ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting: March 25, 2002
Date of Decision: April 16, 2002

IN THE MATTER OF sections 91, 94 and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF Notices of Appeal filed by James Kievit, Paul Adams, and Jeff Eamon, with respect to Approval No. 1702-01-02 issued by the Director, Approvals, Southern Region, Regional Services, Alberta Environment to Lafarge Canada Inc.

Cite as: Preliminary Motions: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re*: Lafarge Canada Inc.*

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Lafarge Canada Inc. for its cement manufacturing plant near Exshaw, Alberta. The Amending Approval permits Lafarge to change the fuel supply for part of the plant from natural gas to coal. The Environmental Appeal Board received ten appeals challenging this Amending Approval. Three of these appeals were accepted and the remaining seven were dismissed.

During the course of processing the remaining three appeals, the Board asked for submissions on what issues identified in the Notices of Appeal should be included in the hearing of the appeals. After reviewing these submissions, the Board decided to hold a preliminary meeting to decide what issues would be addressed at the hearing.

The Board decided that the following issues would be included in the hearing of these appeals:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28;
5. human health impact assessment/vegetation assessment study – Approval Clauses 4.1.30 and 4.1.37;
6. any potential antagonistic environmental effects of burning tires and coal;
7. the environmental effects of burning coal on the viewscape (limited to noise, visible pollutants, blue haze, and odour); and
8. the environmental effects of burning coal on the natural surroundings.

The Board notes that greenhouse gases are not an appropriate issue for the hearing of these appeals.

PRELIMINARY MEETING
BEFORE: William A. Tilleman, Q.C., Chair.

APPEARANCES:

Appellants:	Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon, represented by Ms. Jennifer Klimek.
Director:	Ms. May Mah-Paulson, Director, Approvals, Southern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Charlene Graham, Alberta Justice.
Approval Holder:	Lafarge Canada Ltd. Inc., represented by Mr. Ronald Kruhlak and Mr. Corbin Devlin, McLennan Ross.
Other Parties:	Stoney Tribal Council (Stoney Nakoda First Nation), represented by Mr. Tibor Osvath, Rae and Company.

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I. BACKGROUND

[1] The purpose of this decision is to decide which issues included in the Notices of Appeal properly before the Board will be considered at the hearing of these appeals. The Board will also consider the intervenor requests and the timing of the submissions in preparation for the hearing.

[2] This decision deals with Amending Approval No. 1702-01-02 (the "Approval") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA")[1] issued by the Director, Approvals, Southern Region, Regional Services, Alberta Environment (the "Director") on October 22, 2001, to Lafarge Canada Inc. (the "Approval Holder" or "Lafarge") with respect to its cement manufacturing plant at Exshaw, Alberta (the "Plant") near the entrance to Banff National Park.

[3] The Plant was originally constructed 96 years ago, in 1906. In May 1997, the Plant was granted an approval (the "Original Approval")[2] under EPEA. The plant is currently fueled by natural gas. In the last few years the price of natural gas has been unstable. This has resulted in economic difficulties at the Plant such that during one period in the last few years, two-thirds of the Plant had to be shut down and cement had to be imported from outside the province.[3] Apparently, in response to these unstable natural gas prices, the Approval Holder applied to the Director for an amendment (the Approval) to the Original Approval to allow what is referred to as the "Fuel Flexibility Project". The Fuel Flexibility Project allows the Approval Holder to make modifications to permit the burning of coal as a fuel source in part of the Plant.

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1 The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002.

2 The Amending Approval amends the Original Approval (Approval No.1702-01-00). The Board notes that it did not receive any appeals in relation to the Original Approval.

3 Oral Submission of the Approval Holder, dated March 25, 2002.

A. Procedural History

[4] On November 21 and 22, 2001, the Environmental Appeal Board (the "Board") received ten Notices of Appeal expressing concerns with the Fuel Flexibility Project.[4] The Board acknowledged these appeals on November 21 and 23, 2001, and requested a copy of the records (the "Record") from the Director. The Board also asked if there were any other persons who may have an interest in these appeals.

[5] The Board subsequently determined, based on an agreement reached by the Parties to this appeal, that it would accept the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon (collectively the "Appellants").[5]

[6] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board ("AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The Natural Resources Conservation Board responded in the negative. The AEUB advised that it had issued an Industrial Development Permit to the Approval Holder.[6]

[7] On December 10, 2001, the Board received a copy of the Record, which was distributed to those involved in the appeals on December 11, 2001.

[8] On December 21, 2001, the Director notified the Board that the Municipal District of Bighorn and the Stoney Nakoda First Nation[7] might have an interest in the

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[4] The Notices of Appeal were received from Mr. James Kievit, Dr. Paul Adams, Mr. Marlo Raynolds, Ms. Nadine Raynolds, Mr. Jeff Eamon and Ms. Anne Wilson, Mr. Hal Retzer, the Bow Valley Citizens for Clean Air and Pembina Institute for Appropriate Development, Dr. Tracey Henderson, Ms. Amy Taylor, and Mr. Gary Parkstrom.

[5] The Board's decision to accept the Notices of Appeals of Mr. Kievit, Dr. Adams, and Mr. Eamon is the subject of a separate decision.

[6] The Board will consider the effect of the AEUB's Industrial Development Permit on these appeals in a separate decision.

[7] The Stoney Nakoda First Nation have also identified themselves in other correspondence with the Board as the Stoney Tribal Council and the Stoney First Nation.

appeals. On January 9, 2002, the Board wrote to the Municipal District of Bighorn and the Stoney Nakoda First Nation, advising them of the appeals.

[9] On January 3, 2002, the Board was advised that the Parties were close to an agreement with respect to a number of preliminary matters, including the issues to be considered in these appeals.[8] The Board subsequently requested a written status report respecting this agreement by January 31, 2002. On January 31, 2002, the Board received a letter from the Appellants advising that they were close to an agreement with the Director and Approval Holder on the preliminary matters.

[10] On February 11, 2002, the Board received a letter from the Approval Holder stating that the Parties had reached an agreement with respect to a number of preliminary matters, including which Notices of Appeal should be accepted by the Board. However, this agreement did not appear to include the issues that should be considered by the Board at the hearing of these appeals.

[11] On February 15, 2002, the Board wrote the Parties and asked them to provide a letter outlining their agreement. On February 20, 2002, the Appellants wrote to the Board stating that the Bow Valley Citizens for Clean Air's "… Notice of Appeal succinctly summarizes the issues in this appeal and should be the reference point for this appeal. If that is not acceptable, I would appreciate an opportunity to address the above issue." It was not clear to the Board whether the Parties had reached an agreement in this regard.

