ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting – February 7, 2001
Date of Decision – March 20, 2001

IN THE MATTER OF Sections 84, 85, 85.1, 87 and 89 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

-and-

IN THE MATTER OF an appeal filed by Mr. Henry Desjarlais, on behalf of the Metis Nation of Alberta Zone II Regional Council, and an appeal filed by Ms. Janet Hutchison, counsel for the Metis Nation of Alberta Zone II Regional Council, with respect to Approval No. 136570-00-00 issued under the *Environmental Protection and Enhancement Act* by the Director, Bow Region, Environmental Service, Alberta Environment to AEC Pipelines Ltd. for the construction and reclamation of a pipeline being the Foster Creek Pipeline Project.

Cite as: *Metis Nation of Alberta Zone II Regional Council* v. *Director, Bow Region, Environmental Service, Alberta Environment* re: *AEC Pipelines Ltd.*

PRELIMINARY MEETING
BEFORE

Dr. William A. Tilleman, Chair
Dr. John P. Ogilvie
Mr. Ron V. Peiluck

APPEARANCES

Appellants:	Metis Nation of Alberta Zone II Regional Council represented by Ms. Janet Hutchison and Ms. Gloria Hammermeister, Chamberlain Hutchison.
Approval Holder	AEC Pipelines Ltd. represented by Mr. Shawn Munro and Mr. Brad Gilmore, Bennett Jones.
Department:	Director, Bow Region, Environmental Service, Alberta Environment represented by Ms. Charlene Graham, Alberta Justice.
Board Staff:	Gilbert Van Nes, General Counsel and Settlement Officer; Sheryl Kozyniak, Executive Director and Registrar of Appeals; and Valerie Higgins, Hearing Officer.

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I. INTRODUCTION

[1] This decision deals with two Notices of Appeal filed on behalf of the Metis Nation of Alberta Zone II Regional Council (the "Appellants") in relation to AEC Pipelines Ltd.'s (the "Approval Holder') Foster Creek Pipeline Project (the "Project") near Cold Lake in the Province of Alberta. The question before the Board is the Appellants' ability to file their Notices of Appeal.

[2] The issues addressed in this decision are of particular significance to the parties because what is at stake is the public participation process under the *Environmental Protection and Enhancement Act*, S.A 1992, c. E-13.3 (the "Act" or "EPEA").

II. BACKGROUND

[3] The circumstances in which these Notices of Appeal come before the Board are somewhat unusual in that they question the relationship between Part 3 of the Act (the Notice of Appeal process) and Part 2 of the Act (the Statement of Concern process).[1] As a result, it is useful to set out a detailed background to these appeals, starting with the Appellants' first attempt to file a Statement of Concern.

A. The Statement of Concern

[4] On August 8, 2000 the Appellants wrote to the Director to file a Statement of Concern (the "Statement of Concern") in relation to the Project. The letter advised that: the Appellants are "… prime stakeholders within the region…"; that the Appellants make use of the region; and that "… increase[d] activity in our region had deteriorated hunting and trapping productivity since the commercialization of the oil sands resources." Further, the letter advised:

> "A. Proper Socio-Economic consultation by AEC or their representatives with Metis Elected representatives is questionable. [and]

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[1] The relationship between Part 3 of the Act and Part 2 of the Act has arisen previously in *Bildson* v. *Acting Director, North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Ltd.* (October 19, 1998), EAB Appeal No. 98-230-D and *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), EAB Appeal No. 98-250-D.

> B. Metis environmental concerns were not captured or satisfactorily addressed by AEC or their representatives."

[5] On August 30, 2000 the Director wrote to the Appellants and advised:

> "To consider your letter as an official statement of concern, Alberta Environment requires further information (proximity to proposed project, land use, nature and extent of potential environmental impacts and concerns) to determine whether any of the Metis Nation of Zone II members are directly affected by this proposed pipeline project, and requests that you submit this information by September 8, 2000…."

The letter went on to warn that if a response was not received by September 8, 2000 the submission from the Appellants would "… not be considered an official statement of concern." Further, the letter advised that some of the issues raised in the Appellants' August 8, 2000 letter were "… issues (socio-economic consultation), that are not under the jurisdiction of Alberta Environment or are beyond the purpose and scope of the EPEA application for approval review process." With regard to these issues, the Appellants were referred to the Alberta Energy and Utility Board (the "AEUB").

[6] The Director's September 8, 2000 deadline passed with no reply. On October 13, 2000 the Appellants wrote to the Director in order to provide the additional information the Director had requested. Specifically, the Appellants advised that the Approval Holder failed to consult with them. Further, the Appellants advised that the Project area "… contains numerous varieties of medicinal herbs harvested for traditional healing purposes … [and that] Metis Elders have trap-lines in the area that would be adversely affected by the change in the wildlife habitat created by the project…." A number of statements from Metis Elders were attached to the letter.

[7] On November 15, 2000 the Director wrote to the Appellants acknowledging their October 13, 2000 letter, but said:

> "While your letter expressed general concerns about the traditional activities of Metis within the Cold Lake Air Weapons Range, there was no indication of current use of the lands by the Metis. I am also aware that the Department of National Defence restricts access and use of the lands within the Cold Lake Air Weapons Range."

The letter went on to advise that the Appellants' letter "… cannot be accepted as a formal statement of concern in the EPEA review of this project."

[8] On November 16, 2000 the Director issued Approval No. 136570-00-00 (the "Approval") to the Approval Holder for the Project. The Appellants were not notified.

B. The Notices of Appeal

[9] On December 14, 2000 the Board received a Notice of Appeal (the "First Notice of Appeal") from the Appellants. The First Notice of Appeal was filed by Mr. Henry Desjarlais, President of the Metis Nation of Alberta Zone II Regional Council. It is clear that the Appellants did *not* know that the Approval had been issued. The Board reaches this conclusion because the First Notice of Appeal objected to the Director's November 15, 2000 decision to reject the Statement of Concern referred to in paragraph 7 au-dessus. Specifically, the First Notice of Appeal advised that:

> "In the event an approval is issued, we intend to appeal this approval. We would be willing to have the appeal regarding our Statement of Concern dealt with at the same time as the appeal of the approval."

