ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing by Written Submission - Appellant - May 29, 2000
Director - June 9, 2000
Appellant's Reply - June 21, 2000
Date of Report and Recommendations - July 20, 2000

IN THE MATTER OF sections 84, 85, 87, 92 and 93 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

- and -

IN THE MATTER OF an appeal filed on June 30, 1999, by McCain Foods (Canada) a Division of McCain Foods Limited with respect to Approval No. 72062-00-00 issued to McCain Foods (Canada) a Division of McCain Foods Limited on June 5, 1999 by the Director, Prairie Region, Alberta Environment.

Cite as: McCain Foods (Canada) v. Director, Prairie Region, Alberta Environment.

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HEARING PANEL		Dr. William A. Tilleman Dr. John P. Ogilvie Dr. M. Anne Naeth
PARTIES	Appellant:	Mr. Shawn Denstedt, Counsel, Bennett Jones, representing McCain Foods (Canada) a Division of McCain Foods Limited.
	Director:	Mr. Martin Chamberlain, Counsel, Alberta Justice, representing Mr. Alan Pentney, Director, Prairie Region, Alberta Environment.

I. BACKGROUND

[1] McCain Foods (Canada) a Division of McCain Foods Limited ("McCain") has appealed Approval No. 72062-00-00 issued on June 5, 1999 by Mr. Alan Pentney, Director ("Director") of the Prairie Region of Alberta Environment. The Approval, issued under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 ("*EPEA*" or the "Act"), allows McCain to construct, operate and reclaim a vegetable processing plant near Chin, Alberta, in the County of Lethbridge. While the Approval refers broadly to a vegetable processing plant, the Board understands that the plant is specifically for processing potatoes, primarily to produce frozen french fries.

[2] McCain appeals only Condition 4.2.7 of the Approval, which provides a general prohibition on harmful air emissions from McCain's plant. Specifically, that Condition provides:

> "The approval holder shall not emit an air contaminant or cause to be emitted an air contaminant that causes or may cause any of the following:
>
> (a) the impairment, degradation or alteration of the quality of natural resources; or
> (b) material discomfort, harm or adversely affect the well being or health of a person; or
> (c) harm to property or to plant or animal life."

[3] In its Notice of Appeal, McCain requested that this Condition be deleted because, in McCain's view, it exceeds the Director's jurisdiction under *EPEA*. According to McCain, the Condition exceeds the Director's jurisdiction because it prohibits the release of harmful air emissions that cause adverse effects whereas section 98[1] of *EPEA* only prohibits the release of harmful air

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[1] EPEA Section 98:
(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
(3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval or the regulations.

emissions that cause significant adverse effects. The Board disagrees with McCain because section 98 does not provide a direct standard for the Director's choice of conditions to be included in approvals issued under section 65 of *EPEA*. This interpretation and the Board's related conclusions are explained below.

II. PROCEDURAL HISTORY OF THIS APPEAL

[4] This appeal has taken a circuitous course, in part, due to an important threshold question raised by the Director regarding the Board's jurisdiction to hear this appeal and, more recently, due to McCain's expansion of the narrow legal issue raised in its Notice of Appeal.

[5] After receiving McCain's Notice of Appeal, the Board followed its standard practice of requesting that the Director provide the Board with a copy of the Director's decision-making record (the "Records").

[6] The first response to the Board's request came, not from the Director, but from McCain, who faxed the Board a copy of a letter it sent to the Director, which stated that "the only relevant piece of information to be put before the Environmental Appeal Board is the Approval itself."[2] McCain's letter stated that none of the Director's technical evidence was required for the Board to decide McCain's appeal because it raised only a very narrow legal issue regarding the Director's jurisdiction to impose Condition 4.2.7. In another letter sent directly to the Board, McCain confirmed that its appeal raised only a narrow legal issue and recommended, with the Director's concurrence, that the appeal be handled through written submissions only and without oral representations from counsel or witness testimony. The Director subsequently sent his own letter confirming his agreement with McCain's proposed procedural approaches based on his view of the narrow scope of McCain's appeal.