[12] On March 4, 2002, the Board advised the Parties that the hearing was scheduled for April 24 and 25, 2002, and provided a copy of the Board's Notice of Public Hearing.[9] The Notice of Public Hearing advised that if any person wished to make representations before the Board, they should submit a request in writing by

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[8] See: Letter from the Approval Holder dated January 3, 2002.

[9] The Board's Notice of Public Hearing was published in the *Okotoks Western Wheel* and the *Canmore Leader*.

March 20, 2002. On March 4, 2002, the Board provided a copy of the Board's Notice of Public Hearing to the Municipal District of Bighorn and the Stoney Nakoda First Nation.

[13] On March 5, 2002, the Board wrote to the Parties on several outstanding issues.[10]

[14] The Parties subsequently provided the submissions requested by the Board. A key matter addressed by the Parties was the fact that the Approval before the Board was in fact an amendment of the Original Approval issued in May 1997. The Appellants' response submission, dated March 13, 2002, stated that "…there appears to be a disagreement on the Director's jurisdiction, it is an issue before

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[10] The Board stated:

"Section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 provides:

'(2) 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:

(a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;

(b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);

(c) whether the Director has complied with section 68(4)(a);

(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;

(e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.'

Therefore, in order to ensure that we are able to proceed to a hearing as planned for April 24 and 25, 2002 the Board is requesting submissions from the parties with respect to which matters included in notices of appeal properly before it (Adams, Eamon, and Kievit) will be included in the hearing of the appeals. The Board would like to receive submissions on this question…." (Emphasis removed.)

the Board and full argument should be heard on it."[11] On March 18, 2002, the Board received a further response from the Appellants.[12] The Board reviewed the written submissions respecting the issues and, in a letter dated March 18, 2002, noted that the Appellants presented "…the view that an appeal of an amendment to an approval can include a review of the '…entire scope of the approved operation….'" The Board went on to note that the opposing Parties argued that there is no "…jurisdiction to 'open up' the entire approval." As a result, the Board requested comments from the Parties on the Appellants' request to have full arguments heard on the degree to which the Original Approval can be considered.

B. Interventions

[15] On March 19, 2002, the Board received an intervenor request from the Municipal District of Bighorn. The Municipal District indicated that the Plant is located in the municipality and that its residents are affected by the Approval. The Municipal District identified the "…efforts and process implemented by the Exshaw Community Environment Committee … in monitoring of air quality and other related environmental issues…." The Municipal District indicated that they wished to present evidence regarding the Exshaw Community Environmental Committee.

[16] On March 19, 2002, the Board also received an intervenor request from the Stoney Nakoda First Nation. The Stoney Nakoda First Nation indicated that in their view "…neither Alberta Environment nor the Alberta Environmental Appeal Board (the 'Board') had or have the jurisdiction to issue, amend or approve … [the Approval] in so far as the … Approval may impact upon the Stoney Nakoda [First] Nation, without, at a minimum, the approval of the Stoney Nakoda [First]

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[11] This disagreement related to the degree to which an appeal of an amending approval (the Approval) could consider the Original Approval.

[12] The Board now understands that this response was provided as a result of a typographical error in the Board letter of March 14, 2002. Please see the Board's letter of March 22, 2002, for an explanation of this matter.

Nation." However, the Stoney Nakoda First Nation went on to say that since "… their interests are directly affected and impacted by the … Approval and the appeal of the said … Approval that is before the Board, please be advised that … [they wish] to intervene and present both written and oral submissions, as well as reserving the right to cross-examine any witnesses…."[13]

[17] On March 20, 2002, the Board wrote to the Parties and requested comments on the participation of the Stoney Nakoda First Nation and the Municipal District of Bighorn prior to the Board making a decision regarding their interventions. (These comments were subsequently received on March 26, 2002.)

[18] On March 20, 2002, the Board received submissions from the Parties in response to the concern that "…full arguments should be heard …" on the question of the extent to which the Original Approval can be opened up. In her submission, the Director expressed concern that unless "…the Board process achieves finality, responses and counter-responses can continue to be received."

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[13] The Stoney Nakoda First Nation stated that they wished to address the following issues:

"1. Failure of the Approval Holder, Lafarge Canada Inc., to consult, or adequately consult with the Stoney Nakoda [First] Nation and … [the Federal Crown in regard to the Approval].

2. Failure of the Approval Holder and Environment Alberta to obtain the consent and approval for the … Approval from the Stoney Nakoda [First] Nation and … [the Federal Crown].

3. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess health and environmental impacts of the … Approval on the members of the Stoney Nakoda [First] Nation.

4. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess the impact of the Amending Approval on vegetation and wildlife located on both Reserve Lands and Traditional Lands, including Stoney Nakoda [First] Nation's agriculture and livestock.

5. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess the impact of the … Approval on Stoney Nakoda [First] Nation's traditional land use on both Reserve Lands and Traditional Lands.

6. Failure of Environment Alberta to ensure that a copy of the Approval Holder's annual summary and report be provided to Stoney Nakoda [First] Nation … [and the Federal Crown.]"

C. Preliminary Meeting

[19] In response to this concern and cross-submissions of the Parties, the Board decided to call a Preliminary Meeting "…to hear submissions on the issues to be dealt with at the hearing, the timing of the Affidavits and written submissions, and any other preliminary matters." The Board went on to say that it "…would principally like to hear arguments from the parties with respect to the inclusion of greenhouse gases as an issue and to what extent the original approval can be considered at the hearing of these appeals."[14] Following consultation with the Parties, in the Board's letter of March 22, 2002, the Board scheduled the Preliminary Meeting for March 25, 2002, in the Board's offices in Edmonton. The letter detailed the procedure for the Preliminary Meeting and indicated that the Municipal District of Bighorn and the Stoney Nakoda First Nation were invited to attend if they chose. On March 22, 2002, the Board received a letter from the Stoney Nakoda First Nation advising that they would attend the Preliminary Meeting.[15]

II. SUBMISSION OF THE PARTIES

[20] Based on the Preliminary Meeting submissions, it is clear that the Parties are not far apart on what issues should be considered at the hearing. To illustrate, the Parties are in agreement[16] that the following issues should be included in the hearing of these appeals:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28; and

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[14] See the Board's letter of March 22, 2002.

[15] On March 25, 2002, the Board convened the Preliminary Meeting. In attendance were the Appellants, the Approval Holder, the Director, and the Stoney Nakoda First Nation.

[16] See Appendix 1. (Comparison of Issues on which the Parties Agree.)

5. human health impact assessment/vegetation assessment study – Approval Clause 4.1.30 and 4.1.37.

The Board notes that the Appellants have not advanced the issue regarding the ESP Performance Enhancement Action Plan (Approval Clause 4.1.33) that was identified by the Director and the Approval Holder.