Further, the First Notice of Appeal objected to the Director's decision that the Appellants were not "… personally and directly affected by the project..." and advised that:

> "The Director was informed … that members of the Metis Nation harvest medicinal herbs for traditional healing purposes which would be adversely affected by the project."

Finally, the First Notice of Appeal requested that the Board order the Director to accept the Statement of Concern. Thus, the First Notice of Appeal appealed the Director's decision to reject the Statement of Concern and *not* the decision to issue the Approval.

[10] On December 15, 2000 the Board acknowledged receipt of the First Notice of Appeal and requested that the Appellants provide additional clarification.[2]

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[2] On December 15, 2000 the Board also advised the Approval Holder and the Director of the appeal and according to standard practice, wrote to the Natural Resources Conservation Board (the "NRCB") and the AEUB to ask whether these matters have been the subject of hearings or reviews under their respective jurisdictions. On December 19, 2000 the NRCB advised that the appeal does not deal with any matter that has been the subject of a review under the NRCB's legislation. On January 2, 2001 the AEUB advised that it required more information to respond to the Board's letter of December 15, 2000. On January 9, 2001 the Board advised the AEUB that it would provide further information once it received the information from the Director.

[11] On December 21, 2000 Ms. Hutchison, counsel for the Appellants, spoke with the Board's General Counsel and was advised that the Approval *had* been issued. Surprised, the Appellants wrote to the Board on December 28, 2000 confirming that prior to the December 21, 2000 conversation, the Appellants were unaware that the Director had issued the Approval.

[12] Ms. Hutchison filed the Appellants' second Notice of Appeal (the "Second Notice of Appeal") on January 5, 2001. The Second Notice of Appeal advised that: the Appellants "… wish to appeal the decision of the Director to approve the Foster Creek Pipeline Project…"; that the Appellants were directly affected by the Approval; that the considerations of the Director were "…inadequate and incomplete…" in a number of areas; and that the Approval Holder failed to consult with the Appellants while it did consult other First Nations groups. The Second Notice of Appeal requested the Board review the Approval, based on the information provided, and determine whether the Approval should have been granted.

[13] The January 5, 2000 letter, which accompanied the Second Notice of Appeal, indicated again that at the time the Appellants filed the First Notice of Appeal, they were unaware that the Director had issued the Approval. The letter requested that the Second Notice of Appeal be treated as an amendment to the First Notice of Appeal, or alternatively, that the Second Notice of Appeal be treated as a separate appeal. The letter argued that, pursuant to section 84(4)(c)[3] of the Act, the 30-day time limit only began to run when notice of the decision was actually received and that they received notice of the decision to issue the Approval on December 21, 2000. Finally, the Appellants argued that if a time extension was necessary, it should be granted.

[14] On January 8, 2001 the Appellants responded to the Board's request for more information with respect to the First Notice of Appeal, advising that the considerations of the

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[3] Section 84(4)(c) of the Act provides:

"A notice of appeal must be submitted to the Board …

(c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case."

Subsection (a) provides the time limits for enforcement order and environmental protection orders and subsection (b) provides the time limits for reclamation certificates.

Director were "…inadequate and incomplete…" in a number of areas and that the Approval Holder failed to consult with the Appellants while it did consult other First Nations groups.

[15] On January 9, 2001 the Board acknowledged receipt of the Second Notice of Appeal and requested the records from the Director.[4]

C. Concerns with the Notices of Appeal

[16] On January 10, 2001 the Board received a letter from the Approval Holder. In this letter, the Approval Holder raised the following concerns:

> "The majority of grounds in the latter notice [the Second Notice of Appeal] were never raised in the Metis Nation's submissions to Alberta Environment [the Appellants' letters of August 8, 2000 and October 13, 2000]. It is totally inappropriate to allow the Metis Nation to introduce new matters…."

The Approval Holder argued that the "… determination of whether the Director's decisions were correct must be made on the basis of the information before the Director at that time…."

[17] According to the Approval Holder, the Act establishes a two-part test. To be properly before the Board, the Appellants must: "… have filed a Statement of Concern and be directly affected…." The Approval Holder does not believe that the Appellants are directly

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[4] On January 9, 2001 the Approval Holder and the Director were also provided with a copy of the Second Notice of Appeal. The Board notes that the Director did not provide all of the records relating to these appeals. In his January 18, 2001 letter, the Director stated: "Given the nature of the preliminary motions to dismiss, the Director will not be providing the Department's file at this time." The Director then provided the Board with a subset of these records. As the Board stated in *Bernice Kozdrowski* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 12, 1997), EAB Appeal No. 96-059 at pages 41-42:

> "When the appeal is filed, the Board asks the Department for the record of the decision being appealed. At this point the Department should make available **all** the information that the Director had available to him in the record of his decision. The Board cannot make a completely informed decision as to what matters should be included in the hearing, whether the Approval was properly issued and whether it should be reversed or varied, unless it knows all the facts behind that decision at some point before the end of the hearing. If some of this information is confidential, it should be marked and the Board may withhold it from other parties to the case. However, the Board must have the full record before it to make a completely informed decision." [Emphasis in the original.]

Therefore, in future cases the Director should provided the records requested by the Board even where the Director disputes the validity of the appeal. Failure to do so will require the Board to compel production of these records or take other remedies that are appropriate in the circumstances.

affected or that they filed a valid Statement of Concern. Finally, the Approval Holder argued that pursuant to section 87(5)(b)[5] of the Act, the Board is required to dismiss the Notices of Appeal because, as the argument goes, the Appellants

> "… received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under … any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…." [Emphasis in the original.]

[18] On January 11, 2001 the Board received a letter from the Metis Nation of Alberta Provincial Council (the "MNA") advising that they had no objections to the Approval issued to the Approval Holder – in other words, the Metis Nation of Alberta Provincial Council, the provincial Metis body, supported the Approval.[6] It later became clear that the Metis Nation of Alberta Zone I Regional Council also supported the Approval.[7]

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[5] Section 87(5)(b) of the Act provides:

> "The Board …
>
> (b) shall dismiss a notice of appeal if in the Board's opinion
>
> (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…."