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[2] Bennett Jones' letter of August 25, 1999 to Alberta Justice and copied to the EAB.

[7] The Board repeated its request that the Director provide the Records. The Director subsequently provided the Records, but concurrently submitted a letter asserting that the Board lacked jurisdiction to decide the appeal. According to the Director, because McCain's appeal raised solely a question of law, the matter should properly be considered in the first instance in a judicial review proceeding brought directly before the Court of Queen's Bench.

[8] The Director expanded on this position in a written submission to which McCain responded.[3] Following its review of those submissions, the Board informed the parties by letter that it had jurisdiction to decide the legal issue raised by McCain's appeal and that the appeal should proceed. The Board also stated that it would provide reasons for this conclusion in its final report to the Minister of Environment.[4] The Director nevertheless requested that the Board provide a rationale for its conclusion, to which the Board responded that it substantially adopted the reasons in McCain's submission, while reserving the Board's right to provide its own reasons at a later time.

[9] The Director sought judicial review of the Board's decision that it had jurisdiction to hear the appeal. The Alberta Court of Queen's Bench dismissed the Director's judicial review application, concluding that *EPEA* gave the Board broad powers on appeal and that the Board had provided a sufficient explanation of its decision.[5] Following the Court's decision, the Director and McCain provided written submissions[6] on the merits of McCain's appeal. Once again, both parties agreed to forego an oral hearing.

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[3] Preliminary Matter Submission of the Director dated November 9, 1999. Preliminary Matter Submission of McCain Foods (Canada) dated November 16, 1999. Preliminary Matter Reply Submission of Director (by letter) submitted by Alberta Justice on November 23, 1999.

[4] The Board's function in an appeal of an approval is to submit a written report to the Minister of Environment with the Board's recommendations. The Minister then has broad authority to confirm, reverse, or vary the Director's decision.

[5] *Alberta (Environment) v. McCain Foods (Canada) Ltd.*, [2000] A.J. No. 469 (Alta. Q.B.), Murray J.

[6] Submission of McCain Foods (Canada) ("McCain's Submission") dated May 29, 2000. Submission of the Director ("Director's Submission") dated June 9, 2000. Reply Submission of McCain Foods (Canada) ("McCain's Reply Submission") dated June 21, 2000.

III. ANALYSIS

A. The Scope of Issues and the Board's Standard of Review

[10] In its written submission on the merits of this appeal, McCain lists the following three issues as sub-sets of the overall issue of whether the Director erred by including Condition 4.2.7 in the Approval:

> "(a) Does the imposition of Condition 4.2.7 exceed the jurisdiction granted to the Director pursuant to the Act?
>
> (b) Is the imposition of Condition 4.2.7 an unreasonable exercise of the discretion granted to the Director pursuant to the Act?
>
> (c) Did the Director commit a jurisdictional error by imposing Condition 4.2.7 without evidence regarding general air emission requirements?"[7]

[11] The Board has an initial concern about McCain's identification of these issues. Issue (a) matches the narrow appeal ground listed in McCain's Notice of Appeal. Issues (b) and (c) raise questions of fact and policy that extends beyond McCain's primarily legal question of whether the Director exceeded his jurisdiction under *EPEA* by adopting Condition 4.2.7. These fact-based jurisdictional issues were not raised by McCain in the early stages of this appeal and must be viewed in light of McCain's insistence that the appeal record be limited to the Approval document and that it was unnecessary to convene an oral hearing.

[12] McCain's expanded list of issues was unexpected given that it was the narrow, primarily legal, nature of McCain's sole appeal ground that prompted the Director to argue that McCain's appeal ought to be decided in the first instance by the Court of Queen's Bench.[8]

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[7] McCain's Submission at page 2, paragraph 6.

[8] *Alberta (Environment) v. McCain Foods (Canada) Ltd.*, *supra.* at paragraph 33.

