . . ."); 3 (par. 17) (referring to the "additional disturbance from the B2 Pit" in the context of existing problems in complying with approval limits on Total Suspended Solids, elevated levels of which "can affect aquatic resources, fish and fish habitat.") 3 (par. 18) ("increased disturbance area and runoff from the B2 Project area."); 4 (par. 21) ("There is potential for increased nitrate concentrations in Beaverdam Creek and these levels may exceed the Alberta guideline. . . ."); 4 (par. 24) ("SRCL proposes to disturb land that is classified as alpine terrain which is difficult to reclaim.").

[39] In paragraph 20 above, the Board explained that the "preponderance of evidence" standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will *in fact* be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a "potential" or "reasonable probability" for harm.[49] The Board believes that the Department's submission to the EUB, together with Mr. Bildson's own letters to the EUB and to the Department, make a *prima facie* showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively.[50] Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

CONCLUSION

[40] The Board concludes that Mr. Bildson has satisfied the requirements in section 84(1)(a)(iv) of the Act. On the facts of this case, he filed a statement of concern "in accordance with section 70," and he has satisfied his burden of proving that he is "directly affected" by the Approvals which he has appealed.

[41] The Board will now proceed to a preliminary meeting on the third issue, i.e., whether or not the Board should consider Mr. Bildson's appeal in light of the previous EUB proceedings, for purposes of the restriction in 87(5)(b)(i) of the Act.

Dated on October 19, 1998, at Edmonton, Alberta.

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Dr. William A. Tilleman

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Dr. Steve E. Hrudey

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Dr. Ted W. Best

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49 *Ash and Munroe, supra* note 16, at 11; *Zon, supra* note 37, at 8 n.1; *Vetsch, supra* note 36, at 239; *Graham, supra* note 16, at 296; *see also Iwaskow, supra* note 16, at 10 ("reasonable risk" of harm).

50 In making this finding, the Board expresses no opinion as to whether that potential risk is acceptable or, more generally, whether the socio-economic advantages of the B2 mine expansion outweigh its environmental risks. The issue here is simply whether one individual--Mr. Bildson--is "directly affected" by the mine so that he can (barring one other preliminary hurdle which the Board has not yet addressed) prompt this Board to consider his environmental concerns.