[21] Beyond these five issues, the Parties' positions and their views of the basic principles to be applied are similar with respect to the outstanding issues. These issues[17] are:

1. burning of tires (Approval Clause 4.1.16);
2. viewscape and natural surroundings; and
3. greenhouse gases.

III. BOARD'S ANALYSIS

[22] This decision answers four matters: (1) the issues to be addressed at the hearing; (2) the intervenor requests; (3) the scheduling for filing submissions; and (4) miscellaneous matters.

A. Issues

[23] Section 95 of EPEA permits the Board to determine the issues to be addressed at the hearing. Section 95 provides:

> "(2) 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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> > (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;

[17] See Appendix 2. (Comparison of Issues on which the Parties Do Not Agee.)

> (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);
>
> (c) whether the Director has complied with section 68(4)(a);
>
> (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;
>
> (e) any other criteria specified in the regulations.
>
> (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
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> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

[24] There are three issues on which the Parties are unable to agree: (1) burning tires; (2) viewscape and natural surroundings; and (3) greenhouse gases. The dispute between the Parties in relation to the burning of tires and the viewscape and natural surroundings relates to the scope of the review.

1. Scope of Review

[25] As stated above, when the Board reviewed the written submissions of the Parties with respect to the issues, the Board noted, in a letter dated March 18, 2002, that the Appellants presented "…the view that an appeal of an amendment to an approval can include a review of the '…entire scope of the approved operation….'" The Board notes that the other Parties argued that the appeal of an amendment to an approval does not give the Director "…jurisdiction to 'open up' the entire approval."

[26] But, by the Preliminary Hearing, the Parties had refined their views and were in substantial agreement as to the jurisdiction of the Director and the Board to review an amendment to Lafarge's approval (the Approval).

Section 2(b)

[27] The Appellants, the Director, and the Approval Holder all began their analysis with section 2(b) of EPEA. This provision of EPEA provides that:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing … (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…."

[28] In interpreting section 2(b), the Appellants argued that "…the integration of environmental protection and economic decisions in the earliest stages of planning…" supports the view that the scope of review should be very broad, and that the Director should use an amendment to an approval as an opportunity to make early planning decisions. The Director and the Approval Holder, on the other hand, argued that "…the integration of environmental protection and economic decisions in the earliest stages of planning…" supports the view that the scope of review should be narrow, and that in order to support environmental and economic certainty, planning should be focused on the development of the Original Approval.

The Walker Case

[29] The next step of all the Parties was an analysis of the previous decision of the Board in *Walker*.[18] *Walker* involved a number of appeals regarding a canola oil refinery near Lloydminster, Alberta by United Oil Seed Products ("UOP"). UOP operated an existing canola crushing plant on the site, and the canola crushing plant's original approval (issued under the predecessor legislation to EPEA) was amended (by way of an amending approval issued under EPEA) to permit the construction and operation of the canola oil refinery adjacent to the crushing plant. The appellants in this case argued that the canola crushing plant (authorized under the original approval) and the canola oil refinery (authorized

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[18] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

under the amending approval) "…should be treated as one operating unit and the subject matter of this appeal."[19] The appellants argued "…that the existing plant site for both the crushing plant and the new refinery was not appropriate."[20]

[30] In *Walker,* the Board considered at some length the fact that the original approval for the canola crushing plant was issued under the predecessor legislation to EPEA and how this interacted with the amending approval for the canola oil refinery. The discussion regarding the predecessor legislation is not relevant with respect to the matter currently before the Board, but what is relevant is the finding by the Board regarding the interaction between an original approval and an amending approval:

> "Where ongoing facilities seek additions or changes to operations and do so through amendments to old licences, the test is not to rule out the environmental effects of all pre-Act facilities, as a matter of law, simply because there is a pre-Act facility involved. This is potentially unfair because there *may* be a link between the existing facility and the new facility sought by the amendment. In other words, the existing facility may indeed have environmental effects that are tied synergistically or antagonistically to the new facility. Depending on which side of the appeal a party finds itself, it will want to argue this synergism or antagonism of environmental effects.
>
> Where transitional matters arise between old and new facilities, the resolution must come by way of a factual determination of *how* the existing plant's activities are directly linked to the new approval -- from an environmental effects perspective."[21] (Emphasis in the original.)

The Board then went on to say:

> "That said, the Board wishes to be clear that unless the legislation specifically requires it (and the Act does not), the Board will not make a decision that unfairly affects the existing status or accrued rights of persons who hold pre-Act licences."[22]

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[19] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 2.

[20] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 2.

[21] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

[22] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 8

The Board also stated that:

> "If, for example, the appellants raise a *prima facie* case that pre-existing emissions from ongoing activities compound the emissions given by a new approval, the Board would hear all of the evidence because it is relevant to the environmental acceptability of the *new* approval."[23]

[31] The Board ultimately dismissed the appeals in *Walker* on the basis that the appellants were concerned with the existing canola crushing plant not the new canola oil refinery. The Board stated "…the Board's proper approach is to focus on the existing crushing plant only to the extent that it helps determine the environmental acceptability of the new refinery."[24]

Position of the Appellants

[32] In the Appellants' oral submissions, they reviewed several of the points made in *Walker* and tried to argue that they fell within the test outlined in *Walker* to allow a broader reading to their Notices of Appeal.

[33] *Walker* decided that you should not rule out the effects of the existing facility "…because there *may* be a link between the existing facility and the new facility…."[25] The Appellants responded that: "In this case there is clearly a link between the existing facility and the amended one. It is the same facility. It is going to be emitting substances."[26] The Appellants went on to say that in *Walker,* the plants in question were two separate entities that were not connected physically. They argue that in this case, however, the amendment is being imposed on an old plant and it will effectively become a new physical thing because of the amendment.[27]

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[23] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

[24] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 8.

[25] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

[26] Appellants' Oral Submission, dated March 25, 2002.

[27] Appellants' Oral Submission, dated March 25, 2002.