[13] The Board has broad discretion to decide which of an Appellant's issues it should address.[9] Accordingly, the Board will address issues (b) and (c) in light of the following additional factors:

(1) McCain's own analysis on these issues closely resembles its legal analysis for issue (a);

(2) the Board did not accept McCain's position that the Board's review record should be limited to the Approval document;

(3) the Director has not objected to McCain's inclusion of issues (b) and (c); and

(4) even McCain's jurisdictional issue might require the Board to consider factual and policy matters, as observed by the Court of Queen's Bench.[10]

[14] The Board must also decide what standard of review to apply in considering these issues or how much deference should be given to the legal, policy and factual bases for the Director's decision to adopt Condition 4.2.7. The Board has previously stated in other decisions that it will recommend that the Minister confirm the Director's approval decisions if those decisions best serve the public interest viewed in light of the purposes of the Act and other provisions. In other words, the Board will generally not defer at all to the Director's bases for the decisions at issue.[11] The

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[9] This discretion is provided by section 87(2) of *EPEA*, which states that the Board "may ... determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal ...." See *Environmental Appeal Board Regulation*, AR 114/93, section 13(d). (The Board has broad discretion in setting hearing issues.) See *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 22 C.E.L.R.(N.S.) 141 (Alta.Q.B.), Medhurst J. and *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 23 C.E.L.R.(N.S.) 165 (Alta.C.A), Berger J.A.

[10] *Alberta (Environment) v. McCain Foods (Canada) Ltd.*, *supra*. at paragraph 24. (If the Board concludes that section 98 of *EPEA* provides the operable standard for approval conditions, the Board must then consider issues of mixed fact and law in determining whether Condition 4.2.7 satisfies the section 98 standard.)

[11] *Ash v. Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection (Re:* City of Calgary), Appeal No. 97-032, June 8, 1998, at page 9, paragraph 22. As explained in *Ash*, this non-deferential review is appropriate given: the Board's *de novo* review of the Director's factual findings; the Board's responsibility for interpreting *EPEA* and accompanying regulations; the Board's own environmental expertise and its function of making recommendations to the Minister; and Court's generally deferential review of the Board's findings. *Ibid*. at pages 7-9, paragraphs 17-22. The Court's recent decision in the McCain appeal emphasizes

Board also stated that some degree of deference is inevitable as a practical matter where the Board uses the Director's own decision-making record as the starting point for its *de novo* review.[12] The Board will thus apply a deferential review of the factual and policy aspects of McCain's issues (b) and (c), given the very limited non-*de novo*, scope of the Records and McCain's insistence that the Records should have been even further limited to the Approval.

B. Issue (a): Did the Director exceed his jurisdiction by including a general air emission prohibition in the Approval, when section 98 of *EPEA* provides a general prohibition of substance releases which cause significant adverse effects

[15] McCain's position actually includes two somewhat overlapping sub-issues that the Board will address separately, although McCain's own submission does not clearly distinguish them.

Does *EPEA* section 98 preclude the Director from setting general approval conditions

[16] McCain's position is that while the Director has broad discretion to set approval conditions, that discretion does not include setting general substance release conditions, because the Alberta Legislature has occupied that regulatory field by adopting the general prohibition in section 98.[13]

[17] In the Board's view, McCain's argument fails because section 98 does not purport to govern the scope of approval conditions but, is made expressly inapplicable to approval conditions. Section 98 applies to a release that is not provided for in an approval or the regulations. (See section 98(3).)

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the Board's functions and, thus, indirectly confirms the Board's non-deferential standard of review. See *Alberta (Environment) v. McCain Foods (Canada) Ltd.*, *supra*. at paragraphs 20-28.

[12] *Ash, supra*. at page 9, paragraph 23.

[13] McCain's Submission, pages 6-8, paragraphs 15-25.