[6] The January 11, 2001 letter from the MNA stated:

> "…AEC Pipelines Ltd. has addressed the concerns of Zone I of the Metis Nation of Alberta and is endeavouring to resolve any outstanding issues with Zone II. Based on these developments, the MNA, provincially, does not agree with the appeal."

In response to the letter, the Board wrote the MNA and the Appellants on January 15, 2001 saying:

> "The Board can only assume that as Provincial President, speaking on behalf of all provincial regions of the Metis Nation of Alberta that Ms. Poitras has actual and legal authority to bind Regional Metis Nation Councils. If true, this January 11, 2001 letter has the effect of withdrawing the Metis Nation of Alberta appeal of the AEC Approval.
>
> Accordingly, and unless we hear from Zone II Metis Nation of Alberta Region to the contrary by close of business on **Wednesday, January 17, 2001**, the Board will be closing its file…." [Emphasis in the original.]

On January 16, 2001 the Appellants wrote to the Board in response to the January 15, 2001 letter advising that "…Ms. Poitras has neither actual nor legal authority to bind Zone II Regional Council…." They went on to say:

[19] On January 18, 2001 the Board received a letter from the Director bringing a motion to dismiss the Notices of Appeal pursuant to section 87[8] of the Act. Specifically, the Director argued that the First Notice of Appeal should be dismissed because, according to the Director, the Board does not have the jurisdiction to review his decision respecting the Statement of Concern. The Director argued, further, that the Second Notice of Appeal should be dismissed because the Appellants did not file a Statement of Concern, and because the Second Notice of Appeal was filed outside the 30-day time limit.

> "…bylaws of the Metis Nation of Alberta Association do not grant authority to the President to override decisions of the Regional Council.
>
> Accordingly, the executives of Zone II would request that the Board confirm that their appeal will not be dismissed on the basis of Audrey Poitras' letter of January 11, 2001."

On January 24, 2001, the Board wrote to the parties and advised that as it had not had not received a formal response from the MNA, the Board would accept the Appellants' position as a rebuttable presumption and that the MNA letter of January 11, 2000 did not constitute a withdrawal of the appeal.

7 Letter dated January 30, 2001 from the Metis Nation of Alberta Zone I Regional Council.

8 The relevant portions of section 87 of the Act provides:

> "(5) The Board
>
> (a) may dismiss a notice of appeal if
>
> (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
>
> (i.1) in the case of a notice of appeal submitted under section 84(1)(a)(iv) or (v), (g)(ii) or (j), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
>
> (i.2) for any other reason the Board considers that the notice of appeal is not properly before it, …
>
> and
>
> (b) shall dismiss a notice of appeal if in the Board's opinion
>
> (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…."

[20] On January 22, 2001 the Board provided the AEUB with a map delineating the location of the Project and further requested the AEUB to advise the Board if this matter was the subject of a public hearing or review. The AEUB subsequently advised that it was not.[9]

D. The Preliminary Issues

[21] On January 24, 2001 the Board advised the parties that it intended to hold an oral preliminary meeting on Wednesday, February 7, 2001 at the Board's office, outlined the preliminary issues to be addressed, and requested the parties submit written submissions by January 31, 2001. The letter went on to advise that if any of the parties had concerns with the proposed preliminary meeting they should advise the Board by January 26, 2001.

[22] On January 25, 2001 the Appellants wrote to the Board requesting:

> "… that the issue of whether there are grounds for the Board to impose a stay pursuant to s.89 of the Act be added to the list of [preliminary] issues in your letter of January 24, 2001. We would further request that the Board then hear our client's stay application at the preliminary meeting…."

In a letter dated January 26, 2001, the Board added the request for a stay to the preliminary meeting.

[23] On February 6, 2001, the day before the preliminary meeting, the Board received documents from the Approval Holder and the Appellants. Questions were raised by the Appellants as to the admissibility of certain documents. The Board acknowledged receipt of the documents, but advised the parties that the documents had been sealed and would not constitute a part of the appeal record unless otherwise directed by the Board.

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[9] On January 30, 2001 the Board received a letter from the AEUB stating:

> "…the Board [AEUB] received and approved an application for the subject pipeline and issued License No. 35581 in that regard. The AEC application and its subsequent revision were received and processed as 'routine' and thus no hearing or proceeding was ever held in that regard….
>
> On January 19, 2001 the Board [AEUB] received a request from the Zone II Regional Council of the Metis Nation of Alberta for a review of the Board's approval pursuant to sections 42 and 43 of the Energy Resources Conservation Act. The Board has yet to make a decision with regard to the above review request."

III. PRELIMINARY MOTION

[24] The Board began the preliminary meeting by hearing the motion with respect to the sealed documents that had been received from the Approval Holder and the Appellants on February 6, 2001. The Approval Holder indicated that the documents were in response to the Affidavit of Mr. Henry Desjarlais, filed by the Appellants on January 31, 2001. The Approval Holder indicated that because of the timing of the filing of this Affidavit it was not possible to provide the information earlier.[10]

[25] The Board ruled that it would not accept the late-filed documents. The Board then proceeded to hear the oral submissions of the parties with respect to the main issues of the preliminary meeting.

IV. ANALYSIS

[26] At the preliminary meeting, the Board reviewed the questions that it had previously posed to the parties:[11]

1. Does the Board have the jurisdiction to review the Director's decision whether to accept or reject a Statement of Concern?
2. If the Board can review the Director's decision whether to accept or reject a Statement of Concern, should that review consider information that was not before the Director at the time he made his decision?
3. If the Board can review the Director's decision respecting Statements of Concern, was the Director correct in rejecting the Appellants' Statement of Concern?
4. If the Appellants did not file a valid Statement of Concern, can the Appellants file a Notice of Appeal?
5. Are the Appellants directly affected?

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[10] The Appellants indicated that at least some of the documents could have been provided earlier and also indicated that had the Approval Holder had a concern with the timing of the filing of the Affidavit, the Approval Holder could have expressed their concerns to the Board at the time the Board outlined the proposed procedure for the preliminary meeting. The Director expressed no position.

[11] See the Board's letters of January 24, 2001, January 26, 2001, and February 1, 2001.

