

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: April 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 Ms. Linda J. Court with
respect to Approval No. 150612-00-00 issued by the Director, Bow
Region, Regional Services, Alberta Environment to Lafarge Canada
Inc.

Cite as: *Court v. Director, Bow Region, Regional Services, Alberta Environment,*
re: *Lafarge Canada Inc.*

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to Lafarge Canada Inc. for the opening up, operation, and reclamation of a pit on N 7-22-28-W4M and NE 12-22-29-W4M in the Municipal District of Rocky View, Alberta.

On November 21, 2001, the Environmental Appeal Board received a Notice of Appeal from Ms. Linda J. Court appealing the Approval.

In consultation with the parties, a mediation meeting and settlement conference was held on January 23, 2002, in Calgary, Alberta. However, the Parties did not reach a resolution.

Although the Notice of Appeal stated the grounds of the appeal, the Board decided that it was necessary for the Parties to more precisely indicate what issues are properly before the Board. After reviewing the submissions, the Board decided that the only issues properly before it are:

1. The effect that dust and other air pollutants from the Lafarge Operation may have directly on the Appellant.
2. The effect that noise from the Lafarge Operation may have directly on the Appellant.
3. The cumulative effects that dust and other air pollutants and noise from the Lafarge Operation, and as specifically regulated by the Approval, may have directly on the Appellant.

The operation of the other facilities in the area is *not* before the Board. The other facilities are only relevant to the extent that they form part of the circumstances in which the Lafarge Operation is proposed to be constructed, and to the extent that they contribute to the determination of the cumulative effects as they directly affect the Appellant.

The threshold issue of the directly affected status of the Appellants remains outstanding, and this is an issue that must be addressed as a preliminary matter of jurisdiction at the hearing.

No representations may be made on any other matters at the hearing of this appeal.

DECISION BEFORE:

William A. Tilleman, Q.C., Chair,
Dr. M. Anne Naeth, and
Ted C. Fisher, Q.C.

APPEARANCES Appellant:

Ms. Linda J. Court, represented by Mr. Bradley
Gilmour, Bennett Jones LLP.

Director:

Ms. May Mah-Paulson, Director, Bow Region,
Regional Services, Alberta Environment,
represented by Ms. Charlene Graham, Alberta
Justice.

Approval Holder:

Lafarge Canada Inc., represented by Mr. Richard E.
Bereti and Mr. Paul Cassidy, Blake, Cassels &
Graydon LLP (Vancouver).

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I. **BACKGROUND**

[1] On October 2, 2001, the Director, Bow Region, Regional Services, Alberta Environment (the "Director") issued Approval No. 150612-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act")¹ to Lafarge Canada Inc. (the "Approval Holder") authorizing the opening up, operation, and reclamation of a sand and gravel pit (the "Lafarge Operation") on N 7-22-28-W4M and NE 12-22-29-W4M, in the Municipal District of Rocky View, Alberta.

[2] On November 21, 2001, the Environmental Appeal Board (the "Board") received a Notice of Appeal dated November 16, 2001, from Ms. Linda J. Court (the "Appellant") appealing the Approval. The Appellant had previously filed a Statement of Concern with the Director and was found, for the Director's purposes, to be directly affected. The Board acknowledged the Notice of Appeal and requested a copy of the documents related to this appeal (the "Record") from the Director and requested that all Parties provide the Board with available dates for a mediation meeting and settlement conference or a hearing.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.

[4] On December 6, 2001, the Board received and acknowledged letters dated December 4 and 5, 2001, from the Appellant and the Approval Holder requesting an extension with respect to advising the Board of available dates. The extension was granted, and all parties were requested to provide their available dates to the Board by December 14, 2001.

[5] On December 11, 2001, the Board received a copy of the Record, and on December 12, 2001, it provided a copy to the Appellant and the Approval Holder.

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.

[6] On December 14, 2001, the Board received available dates from all the Parties, and on December 20, 2001, the Board acknowledged receipt of the dates and scheduled a Mediation Meeting and Settlement Conference for January 23, 2002, in Calgary, Alberta.

[7] On January 4, 2002, the Director forwarded two additional documents in relation to the Record to the Board and to the other Parties.