[18] Part 2, Division 2 of *EPEA* (sections 58 to 82) expressly governs the Director's issuance of approvals. Sections 58 and 59 prohibit the commencement of certain specified activities without first obtaining an approval. Section 65(1) states that the Director "may issue or refuse to issue" an approval. This provision grants the Director an extremely broad discretion in deciding whether to even issue an approval. Consistent with this broad delegation of legislative authority, section 65(2) provides that the Director may issue an approval "subject to any terms and conditions the Director considers appropriate."[14]

[19] None of these broad grants of discretion to the Director expressly distinguish between specific and general emission limits. Nor can such a distinction be reasonably inferred from the plainly broad terms of section 65, which give the Director wide discretion to decide the appropriate kinds of conditions to include in approvals. No other provision of *EPEA* Part 2, Division 2 supports the distinction that McCain now urges between specific and general emission limits.

[20] Of course, McCain's legislative interpretation is based, not on any provision in Part 2, Division 2, but on section 98. As stated, McCain's interpretation lacks support from any of the provisions in Part 2, Division 2 of *EPEA*. Nothing in section 98 cures this flaw in McCain's interpretation. In fact, the express terms of section 98 make it clear that McCain's interpretation is in error. Section 98 does not expressly purport to preclude the Director from adopting general emission limits through the exercise of his otherwise broad discretion under section 65(2). The section 98 prohibitions may be equivalent to the subject of approval conditions, but this similarity is hardly sufficient to interpret section 98 as precluding the Director from adopting general emission limits.

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[14] The Director's broad discretionary authority under section 65(2) is limited by section 82(1)(a), which grants the Lieutenant Governor in Council authority to adopt regulations prescribing "conditions on which approvals ... may be granted and to which they are subject ...." But even this limitation is relatively narrow, because section 65(3) expressly allows the Director to adopt approval conditions that are more stringent than those prescribed in those regulations. In its submission (page 8, paragraph 24), McCain argues that the Director's authority under section 65(3) does not authorize the Director to set general emission limits, because the limits in the Substance Release Regulation (A.R. 124/93) are expressed as specific limits. McCain's analysis fails to recognize that a general approval condition could be more stringent than a specific regulation provision, so the specific nature of the regulations does not by itself preclude the Director from setting additional general conditions.

[21] Other parts of section 98 make it clear that the Legislature did not intend this overlap to have any preclusive effect. Subsection 98(3) provides that the prohibitions in that section apply "only where the amount, concentration, level or rate of release of the substance is not authorized by an approval ...." Thus the section 98 prohibitions were intended to fill a gap in the regulatory approval framework, not to create a gap.[15] (The most obvious example of such a gap is a substance release from an activity that is not required to obtain an approval.) The gap filling function of the prohibitions in section 98 is confirmed by the Legislature's title for section 98: "Prohibited release where no approval or regulation" (emphasis added). The gap filling role of the prohibitions in section 98 is further confirmed by:

(1) the plain terms of section 97, which prohibits the release of substances which contravene approval conditions; and

(2) section 96(2), which states that the terms in sections 99 through 101 apply only to substance releases that are not authorized by an approval.

[22] This gap filling function is far different from the gap creating function, which McCain reads into the plain terms of section 98. Thus, McCain wrongly implies that the prohibitions in section 98 were intended to define the boundaries of the Director's discretion under section 65 or to specifically define the appropriate limit for general air emissions for all non-approved and approved-facilities alike.[16] By its plain terms, section 98 was intended to apply to emissions that were not otherwise covered by applicable approval conditions.[17]

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[15] To be clear, the Board believes that in section 98(3) amount, concentration, level and rate of release are sufficiently broad to encompass not only specific emission limits but also general emission limits like those prescribed in Condition 4.2.7.

[16] McCain's Submission at page 8 paragraph 25.