[34] In *Walker* the Board also decided that the extent that the existing approval can be considered must be made on the link between the existing approval and the amending approval. The Board said and we confirm that if "…the appellants raise a *prima facie* case that pre-existing emissions from ongoing activities compound the emissions given by a new approval, the Board would hear all of the evidence because it is relevant to the environmental acceptability of the *new* approval."[28] Based on this, the Appellants in this appeal argued: "And that's what we're looking at here is the emissions given by the amendment. That is the complaint the Appellants have. What will this amended facility emit? What are the impacts of those emissions on the environment?"[29]

[35] With respect to the statement in *Walker* that "…the Board will not make a decision that unfairly affects the existing status or accrued rights of persons who hold pre-Act licences…",[30] the Appellants argue that: "What we are asking the Board is not to go back and check or determine pre-Act rights unless those rights are affected by the amendment. You cannot go back and change the approval without the amendment before you, but our submission is that once they bring in an amendment, they do open up that approval and there may be more stringent requirements on them because of the amendment."[31]

Position of the Approval Holder

[36] In response to Appellant's arguments, the Approval Holder stated:

> "I could adopt Ms. Klimek's [(counsel for the Appellants)] framework because I think that makes sense. And as I understood from what she described, she described a framework, well first you have to look at coal and if there is an environmental effect, then that entitles them to address the environmental effect on that issue and consider how the Director addressed it. If they have reasons to suggest that it was addressed incorrectly, those are reasonable issues to take

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28 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

29 Appellants' Oral Submission, dated March 25, 2002.

30 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

31 Appellants' Oral Submission, dated March 25, 2002.

> before the Board. But the threshold in embarking on this is looking at coal and if there is an environmental effect related to using coal as that fuel source. I see that as sort of our answer….
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> If it is coal-identified impact, yes, and the Director didn't consider it, and they can, I guess, raise evidence to suggest that that may have been incorrect, if they are able to persuade the parties.
>
> But that doesn't leave it wide open that anything that may have an environmental effect is necessarily open to review, which perhaps gets us into other areas…."

In essence, what the Approval Holder said was that the environmental effects caused by the burning of coal are proper issues that can be appealed, whereas environmental effects that are not caused by coal are not proper issues that can be appealed. This is a sound legal argument.

Position of the Director

[37] The Director concurred with the basic framework established by the Appellants stating:

> "In that case [*Walker*], it was an application for a new plant on the site, a refinery. The appellants in that case were complaining about the odours that originated from the existing oilseed crushing operation. They tried to utilize the fact that a new process was going to be placed on that site, it was going to be covered by the same approval, as an opportunity to review the operation of the existing facility. The Board stated that to the extent that there could be a correlation between the new process, the new activities, and those that the appellants were complaining of, the Board had the jurisdiction to look at it. But it was not an opportunity to review that that was the circumstances at the time that the approval, that the amendment, was issued."

[38] The Board agrees. The Board does not intend to go back and change a prior approval that was subject to its own Statement of Concern, Notice of Appeal, and Judicial Review process. In the Board's view, such an approach would not be in keeping with the need for administrative certainty and fairness in licencing in accordance with section 2 of EPEA. Further, in the Board's view, approval holders should be encouraged to bring forth improvements and upgrades to their facilities without having to wait for a ten-year approval to expire. If the Board were to give an interpretation to the appeal provision that resulted in the *entire* approval being opened up and changed every time there was an *amendment* to the approval, this would act as a significant disincentive to such necessary

improvements and upgrades. In the Board's view, when an approval is amended, the issues that are appropriately included in an appeal of the amending approval are those environmental effects that directly or indirectly result from the amendment. And these issues would go to the *amendment* being confirmed, reversed, or varied.

2. Tires

[39] Applying this test to the question of burning tires, the Board is of the view that any potential antagonistic environmental effects of burning tires and coal is an appropriate issue to be included in the hearing of the appeals. We say this because coal is an issue that was not contemplated in the Original Approval. If fact, the Board notes that in applications before the AEUB, the Approval Holder said:

> "Lafarge has worked very hard to make sure our operations are in accordance with all environmental legislation and further, acceptance by our neighbors in the Bow Valley. Using an alternative fuel to gas, such as coal, would dramatically affect our ability to do this. …
>
> Solid fuel would have to be stored on site, as opposed to natural gas which is 'just in time'. Coal storage on site would create environmental issues with regards to the black dust created, and run-off from the coal pile. The visual impact of a large coal pile would also be considered negative from an environmental point of view. The plant is located immediately adjacent to the town of Exshaw, and the coal pile would likely be located within approximately 50M from the Exshaw School and Church.
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> Obviously, any decision to move to an alternate fuel would require an extensive consultation process with the stakeholders in the Bow Valley."[32]

3. Viewscape and Natural Surroundings

[40] Applying the same test, the Board is of the view that the environmental effects from burning *coal* on the viewscape and the environmental effects of burning coal on the natural surrounding are appropriate issues to be included in the hearing of these appeals.

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[32] Letter from the Approval Holder to the AEUB, dated May 8, 1998.

[41] With respect to this issue, the Board would like to provide some direction on "viewscape." We are concerned that the word "viewscape" as used by the Parties has uncertain boundaries. It is the Board's decision that for these appeals, viewscape is intended to mean "noise, visible pollutants, blue haze and odour" as described in the Notices of Appeal. As a result, the issue of viewscape is to be limited to noise, visible pollutants, blue haze, and odour directly impacted by the plant.

4. Greenhouse Gases

[42] The dispute between the Parties with respect to including greenhouse gases as an issue centers on the fact that greenhouse gases are not expressly raised in the three Notices of Appeal accepted by the Board. The Appellants argued that greenhouse gases should be included as an issue because the Notices of Appeal clearly deal with air quality, and greenhouse gases are an air quality impact that will result from the burning of coal. The Appellants noted also that greenhouse gases were identified in many of the Statements of Concern as an issue and thus, it should come as no surprise to the Director and the Approval Holder if it is an issue included in the hearing of these appeals.

[43] An opposing view was presented by the Approval Holder and the Director, who argued that there is a need for administrative finality and that it would be unfair and prejudicial to include greenhouse gases at *this* point in time. In support of their position, the Approval Holder pointed to our previous decision in *Bailey*:[33]

> "In the Board's view, the purpose of a Notice of Appeal is to identify to the Board, and to the other parties, the issues or concerns that the Appellant has with the decision under appeal. It is clear from section 87(2) [(now section 95(2))] of the Act [(EPEA)] that the Notice of Appeal scopes the issues that can be included in the hearing of the appeal. This section of the Act provides that the Board may '…determine which matters included in the notice of appeal properly before it will be included in the hearing of the appeal….' It is the Board's view that if a

[33] Re: *TransAlta Utilities Corp.* (2002), 41 C.E.L.R. (N.S.) 102 (A.E.A.B.), (*sub nom. Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment*, re: *TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R, paragraph 44.

party wishes to advance a concern or issue in the hearing of an appeal, that concern or issue must be raised in the Notice of Appeal in at least very broad terms."

[44] Applying *Bailey*, we decide that and the inclusion of greenhouse gases in these appeals would be inappropriate and unfair because it was not included and argued in the Notices of Appeal. The Board confirms the principle of the need for administrative finality. In support of our decision, the Board notes that the Notices of Appeal that were filed were very detailed, well written, and technically sophisticated, and all the Parties are represented by competent and experienced counsel. As noted by the Appellants, the issue of greenhouse gases was included in many of the Statements of Concern. As a result, the inclusion of the issue of greenhouse gases was reasonably ascertainable on the part of the Appellants. Finally and significantly, the Board notes that the Parties reached an agreement as to *which* Notices of Appeal would be prosecuted and those matters will essentially be heard. As a result, greenhouse gases will not be included as an issue.