[8] Between January 8, 2002, and January 22, 2002, the Board received and acknowledged receipt of several letters from interested and concerned persons.² The Board advised them that if a resolution was not reached at the Mediation Meeting and Settlement Conference and the matter proceeded to a hearing, they would be notified. The Board has subsequently received additional letters from other interested and concerned persons.³ All of these interested and concerned persons were advised that should the matter proceed to a hearing, a Notice of Hearing would be published in the newspaper, and they would have an opportunity to apply to the Board for intervenor status.

II. MEDIATION MEETING AND SETTLEMENT CONFERENCE

[9] Pursuant to section 11 of the Environmental Appeal Board Regulation, A.R. 114/93, the Board conducted a Mediation Meeting and Settlement Conference in Calgary, Alberta, on January 23, 2002, with Mr. Ron Peiluck as the presiding Board member.

[10] Following discussions, no resolution could be reached, and the Board advised the parties that a hearing date would be set. Several exchanges of letters and submissions ensued.⁴

² Mr. Graham Sewell, Ms. Ruth and Mr. Willis Olson, Ms. Bev and Mr. Terry Grantham, Mr. Ulrike (Ricky) Kerrison, Ms. C.L. (Kerry) Kerrison, Mr. Morley Walbaum, Ms. Wendy Hoflin, Mr. Rob Neil, Mr. Sol Andrews, Mr. John Davidson, Mr. Martin and Ms. Lillian Dyck, Mr. D.W. Barron, Mr. Pat Stier, Ms. Barbara Burton and Residents of Cottonwood Estates.

³ Mr. Roger Shields and Ms. Carmen Miller provided letters subsequent to the Mediation Meeting.

⁴ On January 31, 2002, the Board acknowledged letters dated January 29, 2002, from all the Parties, and at that time set out a schedule for written submissions to be provided to the Board to decide the issues for the appeal.

On February 4, 2002, the Appellant provided the Board with her Initial Submission on issues and identified seven issues that she felt should be addressed at the hearing. In response, both the Director and the Approval Holder provided their Response Submissions and argued that the issues presented by the Appellant were too general in nature and did not explain how the Appellant was directly affected. The Board acknowledged these submissions on February 8, 2002.

On February 15, 2002, the Board acknowledged the receipt of the Rebuttal Submission from the Appellant. In this letter, the Board advised the Parties that it had decided to deal with the directly affected status of the

III. DISCUSSION

[11] The purpose of this decision is to determine which matters will be included in the hearing of the appeal.⁵

[12] In the Notice of Appeal, the Appellants identified four grounds for an appeal.⁶ In her February 4, 2002 Initial Submission, the Appellant reiterated and expanded the grounds of appeal as stated in the Notice of Appeal, and added the request for costs as one of the issues:

Appellant prior to deciding the issues to be considered at the hearing of the appeal, and set out a schedule for written submissions on the directly affected issue.

On February 22, 2002, the Board acknowledged receipt of the Appellant's Initial Submission with respect to her directly affected status. On March 4, 2002, the Board acknowledged receipt of the Response Submissions from the Approval Holder and the Director. The Board received the Appellant's Rebuttal Submission on March 11, 2002.

In its letter to the Parties dated March 21, 2002, the Board informed the Parties that the Board would make its decision regarding the directly affected status of the Appellant at the hearing. The Board also stated that it would make the decision regarding the issues to be heard at the hearing and then provide a schedule for the exchange of affidavits and for providing submissions and exhibits.

⁵ Pursuant to section 95(2), (3), and (4) of EPEA, the Board is allowed to make a determination of issues prior to a hearing. Section 95(2), (3), and (4) of EPEA states:

"(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 an 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."

⁶ The grounds, as stated in the Notice of Appeal, are:

- "1. The application submitted by the Applicant was insufficient, incomplete and otherwise inconsistent with the requirements of the EPEA and the Approvals and Regulations Procedure Regulation....