[17] For the same reason, *Canada (Attorney General) v. Public Service Alliance of Canada* (1991), 80 D.L.R. (4th) 520 (S.C.C.) (cited in McCain's Submission at page 6 paragraph 17) is inapplicable. In the *Public Service Alliance* case, a majority of the judges held that the administrative body lacked authority to determine the scope of the statutory term "employee" because Parliament defined that term expressly in the definition section of the statute and that definition clearly applied to the statutory provision at issue. Here, by contrast, section 65 of *EPEA*, read together with the Act's purpose section (section 2), plainly gives the Director broad discretion to define the appropriate approval

conditions and section 98 is expressly not applicable to emissions that are covered by a section 65 approval.

[23] McCain also points to section 2 of *EPEA*, the Act's general purpose section, as providing additional legislative context for limiting the Director's otherwise plainly broad discretion in section 65 to adopt appropriate approval conditions.[18] The Board agrees with McCain that the Legislature's list of environmental and other social objectives in section 2 provide a context for defining the appropriateness of approval conditions adopted under section 65.[19] However, nothing in these broad legislative objectives precludes the Director from deciding to adopt general emission limits in an approval.[20]

[24] Much of McCain's legal argument focuses, not on the plain wording of *EPEA,* but on McCain's view that determining general emission limits is a policymaking function which, in McCain's view should more appropriately be exercised by the Legislature.[21] The Board is not persuaded by this argument. Given the Director's broad discretion under section 65, bounded by the Act's environmental public interest objectives in section 2, the Director must make far-reaching policy judgements in deciding whether to issue approvals and in deciding what approval conditions are appropriate. The Director is also required to make numerous policy decisions when setting the specific emission limits that McCain agrees the Director has authority to set.[22] Whether the Director

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18 McCain's Submission at pages 6-7, paragraph 18.

19 *Bildson v. Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection (re: Smoky River Coal Limited),* EAB No. 98-230-D2, December 8, 1998, at pages 12-13, paragraphs 29-30. (The Director's broad discretion under section 65 is limited by the environmental public interest objections in section 2.) See *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 at page 211 (S.C.C.). (Referencing the statute's purpose section in defining limits of administrative discretion.)

20 The Board might have more of a concern about whether the Act's ambitious objectives were satisfied if the Director had adopted a general emission limit and not included specific emission limits, because general emission limit are generally more difficult to enforce than specific emission limits. However, this concern is not applicable here because McCain's Approval contains many conditions that McCain would describe as specific limits.

21 McCain's Submission at pages 6-8, paragraphs 18-22.

22 Examples of these policy decisions include: choosing acceptable levels of risk; choosing acceptable levels of costs of treating various waste streams in deciding appropriate pollution control requirements; and deciding how much data an approval applicant must collect regarding the nature of environmental effects from various emissions; and deciding whether the potential benefits of a pollution control technology or emission limit are outweighed by their cost or whether to even conduct such a traditional cost/benefit analysis in determining how best to promote the overall public

makes these policy determinations on an individual basis or on a generic basis, the Act's broad terms gives the Director considerable policymaking responsibilities for approvals.

[25] Even if the significant adverse effect standard in section 98 did directly govern the Director's choice of appropriate approval conditions under section 65, as McCain suggests, the breadth of that standard would itself give the Director broad policymaking jurisdiction. The Director must make numerous policy judgements to translate a significance standard into appropriate approval conditions. These judgements include deciding the appropriate mix of specific and general approval conditions necessary to prevent significant adverse emissions.

[26] The broad policymaking functions granted to the Director are characteristic of Canadian environmental laws.[23] Environmental protection advocates have questioned the propriety of this broad delegation of legislative powers, but the fact remains that this classic Canadian approach is a legislated approach over which we have no authority. If McCain is dissatisfied with this approach, their remedy is to seek legislative amendments. The Board is bound to uphold the terms of *EPEA*.

[27] McCain's criticism of the Director's adoption of general approval conditions fails to acknowledge their practical utility in providing a back up function for specific conditions by accounting for the cumulative effects of individually regulated pollutants and of fugitive emissions that are difficult to control directly. Ironically, the availability of general approval conditions is to the benefit of approval holders like McCain, because these conditions allow regulators to issue approvals without first requiring the approval holder to obtain additional hard-to-collect data and other information necessary to establish specific emission limits to address cumulative effects and

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interest objectives of the Act.