B. Intervenor Requests

[45] As stated, the Board has received two intervenor requests. The first is from the Municipal District of Bighorn and the second is from the Stoney Nakoda First Nation.

[46] Rule 14 of the Board's Rules of Practice provides that:

"As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering arguments or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervenor will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervenor will not repeat or duplicate the evidence presented by other parties."

1. Municipal District of Bighorn

[47] On March 19, 2002, in response to the Board's Notice of Public Hearing, the Board received an intervenor request from the Municipal District of Bighorn.[34] As stated, the Plant is located within the Municipal District boundary and the Municipal District wishes to present evidence regarding the Exshaw Community Environmental Committee. So it should.

[48] Taking these comments into account, vis á vis the Municipal District, the Board concludes from what we know and in accordance with Rule 14, that the Municipal District: (1) will be presenting evidence that is directly relevant to the matters included within the appeals before the Board; (2) being a local government, has by definition, a tangible interest in the subject matter of these appeals; (3) will not unnecessarily delay the appeal; and (4) will not repeat or duplicate the evidence to be presented. Therefore, we grant the Municipal District full standing as an intervenor to address the issues identified by the Board as being included in the hearing of these appeals. In granting the Municipal District full standing, the Board confirms that it would like to hear specific evidence from the Exshaw Community Environmental Committee, which is chaired by the Municipal District, as it relates to the issues to be heard in these appeals.[35]

2. Stoney Nakoda First Nation

[49] On March 19, 2002, the Board received an intervenor request from the Stoney Nakoda First Nation. The Stoney Nakoda First Nation expressed the view that neither the Director nor the Board have jurisdiction in this matter as it affects the interests of the Stoney Nakoda First Nation. The Stoney Nakoda First Nation

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[34] In response to the application by the Municipal District to intervene, both the Director and the Approval Holder advise that they have no objections.

[35] The one issue that does concern the Board is that the Municipal District has not taken a position with respect to these appeals. As Rule 14 indicates, the Board normally expects a party to clearly identify whether they support or oppose the project. Therefore, during the Municipal District's presentation, the Board will expect them to indicate whether they support or oppose the Approval before the Board, indicate which portions of the Approval they support and which portions of the Approval the oppose, or provide a satisfactory explanation as to why the are not prepared to take a position. Until it is advised otherwise, for the purpose of establishing the procedure for the hearing, the Board will infer that the Municipal District supports the Approval.

indicated that it is Her Majesty the Queen in Right of Canada that has jurisdiction. Notwithstanding, the Stoney Nakoda First Nation requested to intervene in these appeals to protect their interests, and they identified their right to use, occupy and control "Reserve Lands" and their rights to "Traditional Lands", both of which are near the Plant. Their intervention request went on to identify six "issues" that they wished to address in their submissions.[36] The latter four issues are environmental issues that are included within the issues to be considered at the hearing of these appeals.

[50] The first two issues – the duty to consult and the requirement to obtain consent – are not strictly environmental issues, at least not included within the issues to be considered at the hearing of these appeals. Therefore, with respect to these two issues, shortly before the hearing, the Board provided copies of our decision in *Chipewyan Prairie First Nation*,[37] a copy of which is attached as Appendix 3 to this decision. In *Chipewyan Prairie First Nation*, the Board considered its jurisdiction to consider the duty to consult in some detail. The Board concluded in that case that the Court may be the more appropriate forum to address these types of issues and the Board adjourned the *Chipewyan Prairie First Nation* case for a 30-day period to permit the Chipewyan Prairie First Nation to take the matter to Court. During the course of this Preliminary Meeting, the Chairman offered the Stoney Nakoda First Nation the same opportunity to adjourn this matter and take the duty to consult and other federal jurisdictional arguments the Court. However, the Stoney Nakoda First Nation declined and indicated that they wished to proceed with this matter. To be sure, Stoney Nakoda First Nation intervened to protect their interests. Counsel for the Stoney Nakoda First Nation stated:

"Well, I know that the Stoney Nakoda Nation is aware that this Board will do

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[36] See: Footnote 13.

[37] Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc*. (March 22, 2002), E.A.B. Appeal No. 01-110-ID.

everything that it can and I feel that that is primarily the main reason why the Stoney Nakoda Nation is, or has authorized me to appear here, is that they are aware that this Board will try to do the best that it possibly can. If the Stoney Nakoda First Nation feel that that wasn't the case, then we may very well be in front of the courts already dealing with this issue."

[51] In response to the Stoney Nakoda First Nation's application to intervene, the Director advised the Board that while she had no concerns with their intervention, she was concerned with the first two issues identified in their application. In the Director's view, Alberta Environment engaged in extensive consultation with the Stoney Nakoda First Nation. The Approval Holder also advised of extensive consultation efforts with the Stoney Nakoda First Nation.[38]

[52] Taking these comments into account, the Board concludes, in accordance with Rule 14, that the Stoney Nakoda First Nation: (1) will be presenting evidence that is directly relevant to the matters included within the appeals before the Board; (2) has or may have a tangible interest in the subject matter of this appeal; (3) will not unnecessarily delay the appeal because they only focus on the issue to be addressed; and (4) will not repeat or duplicate the evidence to be presented. Therefore, it is appropriate to grant the Stoney Nakoda First Nation full standing as an intervenor to address the issues identified by the Board as being included in the hearing of these appeals.

C. Scheduling

[53] At the request of the Board, the Parties discussed the matter of the schedule for providing affidavits and submissions in preparation of the hearing. The Parties reached an agreement in this regard, which the Board affirms:

1. the Appellants shall file their affidavits and submission by 4:30 pm on April 5, 2002;

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[38] The Approval Holder also noted that had they chosen to, the Stoney Nakoda First Nation could likely have filed an appeal and that their failure to do so should militate against allowing them to intervene. Further, the Approval Holder suggested that if the Stoney Nakoda First Nation is permitted to intervene, then their participation should be limited to presenting evidence and making submissions.

2. the Intervenors (the Municipal District of Bighorn and the Stoney Nakoda First Nation) shall file their affidavits and submissions by 4:30 pm on April 8, 2002;

3. the Approval Holder shall file its affidavits and submission by 4:30 pm on April 12, 2002;

4. the Director shall file her affidavits and submission by 4:30 pm on April 15, 2002; and

5. the Appellants shall file their rebuttal affidavits and submission by 4:30 pm on April 19, 2002.