6. Can a Notice of Appeal expand on the issues included in a Statement of Concern?

7. Did the Appellants participate in or have the opportunity to participate in one or more hearings or reviews under any Act administered by the Alberta Energy and Utilities Board at which all of the matters included in the Notices of Appeal were adequately dealt with? Were the matters included in the Notices of Appeal adequately dealt with by the hearings or reviews of the AEUB?

8. Was the first Notice of Appeal filed in time?

9. Should the Second Notice of Appeal be accepted as an amendment to the First Notice of Appeal?

10. In the alternative, if the Second Notice of Appeal is considered a separate Notice of Appeal, was it filed in time? If it was not filed in time, should a time extension be granted?

11. Should the appeal be determined to be properly before the Board, does the Board find that there are sufficient grounds to grant a Stay as requested by the Appellants?

A. Question 1 – Can the Board Review the Statement of Concern Decision?

[27] The Appellants argued that the Board clearly has the jurisdiction to review the Director's decision to accept or reject a Statement of Concern. The Director and the Approval Holder argued that the Board's jurisdiction is limited to hearing those appeals that are enumerated in section 84(1) of the Act.

[28] With respect, the arguments presented by the three parties are not inconsistent. The Director and the Approval Holder are correct in stating that the Board's jurisdiction is limited to those grounds enumerated in section 84(1) of the Act.[12] In this particular case, the jurisdiction for the Board to consider the Approval issued to the Approval Holder is derived from section 84(1)(a)(i) and (iv). These sections provide that:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (a) where the Director

[12] The Board also has jurisdiction under the *Water Act*, S.A. 1996, c. W-3.5 and under the *Government Organization Act*, S.A. 1994, c. G-8.5.

(i) issues an approval,…

a notice of appeal may be submitted

(iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 69(1) or (2), or…."

[29] However, the Appellants are also correct. A plain reading of this section makes it clear that the Board has, by reference, the implied jurisdiction to determine whether the person filing the Notice of Appeal filed a "…statement of concern in accordance with section 70…"[13] and whether that person is "…directly affected by the Director's decision…." These preliminary determinations must be made by the Board in the context of its main jurisdiction, which is, in this case, to review the Approval upon the filing of an appeal. In doing so the Board intends to stay within its statutory jurisdiction as described in the *McCain* case.[14]

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[13] Section 70 provides:

"(1) Where notice is provided under section 69(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 69(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change.

(2) A statement of concern must be submitted within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice."

[14] In *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Environmental Appeal Board and McCain Foods (Canada) Ltd.* (2000), 22 C.E.L.R. (N.S.) 258 (Alta.Q.B.), the Court held at paragraph 20 that:

"The result of the pragmatic and functional analysis [as set out in *Union des employes de service Loc. 298* v. *Bibeault* [1988] 2 S.C.R. 1048] leads to the conclusion that that the Board does have the jurisdiction to consider and recommend to the Minister whether or not the Director acted within his jurisdiction in including the Condition in the approval. The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privitive clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal."

[30] In reviewing these decisions, the Board is reviewing procedural elements of the Director's decision to issue the Approval, including whether the Director acted properly in extinguishing appeal rights by rejecting the Statement of Concern. For example, the Board can determine whether the Director took all relevant considerations into account or whether he took irrelevant considerations into account. And if the Director failed to take into account a statement of concern that he should have accepted or vice versa – the appeal may or may not be validly before the Board. This view is consistent not only with section 84(1)(a)(i) and (iv), which refers back to section 70, but with sections 90(3) and 92(1) as well.[15] These sections provide the Board, or the Minister upon the Board's recommendation, with the jurisdiction to make any decision that the Director can make. To do its job properly, including complying with section 87, the Board must be able to review any of the related procedural decisions made by the Director. This view is consistent with the principles set out in the decision of the Court of Queen's Bench in *McCain*.[16]

[31] The Approval Holder and the Director do not agree, arguing instead that because the Board's jurisdiction is limited to those sections enumerated under section 84(1), the proper

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[15] Section 90(3) provides:

"In its decision the Board may

(a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and

(b) make any further order the Board considers necessary for the purposes of carrying out the decision."

Section 92(1) provides:

"On receiving the report of the Board the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, … and

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[16] This judicial review dealt with the ability of the Board to review a decision of the Director that McCain Foods (Canada) Ltd. argued was *ultra vires* the Director's jurisdiction. The Court in *McCain* held that the Board had the jurisdiction to determine whether the Director had exceeded his jurisdiction.

remedy to deal with the decision by the Director to refuse to accept the Statement of Concern is to send the Appellants to Court for judicial review.

[32] The Appellants opposed this view and the Board agrees with the Appellants. It would be inconsistent with the purpose and intent of the Act to require a person whose statement of concern that has been wrongly rejected to have to first undertake a judicial review to remedy the error. In *McCain*, after considering the pragmatic and functional analysis that the Courts use to determine the jurisdiction of administrative tribunals, the Court held that:

> "The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privitive clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal."[17] [Emphasis added.]

It would be illogical, given the direction provided in the *McCain* case, to require a person whose statement of concern has been rejected by the Director to resort to judicial review before bringing their questions before the Board, knowing that one of the questions the Board must decide is the standing (directly affected) question. This is made clear by section 87(5) of the Act, which provides:

> "The Board
>
> (a) may dismiss a notice of appeal if …
>
> (i.1) in the case of a notice of appeal submitted under section 84(1)(a)(iv) or (v), (g)(ii) or (j), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
>
> (i.2) for any other reason the Board considers that the notice of appeal is not properly before it …."

[33] In this case, the Appellants filed the First Notice of Appeal not knowing that the Approval had been issued. As a result, the decision that they claimed to be aggrieved by was the

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[17] *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Environmental Appeal Board and McCain Foods (Canada) Ltd.* (2000), 22 C.E.L.R. (N.S.) 258 (Alta.Q.B.) at paragraph 20.

decision by the Director to reject their Statement of Concern. Unfortunately for the Appellants, the Board does not have the jurisdiction to review the Director's decision respecting the Statement of Concern or the Appellants' directly affected status *in the absence of an appeal properly filed under section 84(1)*. A second appeal, however, was filed and this is reviewable by the Board.