[23] See *R. v. Hydro-Quebec*, 151 D.L.R. (4th) 32 at pages 105-106, paragraph 134 (S.C.C.).

fugitive emissions.[24] Thus, the Director's adoption of Condition 4.2.7 in lieu of attempting to quantify and specifically regulate cumulative emissions likely saved McCain considerable time and effort in obtaining its Approval and, potentially, avoided the possibility that the Director might have denied McCain's application for an approval altogether if the required information on cumulative effects was simply unobtainable.

[28] In sum, the Board views the Director's adoption of general emission limits as the same kind of policymaking function which the Director must exercise in setting other approval conditions. The legislators have written and passed *EPEA* with terms that plainly authorize the Director to adopt general emission limits and, for that reason, McCain's jurisdictional argument fails.

Can the Director adopt general emission limits that are potentially more stringent than the general "no significant adverse effect" standard in section 98

[29] Part (if not all) of McCain's concern with Condition 4.2.7 is that it appears to be more stringent than the general emission standard in section 98, because Condition 4.2.7 prohibits emissions which cause harmful or adverse effects while section 98 prohibits only those adverse effects that are significant.[25]

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[24] McCain misses this point in arguing, in its third issue, that the Director lacked sufficient evidence to justify adopting general Condition 4.2.7. The general Condition is a more efficient alternative than collecting the additional data needed to establish a suite of specific limits that would more completely account for the full potential range of substances that might be emitted from McCain's plant.

[25] As McCain notes, Condition 4.2.7 prohibits emissions that simply "alter" the environment without expressly tying such alteration to any adverse or harmful effect. However, the Board understands McCain's interpretation of this Condition as applying only to adverse or harmful alterations. A Court in an action to enforce this Condition would also likely construe the Condition as applying only to harmful or adverse alterations. See *R. v. Dow Chemical Canada Ltd.* (2000), 32 C.E.L.R.(N.S.) 279 at page 290 (Ont. C.A.). (Accepting availability of the *de minimus* defense to violations of Ontario pollution law.) See *R. v. Shell Canada Ltd.* (2000), 32 C.E.L.R.(N.S.) 117 at page 120 (Alta. Prov. Ct.), James Prov. J. (Rejecting the *de minimus* defense only because evidence showed that the defendant's *Clean Water Act* violations were more than trivial.) See *Dow Chemicals Canada Ltd.* (2000), 32 C.E.L.R.(N.S.) 279 at page 292 (Rejecting defense that strict enforcement of the legislative provision at issue would lead to absurd results based on the Court's ability to construe provision as precluding such results.)

[30] The Board questions the practical import of this linguistic distinction because the concepts of adverse and significant are both so broad that likely any adverse effect could also be defined as significantly adverse, especially when adverse effects are viewed in a cumulative context.[26]

[31] Even assuming that significantly adverse is less stringent than adverse, the Board does not read section 98 as intending to provide a standard for the Director's approval decisions under section 65. The Legislature clearly clarified that section 98 was intended to fill gaps in the approval framework, not to set framework parameters. Nor does the Board see any fundamental problem with allowing the approval conditions to be more stringent than the gap filling or non-approval standard in section 98. This dichotomy is analogous to and consistent with the Legislature's express provision, in section 65(3), allowing the Director to set approval conditions that are more stringent than the generic limits set in the regulations.

C. Issue (b): Is the Director's adoption of Condition 4.2.7 an unreasonable exercise of discretion

[32] Most of McCain's reasoning on this issue stems from its basic view that section 98 of *EPEA* should provide the sole source of general limits on emissions from McCain's plant. The Board disagrees with this view for the reasons provided in Part B above.