D. Miscellaneous Matters

[54] During the course of the Preliminary Meeting, the Stoney Nakoda First Nation advised the Board that, in support of their contention that it is the federal crown that has jurisdiction in this matter, they had filed a petition in June 2001 with the Federal Minister of Environment pursuant to section 48 of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA").[39] Section 48 of

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[39] Section 48 of CEAA provides:

"(1) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of Parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out in Canada and the Minister is of the opinion that the project may cause significant adverse environmental effects on

(a) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the Indian Act,

(b) federal lands other than those mentioned in paragraph (a),

(c) lands that are described in a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that are prescribed,

(d) lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed, or

(e) lands in respect of which Indians have interests,

the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project on those lands.

(2) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of Parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out on

(a) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the Indian Act,

(b) lands that are described in a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that are prescribed, or

(c) lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed,

and the Minister is of the opinion that the project may cause significant adverse environmental effects outside those lands, the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project outside those lands.

(3) The Minister shall not refer a project to a mediator or a review panel pursuant to subsection (1) or (2) where the Minister and the governments of all interested provinces, and

(a) in respect of federal lands referred to in paragraph (1)(b), the federal authority having the administration of those lands,

(b) in respect of lands referred to in paragraph (1)(a) or (2)(a), the council of the band for whose use and benefit the reserve has been set apart,

(c) in respect of lands referred to in paragraph (1)(c) or (e) or (2)(b), the party to the agreement or claim representing the aboriginal people or that party's successor, or

(d) in respect of lands that have been set aside for the use and benefit of Indians pursuant to legislation referred to in paragraph (1)(d) or (2)(c), the governing body established by that legislation,

have agreed on another manner of conducting an assessment of the environmental effects of the project on or outside those lands, as the case may be.

(4) The Minister shall consider whether to make a reference pursuant to subsection (1) or (2)

(a) on the request of the government of any interested province or the federal authority having the administration of federal lands referred to in paragraph (1)(b); or

(b) on receipt of a petition that is

(i) signed by one or more persons each of whom has an interest in lands on which the project may cause significant adverse environmental effects, and

(ii) accompanied by a concise statement of the evidence supporting the contention of the petitioner that the project may cause significant adverse environmental effects in respect of which a reference may be made pursuant to subsection (1) or (2).

(5) At least ten days before a reference is made pursuant to subsection (1) or (2), the Minister shall give notice of the intention to do so to

(a) the proponent of the project;

(b) the governments of all interested provinces;

(c) any person who signed a petition considered by the Minister pursuant to subsection (4); and

(d) the federal authority, in the case of a reference to be made pursuant to paragraph (1)(b).

(6) For the purposes of this section, ‘lands in respect of which Indians have interests’ means

(a) land areas that are subject to a land claim accepted by the Government of Canada for negotiation under its comprehensive land claims policy and that

(i) in the case of land areas situated in the Yukon Territory, the Northwest Territories or Nunavut, have been withdrawn from disposal under the Territorial Lands Act for the purposes of land claim settlement, or

(ii) in the case of land areas situated in a province, have been agreed on for selection by the Government of Canada and the government of the province; and

(b) land areas that belong to Her Majesty or in respect of which Her Majesty has the right to dispose and that have been identified and agreed on by Her Majesty and an Indian band for transfer to settle claims based on

CEAA permits the Minister undertake an environmental assessment notwithstanding that there are no formal triggers under CEAA. (Both the Director and Lafarge advised that there are no section 5 triggers under CEAA.)[40] The

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(i) an outstanding lawful obligation of Her Majesty towards an Indian band pursuant to the specific claims policy of the Government of Canada, or

(ii) treaty land entitlement.

(7) For the purposes of this section, a reference to any lands, land areas or reserves includes a reference to all waters on and air above those lands, areas or reserves."

[40] Section 5 of CEAA provides:

"(1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

(2) Notwithstanding any other provision of this Act,

(a) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and

(b) the federal authority that, directly or through a Minister of the Crown in right of Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project

(i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,

(ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project,

(iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and

(iv) where applicable, shall perform the duties of the responsible authority

Stoney Nakoda First Nation advised that although nine months have passed, they have yet to receive a response from the Federal Environment Minister.

[55] Of course, the CEAA issue is potentially relevant to the Board because sections 95(2)(b) and 95(5)(b)(ii) of EPEA provide:

> "(2) 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 …
>
> (b) whether the Government has participated in a public review in respect of the matter under the Canadian Environmental Assessment Act (Canada) ….
>
> (5) The Board
>
> (b) shall dismiss a notice of appeal if in the Board's opinion ….
>
> (ii) the Government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal."

This is potentially a jurisdictional question. The general intent of these sections of EPEA is to permit only one public hearing with respect to a project.

[56] However, based on the information provided by the Parties, we conclude that no CEAA review has been undertaken, and as a result, there is no jurisdictional impediment to the Board to hear these appeals. In other words, the Board will not delay its proceeding to await a decision by the Federal Government that may never come. However, the Board requests that if any of the Parties become aware of any steps being taken under CEAA to undertake a review, they are to advise the Board immediately.[41]

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in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(a) and 37(1)(a)."

[41] The Board notes that this is the same request that it made of the Parties in its letter of February 15, 2002, in response to the Stoney Nakoda First Nation's first contact with the Board requesting information.

IV. DECISION

A. Issues to be Addressed at the Hearing

[57] For the reasons stated above, pursuant to section 95(2), the Board will hear the following issues as they relate to the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28;
5. human health impact assessment/vegetation assessment study – Approval Clause 4.1.30 and 4.1.37;
6. any potential antagonistic environmental effects of burning tires and coal;
7. the environmental effects of burning coal on the viewscape (limited to noise, visible pollutants, blue haze, and odour); and
8. the environmental effects of burning coal on the natural surroundings.

[58] Greenhouse gases are *not* an appropriate issue for the hearing of these appeals.

[59] Pursuant to section 95(4), representations on other matters will not be permitted.

B. Intervenor Status

[60] The Municipal District of Bighorn and the Stoney Nakoda First Nation are granted full intervenor status to address the issues identified by the Board.

C. Scheduling

[61] The Parties shall submit their affidavits and submissions in accordance with the agreement reached by the Parties at the Preliminary Meeting.

D. Miscellaneous

[62] The Board requests that if any of the Parties become aware of any steps being taken under CEAA to undertake a review, they are to advise the Board immediately.

Dated on April 16, 2002, at Edmonton, Alberta.