[34] The Board has the jurisdiction to review the Director's decision whether to accept or reject a Statement of Concern in the context of reviewing one of the decisions under appeal enumerated in section 84(1) of the Act. Once engaged, the Board concludes that it has the jurisdiction to review elements of the Director's decision, including whether the Statement of Concern filer is directly affected and whether the Statement of Concern was sufficient.

B. Question 2 – Should the Board Consider New Information?

[35] The second question posed by the Board was "If the Board can review the Director's decision whether to accept or reject a Statement of Concern, should that review consider information that was not before the Director at the time he made his decision?"

[36] In support of their position that the Board can take new information into account, the Appellants point to the *de novo* jurisdiction given to the Board by section 87(2)(d) of the Act and confirmed by the Alberta Court of Appeal.[18] Section 87(2)(d) provides:

> "Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:…

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[18] In *Chem-Security (Alberta) Ltd.* v. *The Lesser Slave Lake Indian Regional Council and the Environmental Appeal Board* (1997), 56 Alta. L.R. (3d) 153 (Alta.C.A.) the Court held at paragraph 11:

> "Section 87(2) of the Act contemplates that, prior to the hearing of an appeal, the Board may determine which matters set out in a notice of objection [now a notice of appeal] will be included in the hearing of an appeal. In making that determination the Board is entitled to consider 'whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made.'
>
> It follows that the hearing before the Board is a *de novo* hearing. The Board is empowered to consider evidence that was not before the Director."

> (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made…."

[37] The Approval Holder argues that the Board cannot consider information that was not before the Director at the time he made his decision. The Approval Holder argues that reviewing the Director's decision taking into account information that was not before him at the time he made his decision would have the effect of extending the period for filing the Statement of Concern. And it would permit the Board to accept "new" evidence - for example, evidence that was not readily available at the time the Statement of Concern was filed.

[38] The Approval Holder relies on the case of *Smulski*.[19] This case deals with a review under the *Surface Rights Act*.[20] In *Smulski* the Court of Appeal said:

> "We are concerned about the practice, which appears to be developing, whereby a party to a surface rights arbitration obtains or is aware of evidence touching the matter of compensation but defers its presentation until an appeal to the Court of Queen's Bench is pursued.
>
> …
>
> Evidence which is not presented at the first opportunity and from a convenient source should be approached with caution. The ends of the *Surface Rights Act* are not promoted by inverting the board's assessment into a mere stalking horse or provisional inquiry which lend itself to easy adjustment under the guise of the statutory appeal."[21]

[39] The Board is of the view that there are clear differences between the purposes of the *Surface Rights Act*[22] and the purposes of EPEA.[23] *Smulski* is therefore distinguishable. The

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19 *Esso Resources Canada Ltd.* v. *Smulski et al.* (1981), 18 Alta. L.R. (2d) 200 (Alta. C.A.).

20 R.S.A. 1980, c. S-27 (now S.A. 1983, c. S-27.1).

21 *Esso Resources Canada Ltd.* v. *Smulski et al.* (1981), 18 Alta. L.R. (2d) 200 (Alta. C.A.) at page 203.

22 A review of the *Surface Rights Act* makes it clear that the intent of the act is to deal with applications by mineral owners for access to land and to deal with specific compensation issues. There is no broad environmental jurisdiction in the Surface Rights Board. As stated on their website, under Environmental Issues: "Due to the nature of the Boards' mandate (compensation setting), there is no impact on the environment by the operations of the Boards. All environmental issues before the Boards are dealt with by the appropriate agencies."

23 Section 2 states:

Surface Rights Act was designed to arbitrate disputes between mineral right owners and landowners regarding access to land and compensation. EPEA, while permitting public participation that frequently pits landowners and the users of land against mineral right owners, also serves a greater public interest, the protection of the environment. Plus, the principle of delay or *laches* does not apply in the appeal before the Board as, if the Appellants filed late it was because the Director did not notify them, even as a courtesy, that the Approval had been issued. As such, while the Board is mindful of Court of Appeal's caution in *Smulski*, the Board does not read that case as creating a bar to the Board's *de novo* jurisdiction.

[40] The Board also relies on the case of *Gulf Canada Resources Ltd.*[24] In that case, Justice Kenny held that the Board has the authority to look at evidence that to the Director's attention after his decision was made. Justice Kenny held:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health to the well-being of society;
>
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
>
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
>
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
>
> (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
>
> (i) the responsibility of polluters to pay for the costs of their actions;
>
> (j) the important role of comprehensive and responsive action in administering this Act."

[24] *Gulf Canada Resources Ltd*. v. *Minister of Environmental Protection* (1996), 44 Admin. L.R. (2d) 240 (Alta.Q.B.)

> "This new information which came before the Board was properly before the Board pursuant to the Act. The applicant argues that to consider this information was contrary to the criteria set up by the Act. I disagree. In my view, the Board was following the same criteria and undertaking the same process which the inspectors and the director would have followed. Had this information been available at the time to the inspectors about the discernable growth problem and the pockets of white substance on the surface of the soil, I am satisfied that the inspectors would have come to a different conclusion and would have likely directed, as the Board did, that the applicant provide additional information to deal with these issues with its application for a Reclamation Certificate.
>
> In summary, the Board and the Minister were entitled to consider new information before them, the information was relevant and caused the Board to consider whether, in fact, the land had been properly reclaimed."[25]

[41] Ms. Graham, counsel for the Director, argued as her first position that further information should not be considered because the Appellants were given an adequate opportunity to file and supplement their Statement of Concern. However, in oral argument, she more persuasively argued, in the alternative, that if the Board were to permit additional evidence to be considered in reviewing the Director's decision respecting the Statement of Concern, such additional evidence should only be considered in a *narrow* set of circumstances. Specifically, Ms. Graham persuaded the Board: to balance the interests of the Approval Holder with the interests of the Appellants; that there is an obligation on those filing a Statement of Concern to effectively participate in the public consultation process; and that the Board must be mindful of the need for certainty in the Approval process in deciding how far to look into the Statement of Concern process.

[42] The Board accepts Ms. Graham's oral argument. She provides a reasonable balance of the interests served by Part 2 and Part 3 of the Act. The Appellants must be given an effective opportunity to participate in the public consultation process, but this right must be balanced with a need for certainty in the Approval process. The Board accepts that the jurisdiction which section 87(2)(d) grants the Board, *vis < vis* the section 70 decision of the Director, should be used with caution particularly when linking Part 2 and Part 3 of the Act.