[33] McCain raises the additional point, however, that unlike the legislative process leading to the adoption of section 98 of *EPEA*, the Director's adoption of Condition 4.2.7 did not result from public consultation and, thus, is inconsistent with the public consultation objectives in

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[26] *Tetzlaff v. Canada (Minister of the Environment)* (1990), 4 C.E.L.R.(N.S.) 201 at page 215 (F.C.T.D.) Muldoon J. *affirmed* (1992), 6 C.E.L.R.(N.S.) 89 (F.C.A.). (Viewing significant environmental impacts as synonymous with moderate or not insignificant impacts.) *R. v. Colt Engineering Corp*. (1999), 32 C.E.L.R.(N.S.) 172 at page 176 paragraph 29 (Alta. Prov. Ct.) Davie Prov. J. (Referring to adverse effects as the operable standard under section 98(2) in prosecution for violating that section.)

section 2 of *EPEA*.[27] The Board is not persuaded by this argument. The Director's decision-making file reveals that his staff kept McCain or its consultants well informed during the approval process. In particular, the Director's staff provided McCain with the draft Approval containing Condition 4.2.7, and reviewed and responded to McCain's criticism of that condition in writing.[28] That the Director ultimately disagreed with McCain's criticism is, in itself, insufficient proof that McCain was not provided sufficient input. Whether or not the Director kept other members of the public adequately informed, the Board sees no shortcoming in McCain's ability to participate in the approval process.

[34] Thus, the Board finds Condition 4.2.7 to be a reasonable exercise of the Director's discretion from the standpoint of McCain's concerns. The Board believes this conclusion is particularly warranted in light of the deferential review and the procedural history of this appeal.

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[27] McCain's Submission at pages 10-11, paragraphs 32-35.

[28] Director's Records: Tab 74 (draft Approval sent to McCain for its input), Tab 80 (McCain's response), and Tab 81 (the Director's reply to McCain's response).

D. Issue (c): Did the Director adopt Condition 4.2.7 without sufficient evidence?

[35] McCain's submissions on issue (c) stem largely from the mistaken presumption that section 98 of *EPEA* should be the only source of general emission standards. McCain suggests that the Director made up the justification that this Condition is necessary to address the cumulative effects of emissions from McCain's plant after the fact.[29] The Board rejects this challenge because, given the *de novo* nature of the Board's review,[30] the Director is allowed to raise justifications in the appeal that were not made explicit during the approval issuance process. The Board agrees that the Director should strive to offer pre-issuance justifications, and the Board itself might give after the fact justifications special scrutiny. However, the Board is unconcerned by the Director's relative silence prior to this appeal. The justifications for Condition 4.2.7 are evident and the Board understands that Condition 4.2.7 is an approval condition that the Director inserts in all approvals

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29 McCain's Reply Submission at page 3, paragraph 9.

30 See *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 22 C.E.L.R.(N.S.) 141 (Alta.Q.B.), Medhurst J. and *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 23 C.E.L.R.(N.S.) 165 (Alta.C.A), Berger J.A.

for large industrial activities like McCain's plant. Under these circumstances, the Board is not convinced that further justification was warranted at the pre-issuance stage.

[36] McCain also argues that there is no evidence to suggest that cumulative effects are a concern.[31] The Board views this argument with skepticism in light of McCain's original position that the Approval should be the only evidence put before the Board. The Board disagrees with McCain's position based on its review of the Director's decision. Condition 4.2.7 is plainly intended to address cumulative effects should they turn out to be a problem. From this perspective, the Director does not need to have evidence of cumulative effects prior to taking this proactive step. If there was a need to regulate individual emissions from McCain's plant, it is hard to imagine why the cumulative effects of all of those emissions would not also need to be addressed. Evidence regarding individual emissions is likely sufficient to warrant at least a general prohibition aimed at dealing with the cumulative effects of those individual emissions, should these effects occur.