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William A. Tilleman, Q.C.
Chair

V. Appendix 1 – Parties Agree

APPENDIX 1 - Comparison of Issues on which the Parties Agree		
APPELLANTS	**DIRECTOR**	**APPROVAL HOLDER**
SO2 Emissions Did the Director err in the conditions imposed on the proponent with respect to SO2 emissions? Did the Director err in not imposing conditions on Lafarge to use the best available demonstrated technology in the conversion? The Appellants argue that there is an issue regarding the implementation requirements.	**Stack Emission Limits (Approval Clause 4.1.13)** The Appellants are concerned that: (1) the modeling predicted exceedances of SO2, (2) there are different sulphur recovery from the oil and gas industry, (3) there are different limits for Kiln 4 and 5, (4) that the effective date for reduced opacity and particulate matter are unacceptable, and (5) that the approval should require technology so that there are no predicted exceedances of Alberta Ambient Guidelines. The Director does not appear to object the inclusion of these issues. **SO2 Reduction Plan (Approval Clause 4.1.35)** The Appellants have concerns with: (1) the timing of the SO2 reduction plan, (2) the application of best available demonstrated technology, (3) the 25% reduction figure, (4) the requirement to implement the plan, and (5) the goal, which should be no exceedances prior to conversion to coal. The Director objects to the inclusion of the concern regarding the implementation of the reduction plan. The Director argues that 4.1.36 requires the implementation of the reduction plan.	**Limits (Approval Clause 4.1.13)** Should the particulate limits be the same for Kilns 4 and 5? Should the SO2 limits be the same whether the facility burns natural gas or coal? **Sulphur Reduction Proposal (Approval Clause 4.1.35)** Is the sulphur reduction proposal reasonable? Is the June 2005 reduction program reasonable?
Mercury and Heavy Metals Did the Director err in not imposing more rigorous conditions for mercury, heavy metals and polyaromatic hydrocarbons? Did the Director err in not imposing conditions on Lafarge to use the best available demonstrated technology in the conversion	**Mercury** The Appellants have concerns that: (1) there is no requirement to mitigate mercury, (2) there is no mercury reduction plan required, and (3) there is no requirement to utilize best available demonstrated technology to minimize emissions. The Director does not appear to	**Mercury** Should the approval holder be required to design a mercury reduction plan?

	object to the inclusion of these issues.	
Particulates Did the Director err in not imposing more stringent conditions with respect to the emission of particulate matter? It is the appellant's submission that Lafarge should have been required to take the necessary steps to further reduce the amount of particulate matter emitted from the plant.	**Particulates** The Appellants want further mitigation. The Director does not appear to object to the inclusion of this issue.	
Monitoring and Reporting Did the Director impose appropriate monitoring requirements on Lafarge? It is the appellants' submission that the Director's monitoring requirements are inadequate and will not properly assess the impact of the plant. In particular, the continuous ambient monitoring should continue for the life of the plant. The passive monitoring is inappropriate for the nature of the emissions from the plant and the location of such monitoring is inadequate. Furthermore the approval only requires Lafarge to submit a plan for passive monitoring, it does not require the to implement it. The Appellants argue that there is an issue regarding the implementation requirements	**Monitoring and Reporting (Approval Clause 4.1.24)** The Appellants have concerns with: (1) the elements monitored, (2) the frequency of monitoring, (3) the location of the monitoring devices, (4) the duration and type of monitoring, and (5) the requirement that the Approval Holder participate in the organization, establishment and operation of an Air Quality Monitoring Zone for the Upper Bow Valley or participate if one arises. The Director does not appear to object to the inclusion of these issues. **Passive Ambient Air Monitoring Program Proposal (Approval Clause 4.1.28**) The Appellants have concerns: (1) with the passive vs. continuous monitoring requirements, (2) that the requirement to carry out the proposal and to carry out mitigation, and (3) that the areas to be monitored should be expanded. The Director objects to the inclusion of the concern regarding the requirement to carry out the proposal and the mitigation. The Director argues that Approval Clause 4.1.29 requires the air-monitoring proposal to be carried out.	**Ambient Air Monitoring and Reporting (Approval Clause 4.1.24)** Is the ambient monitoring and reporting program requested by the Director reasonable? **Passive Ambient Air Monitoring Program Proposal (Approval Clause 4.1.28**) Should this program incorporate monitoring in Quaite Valley Campground and Jewel Pass?
Human Health Impact Assessment/Vegetation Assessment Report	**Human Health Impact Assessment (Approval Clause 4.1.30)**	**Human Health Impact Assessment (Approval Clause 4.1.30)**

Should the Director have made the human health assessment, the vegetation study and the monitoring requirements with respect to the current and future operations as part of the application process rather than conditions of the approval? If the inclusion of these requirements is appropriate, did he err in not making it a condition of the approval that any impact found in these assessment be mitigated? The Appellants argue that there is an issue regarding the implementation requirements	The Appellants have concerns with: (1) the scope of the Human Health Impact Assessment, and (2) the timing of provisions of the Human Health Impact Assessment. The Director objects to the inclusion of the concern regarding the implementation the Human Health Impact Assessment. The Director argues that Approval Clause 4.1.31 requires the implementation of the Human Health Impact Assessment. **SO2 Impacts on Vegetation Assessment Report (Approval Claus 4.1.37)** The Appellants have concerns with: (1) the timing of the Vegetation Assessment, and (2) no requirement for mitigation or follow-up. The Director does not appear to object to the inclusion of these issues.	Should the Human Health Impact Assessment be conducted prior to using coal as a fuel source? Should the Approval Holder be required to further mitigate emissions should the Human Health Impact Assessment identify the Lafarge as the source of the problem? **SO2 Impacts on Vegetation Assessment Report (Approval Clause 4.1.37)** Is Lafarge required to mitigate the problems that have been identified as its responsibility?
ESP Performance Enhancement Action Plan No comments provided.	**ESP Performance Enhancement Action Plant (Approval Clause 4.1.33)** The Appellants have concerns with: (1) the timing and scope of the ESP Performance Enhancement Plan, and (2) the requirement regarding the implementation of the plan. The Director objects to the inclusion of the concern regarding the implementation of the ESP Performance Management Plan. The Director argues that 4.1.34 requires the implementation of the ESP Performance Enhancement Plan.	**ESP Performance Enhancement Action Plan (Approval Clause 4.1.33)** Should the approval holder submit and implement a plan to upgrade the ESP before the using coal as an alternate fuel source?