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[25] *Gulf Canada Resources Ltd*. v. *Minister of Environmental Protection* (1996), 44 Admin. L.R. (2d) 240 (Alta.Q.B.) at paragraphs 31 and 32.

[43] In this case, the Board agrees with Ms. Graham that the Appellants had a reasonable opportunity to participate in the public consultation process. After their initial Statement of Concern letter, the Director wrote to them providing an additional opportunity to file more information. The Director went so far as to detail the information that he required. In oral argument, the Board learned that the Appellants even met with the Director and were able to file the additional information after the September 8, 2000 deadline imposed by the Director. The Director did all that he could reasonably be expected to do.

C. Question 3 – Was the Director Correct Regarding the Statement of Concern?

[44] The criteria for accepting a Statement of Concern are provided by section 70(1) of the Act. Section 70(1) provides:

> "Where notice is provided under section 69(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 69(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change."

[45] It is clear from section 70(1) that a prerequisite to filing a valid Statement of Concern is that the person filing the Statement of Concern must be directly affected. Given, however, the Board's answer to Question 5 below, we will assume that the Director was reasonable, if not correct, in rejecting the Statement of Concern.

D. Question 4 – Can a Notice of Appeal be Filed Without a Statement of Concern?

[46] The Board is of the view, and the parties seem to be in agreement, that the question of whether the Appellants can file a Notice of Appeal in circumstances like this has been previously decided by the Board. In oral argument, all of the parties referred the Board to the case of *O'Neill*.[26]

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[26] *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection* re: *Town of Olds* (March 12, 1999), EAB No. 98-250-D.

[47] In *O'Neill*, Mr. O'Neill stated that he had filed a Statement of Concern with the Director – both by mail and e-mail. No one, including the Director could find a copy of either version of the Statement of Concern. In *O'Neill* the Board said:

> "Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even when a statement of concern has *not* been filed – due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case."[27] [Emphasis in the original.]

[48] Again, the Board is of the view that the Appellants now before us had a reasonable opportunity to participate in the Statement of Concern process. They did file a Statement of Concern, though somewhat inadequate, and this leads to the next test, which is the question of directly affected.

E. Question 5 – Are the Appellants Directly Affected?

[49] The main question that the Board must answer is a requirement of section 84(1) of the Act: "Are the Appellants directly affected?"

1. Evidence

[50] The Appellants argue that the Appellants'

> "… use and rely upon natural resources in the immediate proximity of the Project. Of particular note is their reliance upon and use of Sinclair Lake, Wolf Lake, Sand River, Wolf River and their tributaries. These watercourses are close in proximity to the pipeline and thus at risk of being affected in the case of a release. Further, the Wolf River, Sand River and tributaries that feed Wolf Lake will have pipeline crossings constructed in their beds. This creates a real risk of interference with water quality, fisheries resources and may create sedimentation problems."[28]

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[27] *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection* re: *Town of Olds* (March 12, 1999), EAB No. 98-250-D at paragraph 14.

[28] Paragraph 64, Appellants' Written Submissions (January 31, 2001).

[51] In support of their submission, the Appellants provided the Affidavit of Mr. Henry Desjarlais. In the Affidavit, Mr. Desjarlais advises that:

> "Based both on personal knowledge and information I have received from our Zone's members and elders, I can confirm that our member do make use of the area in and around the route proposed for the Foster Creek Pipeline."[29]

[52] The Affidavit then goes on to outline, based on letters, lists and statements, a number of general impacts on various members of the Appellants.

[53] The Approval Holder indicates that:

> "The proposed Pipeline is approximately 54 km in length, with approximately 42 km of the Pipeline to be constructed within the Cold Lake Air Weapons Range (the "Range"), and approximately 12 kilometers to be constructed south of the range."[30]

[54] Further, the Approval Holder states that:

> "On December 21, 2000, the [A]EUB approved a route deviation principally within the Cold Lake Air Weapons Range. The route deviation involves a new alignment strongly requested by the Alberta Government, Department of Resource Development and the Department of National Defense. Both the original and deviated routes are wholly within provincial crown land. The deviation occurs primarily within the [Cold Lake Air Weapons] Range (which is in Zone 1, and to which non-military access is restricted). A portion of the route in Zone 2, approximately 2.5 km in length, immediately south of the Range, was also deviated, such that it is now 3 km shorter within Zone 2 and adjacent to a road allowance and the Enbridge right-of-way. That portion of the pipeline within the Range will be installed within 15 m of the Enbridge existing right-of-way, with 10 m of temporary workspace utilized adjacent to that right-of-way. The 2.5 km portion immediately south of the Range parallels a road and the Enbridge right-of-way, while the remaining 9.5 km at the south end of the route parallels a power line."[31]

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29 Paragraph 3, Affidavit of Mr. Henry Desjarlais (January 21, 2001).

30 Page 1, Approval Holder's Written Submission (January 31, 2001).

31 Page 4, Approval Holder's Written Submission (January 31, 2001).

[55] The Board also understands that in response to the AEUB realignment, on January 18, 2001 the Director issued Amending Approval No. 136570-00-01 (the "Amending Approval") which may also be appealed and about which the Board makes no decision today.[32]

[56] During oral argument, there was some debate as to what portion of the pipeline remains under the Approval and which could potentially affect the Appellant. If you examine the Amending Approval, it provides:

> "2. This amended approval is for the construction and reclamation of the pipeline described in the document [(the "New Document")] entitled, *Amendment to Conservation and Reclamation Approval No. 136570-00-00 for the proposed Foster Creek Pipeline Project* (AXYS Environmental Consulting Ltd., December, 2000).
>
> 3. All other conditions of EPEA Approval No. 136570-00-00 to apply."

There are two possible interpretations of this amendment. The first is that the New Document has the effect of completely replacing the proposed pipeline route. The second is that the New Document only replaces the upper portion of the proposed pipeline route and leaves only a small portion of the pipeline south of the Cold Lake Air Weapons Range under the Approval. The Board does not have a copy of the New Document, but for the purposes of this decision, the Board assumes that at least a portion of the pipeline remains within the Approval under appeal.