- "1. Whether the application submitted by Lafarge Canada Inc. (the 'Applicant') was insufficient, incomplete and otherwise inconsistent with the requirements of the EPEA and the Approvals and Registrations Procedure Regulation....
2. Whether it was incorrect and/or unreasonable for the Director to issue the Approval on the basis of an incomplete application, or on the basis of no evidence or insufficient evidence concerning matters that should have been considered by the Director.
3. Whether the impacts of the proposed pit on the environment and the Appellant are significant and adverse and therefore inconsistent with the EPEA and regulations made under the EPEA. For example ...
[whether the proposed pit, alone or combined with existing pit operations, will or may produce dust and other air pollutants, increase noise levels, or impact the quantity or quality of the groundwater, that will adversely impact the environment or adversely impact the health of the Appellant, the community, or wildlife in the area].
4. Whether it was unreasonable or incorrect for the Director to issue the Approval where it had no evidence or insufficient evidence concerning the

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2. The impacts of the proposed pit on the environment and the Appellant are significant and therefore inconsistent with the EPEA and regulations made under the EPEA. More specifically,
 - a. the proposed pit will impact the quantity of groundwater and may impact the quantity and quality of groundwater relied upon by the Appellant as a drinking water supply;
 - b. the Director did not have sufficient evidence to reasonably conclude that the proposed pit will not adversely impact the quantity and quality of groundwater relied upon by the Appellant as a drinking water supply;
 - c. the Director did not have sufficient evidence to reasonably conclude that the proposed pit will not have significant adverse environmental effects on the Bow River include *[sic]* fish, wildlife and waterfowl habitat;
 - d. the proposed pit will produce dust and other pollutants that will adversely impact the environment and may adversely impact the health of the Appellant;
 - e. the Director did not have sufficient evidence to reasonably conclude that the proposed pit will not have a significant adverse effect on air quality and the health of the Appellant;
 - f. the proposed pit will produce an unacceptable level of noise;
 - g. the proposed pit, combined with existing pit operations, will produce unacceptable cumulative impacts concerning air pollutants, water quantity and quality, and noise;
 - h. the Director failed to adequately consider the cumulative air pollutant and noise impacts of the proposed pit on the environment and the Appellant;
 3. Such other grounds as set out in the Appellant's Statement of Concern, and as may be subsequently put forward by the Appellant.
 4. Based on the foregoing grounds of appeal, it was incorrect and/or unreasonable for the Director to issue the Approval. In the alternative, the terms and conditions set out in the Approval are insufficient to reasonably address the concerns of the Appellant."

matters listed in paragraph 3 above.

5. Whether the Director took into account irrelevant considerations or failed to take into account relevant considerations in exercising its discretion to issue the Approval and in consideration of the matters listed in paragraph 3 above.
6. Whether the Director fettered its discretion or otherwise failed to exercise its discretion in respect of the issuance of the Approval and in consideration of the matters listed in paragraph 3 above.
7. Whether the Director or the Applicant should be required to pay the costs of the Appellant concerning this proceeding."

[13] The issues expressed in the Appellant's filed Statement of Concern have been incorporated into the Notice of Appeal by reference. The areas of concern listed in the Statement of Concern were:

1. water — supply and quality of groundwater and effects on the Bow River;
2. noise/dust — dust and pollution, noise, and effects of dewatering on noise levels;
3. ecological — fish, birds, and wildlife of the area; and
4. aesthetics/recreation — view, stability of the area once product removed, recreational use of the area, environmentally sensitive area.⁷

[14] The Approval Holder provided a preliminary response⁸ and a Response Submission.⁹ In the preliminary response, the Approval Holder was "...concerned that the Appellant's submission makes no effort to provide any foundation supporting the contention that each issue raised ought to be heard by the Board or brought by this Appellant.... [W]e have little to work with in responding to the Appellant's Submission." And it continues:

"In our view, there is but one issue that perhaps ought to be dealt with by the Board at [the] hearing: potential dust emissions from the site that allegedly 'directly affect' the Appellant, subject to the Appellant establishing her standing in that regard."

[15] In the Response Submission, the Approval Holder restated its concern that the "...Appellant's Submission fails to provide adequate information, explanation or evidence in support of the various issues the Appellant wishes to have heard in this appeal." The Approval Holder then continued by reviewing the issues stated in the Appellant's submission.

⁷ See: Appellant's Statement of Concern, Tab 28 of the Record.

⁸ See: Letter from Approval Holder, dated February 5, 2002.

⁹ See: Submission of Approval Holder, dated February 7, 2002.

[16] As to the first issue raised by the Appellant, the Approval Holder stated:

"...However, the Appellant provides no information or explanation (on this or any other proposed issue), upon which the Board can now base a preliminary determination as to whether this is indeed an issue that ought to be heard on appeal. Further, and this applies to each issue proposed in the Appellant's Submission, because of this lack of information or explanation, Lafarge is left with nothing on which to base its response. As a result, it is submitted that the Board ought not to set this issue as one to be addressed at hearing."