VI. Appendix 2 – Parties Do Not Agree

APPENDIX 2 - Comparison of Issues on which the Parties Do Not Agree		
APPELLANTS	**DIRECTOR**	**APPROVAL HOLDER**
Scope of Review What is the Director's jurisdiction when reviewing the application to make major modifications to a plant i.e. can he re-consider the entire scope of the approved operation and imposed conditions that deal with existing and ongoing environmental impacts? The appellants submit that the Director should have required Lafarge to install the necessary equipment to eliminate exceedances of the Guidelines prior to allowing it to burn coal. The Appellants "…disagree with the position that since this application is not for a green field project, the Director could only look at the impact of the conversion to coal. I disagree with this position as the Act and Regulation give the Director authority to look at the environmental impact of the plant as modified by the amendment." The Appellants state "…in making an application for the amendment certain studies were done which indicate that there are existing problems with the current operation. It is our view that when an application for an amendment that allows major modifications disclose problems with the plant, the Director must, and should, deal with those problems before approving the amendment. … If our submission is correct, then the issue of tires, viewscape and general concerns should be addressed by the Board."	**Scope of Review** The Director stated that this "…amendment was initiated through an application by Lafarge to the Director for an approval amendment to allow the use of coal as a fuel option. This amendment only relates to that application. The Director only considered and amended the approval as it related to the use [of] coal as a fuel source. The Director did not re-consider the entire scope of the approved operation. It is the Director's submission that only those amendments arising from the Lafarge application should be before the Board." The Director argues "…the Director does not have the jurisdiction to 'open up' the entire approval. The Director can only address the issues that arise from the amendment application. Given that the Director has this restriction, it is submitted that the 'broader issue' proposed by … [the Appellants] should not be before the Board." The Director further advises "…this issue has not been previously raised in the Notices of Appeal filed by the three Appellants. The ground of appeal which the Appellants put forward generally relate to specific clauses in the Amending Approval. There was no request in the Notice of Appeal to 'open up' the entire approval."	**Scope of Review** The Approval Holder advises "…for the hearing in the present matter, the Appellants may be entitled to present evidence related to impacts of both the Original Approval and the Amending Approval if they demonstrated a *prima facie* case that impacts from ongoing activities compound impacts from the Amending Approval. But for the issue to be included in the hearing before the Board, the issue must relate to the Amending Approval not the Original Approval." "It is on this basis that Lafarge objects to the Appellants' issues on plant operations and conditions which are not impacted in any different way with respect to this amendment to use coal as an alternative fuel source. This would include dispensing with issues with respect to viewscape, burning fuel for tires, and the nature of surrounding areas."
Natural Areas/Viewscape Did the Director err in not considering the nature of the surrounding area (i.e. protected areas) and recreational users in the	**Viewscape/General Issues** The Appellants have concerns: (1) that the amendment does not address the cause, (2) with the existence of the plume, (3) with noise, (4) with	**Viewscape/General Impacts** "…as this amending application only contemplates the use of an alternative fuel sources, the comments under this heading should

area when he determined that much of the area is uninhabited? Did the Director err in not imposing conditions with respect to noise, visible pollutants, blue haze, odour and greenhouse gas emissions?	odour, and (5) with the economic impact on tourism. The Director objects to the inclusion of the viewscape and general issues. The Director argues: "A number of these issues pre-date this amendment and have been an ongoing concern to valley residents in regards to Lafarge's and others operations in the Bow Valley. It is the Director's submission that these issues should be limited to how the use of coal as a fuel option in the in the Lafarge cement plant will affect the items raised.	relate only to those concerns specifically impacted by the use of coal as a fuel source rather than natural gas."
Tires Did the Director err in continuing to allow Lafarge to burn tires for fuel?"	**Tires (Approval Clause 4.1.16)** The Director objects to the inclusion of this issue stating that this "…was only one 'clerical' amendment and that relates to the section numbers and organization of the clauses of the 'Use of Tires as Fuel'. That authorized activity was in the original approval. … There has been no change in the regulatory requirements for Lafarge to meet in regards to the usage of tires as fuel. Therefore, it is submitted that this is not an issue that should be before the Board."	**Tires** "This amending approval did not consider the applicability of this fuel source as it was decided in a previous approval which was not appealed."
Greenhouse Gases Did the Director err in not imposing conditions with respect to noise, visible pollutants, blue haze, odour and greenhouse gas emissions?	**Greenhouse Gases** "The issue of Greenhouse Gas Emissions was not set out in any of the Notices of Appeal recognized by the Board. None of those Appellants requested that the Director/Board consider this issue or that the Approval should address [this] issue. It is submitted that this issue should not be considered in this appeal. It is unfair to all parties to this appeal to have major 'new' issues added to the appeal at this late stage of the process."	**Greenhouse Gases** "This is not an issue which the Department currently has any formulated policy or guidelines. Accordingly, it is inappropriate to embark on establishing conditions for this subject matter at this time."

VII. Appendix 3 - *Chipewyan Prairie First Nation* Case

See 2002 AEAB 10 for complete Decision

2002 AEAB 10 **Appeal No. 01-110-ID**

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Procedural Decision

Date of Decision – March 22, 2002

IN THE MATTER OF sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by the Chipewyan Prairie First Nation with respect to Approval 153497-00-00 issued on December 7, 2001, under the *Environmental Protection and Enhancement Act* by the Director, Bow Region, Regional Services, Alberta Environment, to Enbridge Pipelines (Athabasca) Inc.

Cite as: Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc.*

EXECUTIVE SUMMARY

The Board received a Notice of Appeal from the Chipewyan Prairie First Nation (CPFN) with respect to an Approval issued under the *Environmental Protection and Enhancement Act* to Enbridge Pipelines (Athabasca) Inc. for the construction and reclamation of a pipeline near Christina Lake, Alberta. CPFN asked for a Stay of the Approval pending the resolution of their appeal.

Alberta Environment argued that the Board does not have the jurisdiction or expertise to decide constitutional issues relating to: the validity of the alleged aboriginal and treaty rights of CPFN; the alleged infringement of those rights; and the alleged duty of Alberta Environment to consult with CPFN. On this basis, Alberta Environment argues that the appeal should be dismissed.

The Board asked for submissions from the Parties on the questions:

> "1. What steps, if any, have the CPFN taken, since it first knew of the request for the Approval that is the subject of this appeal, to enforce the rights to which it now asks the Board to give effect?
>
> 2. Given the nature of the rights the CPFN seeks to enforce, and the likelihood of controversy between the parties over the existence, extent and consequences of those rights, why is the Board the appropriate forum to deal with these issues as opposed to the ordinary courts, which possesses among other powers, the power to grant appropriate interim relief?"

Following its review of these submissions, the Board has decided to adjourn the request for a Stay for 30 days to allow CPFN to commence an action in Court to enforce the rights that they are claiming, should they wish to do so. As part of such an action, CPFN can seek an order against Alberta Environment to restrain the granting of permission to proceed with the pipeline project. If such an injunction is granted, the Board will immediately review it and consider the request for a Stay in light of the terms of such an injunction. CPFN may instead seek a mandatory injunction requiring that the consultation measures they are requesting be carried out. Again, the Board will be guided by the decision of the Court, whatever it may be.