[57] One of the other issues that was discussed at some length in oral argument was the northern boundary of the lands claimed by the Appellants as part of their Zone. The Approval Holder and the Director both claimed that the northern boundary of the Appellants' Zone to be the southern boundary of the Air Weapons Range. The Appellants claimed that their Zone extended far north into the Air Weapons Range. (If so, this area is off limits to the public.)

[58] With respect to this issue, the Board requested that the parties mark their understanding of the boundaries on a map. This map was entered at Exhibit 1. The Board notes that while there appears to be some dispute as to where the northern boundary of the Appellants

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[32] The effects of the Amending Approval were described in more detail at the preliminary meeting and resulted in the development of a diagram by the parties that was filed as Exhibit 2. The Amending Approval has now been appealed. Notice of Appeal was filed on February 16, 2001 as EAB Appeal No. 01-035.

Zone lies, there is no dispute about where the southern boundary of the Cold Lake Air Weapons Range lies. Regardless of how far north the Appellants' Zone extends, it is the Board's understanding that access to the Cold Lake Air Weapons Range, as defined by Exhibit 1 which is a map produced by the Government of Alberta's Department of Aboriginal Affairs, is with good reason, highly restricted. The Board accepts this map as the demarcation, for all practical purposes, of the northern boundary of the Zone II. In the result, there is only a small segment of the pipeline that would not be restricted by the Air Weapons Range.

2. Directly Affected

[59] The Board's starting point is found in the case of *Wessley*,[33] which states that standing must be determined on a case by case basis, taking into account the particular facts and circumstances of each appeal. It is a factual test.[34]

[60] The principle test for directly affected is also discussed in *Kostuch*:

> "Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e. the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point: the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. '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.

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[33] *Fred J. Wessley* v. *Director, Alberta Environmental Protection* (February 2, 1994), EAB Appeal No. 94-001.

[34] See *Bildson* v. *Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D.

> Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[35] [Emphasis added.]

[61] Significantly, *Kostuch* goes on to say:

> "The determination of whether a person is directly affected is a multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing."[36] [Emphasis added.]

[62] The dispositive issue in this case is: Since the Appellants filed their appeal as a society, can they be directly affected under section 84(1)? To answer this, two cases were discussed during the oral submissions, *Hazeldean*[37] and *Graham*.[38] In both cases, the issue of a group filing an appeal was addressed.

[63] In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. Two other appeals were also received in this case – the first on behalf of an individual and an environmental association, and the second from an individual. The plywood manufacturing plant objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

[64] In *Hazeldean*, the Board said:

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35 *Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35. These passages are cited with approval in *Kostuch* v. *Director, Air and Water Approvals Division, Environmental Protection* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25.

36 *Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 38.

37 *Hazeldean Community League* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* (July 16, 1995), EAB Appeal No. 95-002.

38 *Graham* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1996), 20 C.E.L.R. (N.S.) 287. This case was judicially reviewed and then taken to the Court of Appeal. See *Graham* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1997), 22 C.E.L.R. (N.S.) 141 (Alta.Q.B.) and (1997), 23 C.E.L.R. (N.S.) 165 (Alta.C.A.).

> "The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.
>
> Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them."[39]

[65] The *Graham* case involved appeals filed by three organizations. Mr. Graham filed his appeal on behalf of the Alberta Trappers Association. The other two organizations that appealed were the Lesser Slave Lake Indian Regional Council and the Toxics Watch Society (which latter withdrew its appeal). The appeals related to an approval granted to the hazardous waste treatment facility located at Swan Hills.

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[39] *Hazeldean Community League* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, EAB No. 95-002 at pages 4 and 5.

[66] The Board in *Graham* ruled that only one individual represented and specifically identified by one of the organizations was directly affected. This individual, Mr. Charlie Chalifoux, was a trapper that regularly trapped adjacent to the facility.

[67] The Board also considered these arguments in *Bailey*.[40] In *Bailey*, the Board held:

> "The cornerstone of all of the cases is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 84 of the Act, individual members of the organization should also file – either jointly with the organization or separately. There will be cases, such as *Hazeldean*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced that the majority of the individual members of the organization are individually and personally impacted by the project."

[68] In this appeal, no specific individual or individuals have been included or identified in the appeal with sufficient evidence to conclude that they are directly affected. We do not have a Mr. Charlie Chalifoux. And we do not have a majority of citizens, as in *Hazeldean*, who were equally impacted.

[69] As a result, on the evidence before us, the Board concludes that the Appellants as a society are not directly affected.

F. Question 6 – Can the Notice of Appeal Expand on the Statement of Concern?

[70] Given that the Board has concluded that the Appellants are not directly affected, the Board concludes that it is not necessary to address this issue.

G. Question 7 – Did the Appellants Participate in an AEUB Hearing?

[71] Given the conclusions reached with respect to the directly affected status of the Appellants in Question 5 above, the Board finds that it is not necessary to discuss the jurisdictional limitations that arise from the details of the AEUB involvement.

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[40] *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), EAB Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID at paragraph 53.

H. Question 8 – Was the First Notice of Appeal filed in time?

[72] The Board concludes that the first Notice of Appeal was invalid because it sought to appeal the Statement of Concern, instead of the Approval.

I. Question 9 - Should the Second Notice of Appeal be accepted?

[73] The Board has concluded that the Appellants are not directly affected. In reaching this decision, we are assuming that the Second Notice of Appeal was otherwise valid because the Appellants filed it within 30 days of *actual* notice of the Approval being issued[41] and that a Statement of Concern was filed on August 8, 2000, albeit inadequate.

[74] The Board notes that there was some discussion at the preliminary meeting regarding when the 30-day appeal period should start running in the case of Appellants. The uncertainty about when the 30-day appeal period should start running was because the Appellants did not receive notice of the Approval being issued from the Director. The Appellants argue, as stated above, that the 30-day period should only start running once actual notice is received. The Director expresses concern with this view. Ms. Graham advised the Board that, in her view, the Act does not expressly contemplate this situation. The Director is of the view that there is no obligation to provide notice to someone who he has decided is not directly affected. The only guidance that Ms. Graham could find was in the *Environmental Protection and Enhancement (Miscellaneous) Regulation*.[42] Section 3(2)[43] provides that the

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[41] Section 84(4)(c) of the Act provides:

> "A notice of appeal must be submitted to the Board …
>
> (c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case." [Subsection (a) provides the time limits for enforcement order and environmental protection orders and subsection (b) provides the time limits for reclamation certificates.]