[17] The Approval Holder restated similar concerns with issues 2, 4, 5, and 6 of the Appellant's submission. The Approval Holder indicated it could not respond to issues "...so vaguely stated." In response to issue 3, the Approval Holder did not believe that dust should be an issue as it had been adequately dealt with under the Approval and the development permit issued by the Municipal District of Rocky View.¹⁰

[18] The Approval Holder stated that noise concerns are dealt with by the municipality and not the Director. Also, in the permit issued by the Municipal District of Rocky View, there are stringent noise level requirements and monitoring programs.¹¹

[19] In response to the issue of groundwater quality and quantity, the Approval Holder stated that the Appellant "...resides over a completely different water system than that under the Site." It goes on to state that there "...is simply no way that the Appellant's water supply could be affected without first substantially lowering the level of the Bow River." In addition, the Approval requires groundwater monitoring.

¹⁰ In the Approval Holder's submission, it stated:

"...the Municipal District of Rocky View ('Rocky View') issued a development permit requiring Lafarge to prevent visible dust from leaving the Site as a result of traffic and the use of machinery. This stringent requirement is sufficient, it is submitted, to address any dust issues related to the Site. Further, the crusher will be used on a limited basis (most crushing will be done at another site) and will be covered; water will be used for dust suppression as necessary in order to comply with the Approval; the access road will be paved; and, only about 30 acres will be exposed at any one time due to a continuous reclamation system that will be in place at the Site...." [Emphasis deleted; footnotes excluded.]

¹¹ The Approval Holder stated:

"...Rocky View clearly and effectively addressed this issue in the development permit. It set a limit of 55 dbs at the Site's property line, which must be complied with 24 hours a day. This is an extremely stringent requirement, as evidenced by the fact that it is the same as the City of Calgary noise bylaw respecting residential areas during nighttime hours.... In addition, the permit necessitates noise monitoring...."

[20] According to the Approval Holder, the issue relating to the effect on fish, wildlife, and waterfowl had been considered as the Director had received a report as part of the approval process indicating there would be no significant risk related to the project.

[21] On the issue of cumulative effects, the Approval Holder believed that the Appellant was using the appeal process "...in a veiled attempt to express concern over other gravel operations." The Approval Holder stated that if no harm could be caused by the operation through responsible operating practices and complying with the Approval and the permit issued by the Municipal District of Rocky View, then the issue of cumulative effects is irrelevant.¹²

[22] The Approval Holder also stated that it would be seeking costs.

[23] In the Director's Response Submission, the Director requested that the appeal be limited to the issue of potential dust emissions from the site. The Director stated that the issues raised by the Appellant were "...very general in nature..." and did not provide enough information for the Director to determine the case against her.¹³

[24] The Director stated that the issue of noise was considered and addressed by the Subdivision and Development Appeal Board, and there were no defined limits for noise under EPEA or the corresponding regulations. In her submission, the Director stated that she was unclear on what basis the Appellant claimed that the operation may impact the groundwater quality and quantity and affect the Bow River and area wildlife.¹⁴ The Director noted various

¹² In the Approval Holder's submission, it stated:

"If no harm can be caused by the operations, because of responsible operating practices and stringent noise and dust requirements, and no issues exist regarding groundwater and the Bow River (fish, wildlife and waterfowl), then it is submitted that the Appellant's submission regarding cumulative effects is a red herring and simply irrelevant."

¹³ The Director's submission stated:

"The issues raised by the Appellant, in its February 4, 2002, submission and its November 16, 2001, Notice of Appeal are very general in nature. It is respectfully submitted that it is not enough for the Appellant to allege that the application by Lafarge Canada Inc. was incomplete or that the Director failed to exercise their discretion reasonably, for the reasons set out in paragraphs 1, 2, 4, 5, and 6 of the Appellant's February 4th submission. The Appellant must provide additional information to substantiate their grounds of appeal. Without more information, the Director is unable to fully ascertain the case that is being made against it."