[37] McCain's final argument with the Director's cumulative effects justification is that section 98 can deal with any such effects, even if that section does not apply automatically.[32] This argument has some threshold appeal, but loses force on closer examination. As previously mentioned, section 98 applies, per subparagraph (3), only where the amount, concentration, level or rate of release of the substance is not authorized by an approval. Absent Condition 4.2.7, if McCain's cumulative emissions started causing McCain's neighbours to become ill, but McCain's individual pollutant emissions were within the specific limits set for those emissions, then McCain might argue that its cumulative emissions were authorized by the Approval and, thus, the general prohibition in section 98 was inapplicable. Thus, McCain might avoid liability under section 98 for harmful cumulative emissions based on pollutant-specific emissions that were never intended to account for cumulative (multi-pollutant) effects. To avoid facing this potential shortcoming, the

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31 McCain's Reply Submission at page 3, paragraph 10.

32 McCain's Reply Submission at pages 3-4, paragraph 11.

legislation gives the Director the ability to ensure that all applicable standards for McCain's plant (specific and general standards) were contained in the Approval, rather than having some standards in the Approval and others only in legislation.

[38] While taking aim at the Director's cumulative effects justification, McCain's submissions do not appear to address the Director's other point, that Condition 4.2.7 is needed to address fugitive emissions. Condition 4.2.6 requires McCain to control its fugitive emissions in accordance with Condition 4.2.7. The general prohibition in 4.2.7 provides a limit or target for McCain's control of fugitive emissions. Without that limit in 4.2.7, the requirement to control fugitives in Condition 4.2.6 would be meaningless. Applying a very limited deferential standard of review in light of the abbreviated nature of this appeal, the Board is satisfied with the Director's presumption that fugitive emissions need to be controlled.

[39] McCain's final point is that, with a broadly worded general limit like that in Condition 4.2.7, McCain "would be unable to determine if it was in compliance with its Approval and would be at the mercy of the Director's discretion."[33] The Board believes section 98, McCain's preferred general limit, provides a similarly broad and ambiguous compliance target. The Board is particularly unpersuaded by McCain's concern because, without any required program to regularly monitor the effects of McCain's overall emissions, Condition 4.2.7 provides a relatively weak enforcement tool.

IV. RECOMMENDATIONS

[40] The Board recommends that the Minister of Environment dismiss the appeal by McCain and confirm the Director's adoption of Condition 4.2.7.

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[33] McCain's Reply Submission at page 6, paragraph 19.

[41] Attached for the Minister's consideration is a draft Ministerial Order implementing this recommendation.

[42] Finally, with respect to section 92(2) and 93 of the *Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister by the Board be sent to the following parties:

- McCain Foods (Canada) a Division of McCain Foods Limited, represented by Mr. Shawn Denstedt, Counsel, Bennett Jones.
- Mr. Alan Pentney, Director, Prairie Region, Alberta Environment, represented by Mr. Martin Chamberlain, Counsel, Alberta Justice.

Dated July 19, 2000, at Edmonton, Alberta.

"original signed by"

Dr. William A. Tilleman

"original signed by"

Dr. John P. Ogilvie

"original signed by"

Dr. M. Anne Naeth

V. EXHIBITS

1. Written Submissions of the Parties.
   - A. Submission of McCain Foods (Canada) dated May 29, 2000.
   - B. Submission of the Director dated June 9, 2000.
   - C. Reply Submission of McCain Foods (Canada) dated June 21, 2000.

VI. DRAFT ORDER

Ministerial Order
/2000

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3.

Order Respecting EAB Appeal No. 99-138

I, Halvar Jonson, Minister of Environment, pursuant to s.92(1) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 hereby confirm the decision of the Director and dismiss the appeal in the matter of EAB Appeal No. 99-138.

Dated at the City of Edmonton, in the Province of Alberta, this _____, day of _____, 2000.

_____

Halvar Jonson
Minister of Environment

ALBERTA ENVIRONMENT

Office of the Minister

Ministerial Order
75/2000

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3.

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Dated at the City of Edmonton, in the Province of Alberta, this 31 day, of August, 2000.

Halvar Jonson
Minister of Environment

228 Legislature Building, Edmonton, Alberta, Canada T5K 2B6 Telephone 780/427-2391 Fax 780/422-6259