The Board accepts that the 30-day appeal period should run, for the purposes of this particular case, from December 21, 2000 – the date the Appellants received actual notice that the Approval had been issued.

[42] *Environmental Protection and Enhancement (Miscellaneous) Regulation,* A.R. 118/93.

[43] Section 3(2) of the *Environmental Protection and Enhancement (Miscellaneous) Regulation* provides:

written notice of the decision to issue an approval must be provided to every person who submitted a statement of concern within 15 days of the approval being issued. Ms. Graham argued that, by analogy, this would mean that the latest that the Appellants in this case could have filed a Notice of Appeal was December 30, 2000.[44] On this basis, Ms. Graham argued that the Second Notice of Appeal, which was filed on January 5, 2001, was filed out of time.

[75] In this particular case, even if the Board were to apply this principle, the Director and the Appellants were in direct consultation such that allowing the appeal to be received a few days late is not unfair. As a result, if it were necessary, the Board would be prepared to extend the time for filing of the Notice of Appeal pursuant to section 85.1 of the Act.[45]

J. Question 10 – Should the Second Notice of Appeal be treated separately?

[76] Again, we assume for the purposes of our ruling that the second Notice of Appeal was valid.

K. Question 11 – Should a Stay be granted?

> "Where the Director
>
> (a) issues an approval …
>
> the Director shall, where notice of the application or proposed changes was provided under section 69(1) or (2) of the Act, provide written notice of the decision or cause the applicant or approval holder to provide written notice of the decision within 15 days after the date the Director signs the decision to every person who submitted a statement of concern in accordance with section 70 of the Act."

[44] The Approval was issued on November 16, 2000. Section 3(2) of the *Environmental Protection and Enhancement (Miscellaneous) Regulation* provides that notice is to be provided within 15 days and there is a 30-day appeal period. This would make the final date for receiving a Notice of Appeal December 30, 2000.

[45] Section 85.1 of the Act provides:

> "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."

[77] On February 8, 2001, the Board wrote to parties and advised them that it had decided to *deny* the application for the stay. The Board advised that its reasons would follow in the main decision.

[78] The parties concur as to the test that the Board should apply with respect to the stay. The test, as stated in the cases of *Przybylski*[46] and *Stelter*,[47] is based on the Supreme Court of Canada case of *RJR MacDonald Inc.*[48] As stated in *Stelter* in paragraph 11, in order to grant a stay, the Board must be satisfied that:

1. upon a preliminary assessment of the merits of the Appellants' case, there is a serious case to be tried;
2. the Appellants would suffer irreparable harm if the stay is refused;
3. the Appellants would suffer greater harm from the refusal of a stay pending a decision of the Board on the appeal than the Approval Holder would suffer from the granting of a stay; and
4. the overall public interest warrants a stay.

The latter two parts of the test are commonly referred to as the "balance of convenience".

[79] In *Stelter* the Board commented on the test. The Board said:

> "A 'serious question to be tried' suggests that it is a question that is not frivolous or vexatious. It requires the Appellant to show that there is a potential for success on appeal. …
>
> 'Irreparable harm' the second part of the test, refers to the nature of the harm, and not its magnitude. Harm is irreparable if it cannot be adequately compensated in damages.
>
> Finally, all else being equal, the 'balance of convenience' must then be addressed. Obviously, the factors to be considered in assessing the 'balance of convenience' depends on the facts of each case."[49]

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[46] *Przybylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* re: *Cool Springs Farms Diary Ltd.* (June 6, 1997), EAB No. 96-070.

[47] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (February 9, 1999), EAB No. 97-051.

[48] *RJR MacDonald Inc.* v. *Canada (Attorney General)* (1994) 111 D.L.R. (4th) 385 (S.C.C.).

[49] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (February 9, 1999), EAB No. 97-051 at paragraphs 12 to 14.

[80] Applying the first part of the test, the Board is prepared to accept that there is a serious issue to be tried between the parties.

[81] With respect to the second part of the test, irreparable harm, we do not believe there is sufficient evidence before us to demonstrate a sufficient connection between the potential impacts of the project with the Appellants and more specifically with individual members. The majority of the proposed pipeline is being constructed on the Cold Lake Air Weapons Range. It is the Board's understanding that, while the Appellants may claim portions of the Air Weapons Range as part of their Zone, access to the Air Weapons Range is highly restricted for public safety reasons. As a result, the Board is of the view that declining to grant the stay will not cause the Appellants irreparable harm. It may or may not cause the Metis Nation of Alberta Zone I members irreparable harm,[50] but that would be a different appeal.

[82] With respect to the balance of convenience, the Board is persuaded by the arguments of the Approval Holder that there are environmental advantages to undertaking pipeline construction in the winter season. The Board is also mindful of the significant economic costs to the Approval Holder should the pipeline construction, which is currently under way, be abruptly stopped. Again, the Board is not prepared to grant a stay.

V. CONCLUSION

[83] The Board would like to thank Ms. Charlene Graham, Ms. Janet Hutchison, Mr. Shawn Munro, and Mr. Gilmore for their submissions, which were well written and very well argued.

[84] The Board has concluded that the Appellants, the Metis Nation of Alberta Zone II Regional Council, are *not* directly affected according to the Act. As such, the appeal is dismissed.

[85] Pursuant to section 88 of the Act, if the parties wish to speak to costs they are required to make their application in writing to the Board no later than 21 days from the date of this decision.

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[50] The Metis Nation of Alberta Zone I is said to include the entire Cold Lake Air Weapons Range.

Dated on March 20, 2001 at Edmonton, Alberta.

“original signed by”

_____

Dr. William A. Tilleman, Chairman

“original signed by”

_____

Dr. John P. Ogilvie, Vice-Chair

“original signed by”

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Mr. Ron V. Peiluck, Member