¹⁴ The Director's submission stated:

"(b) It is unclear on what basis the Appellant submits the proposed pit operation may impact the quantity or quality of groundwater relied upon by the Appellant as a drinking water supply.

sections of the Approval that pertained to these issues. The Director further stated that some of the issues may be more applicable under the *Water Act*, R.S.A. 2000, c. W-3.¹⁵

[25] With respect to the issue of cumulative effects, the Director stated:

"The Board only has the jurisdiction to deal with Approval No. 150612-00-00 in the context of the current appeal. It is respectfully submitted that the Board does not have the jurisdiction to deal with the issue of 'cumulative effects' in the context of other existing pit operations."

[26] The Appellant's Rebuttal Submission stated:

"...Lafarge did not argue that the issues were beyond the jurisdiction of the Board nor did it argue that the Appellant failed to raise them in the Notice of Appeal. In addition, given that the Lafarge pit will cause air emissions, produce noise, have impacts on groundwater and will be operating in the vicinity of existing pits, the factual foundations for the issues are obvious and well known to both Lafarge and the Director...."

[27] In response to the Director's comments, the Appellant stated that the Notice of Appeal does not limit the Appellant's concerns to dust as "other air pollutants" were also referenced.

IV. ANALYSIS

[28] The Board has the authority under section 95 of EPEA to determine the issues to be heard. It requested submissions from the Parties to clarify issues and positions. However, once the Board determines which issues will be heard at the hearing, pursuant to section 95(4), the Parties cannot make representations on matters that the Board has not included.

There does not appear to be any compelling evidence to suggest that such an adverse impact could occur. In addition, the Director notes that paragraph 2.1.13 of the Approval requires that the approval holder develop and implement a groundwater monitoring program for the approval that covers water quality and quantity.

(c) It is unclear on what basis the Appellant submits that the proposed pit will have an adverse effect on the Bow River including adverse effects on fish, wildlife and waterfowl (*sic*)....The Director notes that paragraph 3.1.10 of the Approval requires that the Approval holder maintain a 30 metre undisturbed buffer zone between the pit and the top of the left bank of the Bow River."

¹⁵ The Director stated in his submission:

"The Director further submits that some of the Appellant's issues may be more appropriately addressed under the *Water Act*. Without more information from the Appellant as to the specific nature of their concerns regarding the potential impact of the ...gravel pit operation on water quality and quantity, it is difficult for the Director to comment on whether their concerns would be

[29] With respect to the issues listed as 1, 2, 4, 5, and 6, it is the role of the Board to determine if the Director followed the Act or the regulations. This is not an identifiable issue that can be heard in and of itself; it is a consideration that is part of all considerations undertaken by the Board. These types of concerns can only be raised in the context of a specific factual issue that is properly before the Board. It is the Board's function to make the decision whether the Director appropriately considered relevant information in granting the Approval and determine the merits of the factual issues in that regard.

[30] The Board agrees with the Approval Holder and the Director that the Appellant did not provide an adequate explanation of some of the issues. However, the Board also agrees with the Appellant on the introduction of evidence. At this point of the appeal process, the Board does not require concrete evidence. What the Board requires is some information that will define the issues. Broad, general statements that can encompass a myriad of issues do not provide the Board, or the other parties, with the specific information required to delineate the issues.

[31] The Approval Holder and the Director cannot simply state that in their view the issue has been properly decided in the Approval and therefore should not be reviewed by the Board. If the Board were to accept this flawed logic then the only issues that could be appealed are those where the Approval Holder and the Director agreed that with the appellant that an issue had been wrongly decided. As the Board has been previously advised by the Director, the Statement of Concern process and subsequent Notice of Appeal process is to ensure that a better approval is developed having regard to, among other things, the proper balancing of the purposes of the Act.¹⁶ As a result, an appellant should be allowed to bring forth legitimate specific

more appropriately addressed in the context of a licence under the *Water Act*."

¹⁶ Section 2 of EPEA provides:

"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 and 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;

concerns that it has with the terms and conditions of an approval, even if the Approval Holder and the Director believe they have been properly decided. That is what appeals do.

[32] The third issue presented by the Appellant in her submission refers to the effect that the Lafarge Operation will have on the environment and the Appellant. This issue presents the Board with the best indication of the Appellant's concerns properly connected to the Approval. On this point, and after reviewing all of the submissions, it appears to the Board, and most of the Parties agree, that dust and other air pollutants is the key issue.

[33] The Board notes that the issue of noise has been dealt with under the permit issued by the Municipal District of Rocky View, and that may be the end of the matter eventually. However, the Board also notes that section 1(mmm)(ii) of the Act specifically includes noise, or more properly sound, as a substance¹⁷ and, therefore, it is clearly within the jurisdiction of the Director to consider this issue. It is not a sufficient response for the Director to simply say that the municipality will or has dealt with this issue. Noise, as defined by the Act, is an impact on the environment that may be caused by the Lafarge Operation and therefore should be considered by the Director. As a result, noise as it relates to the Lafarge Operation and the Approval that is under review by the Board, is an issue that is properly before the Board.

[34] The Board is unclear on the specifics regarding the groundwater and Bow River issues. In the Board's view, it has not been provided with enough information to demonstrate a sufficient connection with the Approval before the Board, and it appears more appropriate to hear the Appellant's concerns on these issues under the *Water Act* process.

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- (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."

¹⁷

Section 1(mrnm)(ii) of EPEA provides:

"In this Act ... (mmm) 'substance' means ...(ii) any sound, vibration, heat, radiation or other form of energy"

[35] The Appellant has also raised concerns regarding impacts on fish, birds, and wildlife and impacts on aesthetic and recreational values. In the Board's view, the concerns that the Appellant raises with these issues are captured within the principle concerns of dust and air pollutants and noise. The concerns that the Appellant has with fish, birds, and wildlife and aesthetic and recreational values are, in her view, caused by the impacts of dust and air pollutants and noise, and therefore a separate consideration of these latter issues is not necessary.

[36] The Board does not agree with the Director when she argued that the Board does not have the authority to look at cumulative effects. The Director does. And since the Board can make any decision that the Director could make,¹⁸ we believe the Director can, and should, consider cumulative effect as set out below. Therefore, the Board has the jurisdiction to hear the issue in appeal. However, in considering the issue of cumulative effects in this appeal, it is critical that the Board's considerations are focused *only* on the Lafarge Approval and *not* on the other facilities in the area. Those facilities and their approvals are *not* under appeal. As a result, the cumulative effects of dust and other air pollutants and noise, as captured below, is an issue that is properly before the Board.

[37] However, by including the matter of cumulative effects, the Board wishes to stress that the cumulative effects of a project are insufficient to form the basis for the directly affected status of an appellant. While the Board is prepared to consider the issue of cumulative effects in this case, the Appellant still has the preliminary jurisdictional hurdle of standing to overcome. In the Board's view she cannot do this merely by pointing to any cumulative effect of the Approval. In the Board's view, to be considered directly affected, an appellant must be directly affected by the approval that is under appeal in and of itself. There must be a direct nexus between the approval being appealed and the impacts that the appellant is using as the foundation for standing.

¹⁸ Section 98(2) of EPEA states:

"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."

[38] The Board agrees with the Director that costs should be dealt with as a separate matter once the preliminary (directly affected) decision and/or final decision of the appeal is rendered. The Board notes, however, that both the Appellant and the Approval Holder reserve the right to speak to costs once a final decision with respect to this appeal has been made.

V. DECISION

[39] Pursuant to section 95(2) of EPEA, the Board determines that the following matters will be included in the hearing of the Appeal:

1. The effect that dust and other air pollutants from the Lafarge Operation may have directly on the Appellant.
2. The effect that noise from the Lafarge Operation may have directly on the Appellant.
3. The cumulative effects that dust and other air pollutants and noise from the Lafarge Operation, and as specifically regulated by the Approval, may have directly on the Appellant.

[40] In stating these issues, the Board reiterates that the substance of the operations of other facilities in the area is *not* before the Board. They are only relevant to the extent that they form part of the circumstances in which they interact with the Lafarge Operation that is under appeal.

[41] The Board also repeats that the threshold issue of the directly affected status of the Appellant remains outstanding, and this is a key preliminary issue that will be addressed at the hearing.

[42] Pursuant to section 95(4) of EPEA, the Board has determined, in paragraph 39, the matters that will be included in the hearing of this appeal and as a result, no representations may be made on any other matters at the hearing of this appeal.

Dated on April 22, 2002, at Edmonton, Alberta.

“original signed by”
William . Tilleman, Q.C., Chair

“original signed by”
Dr. M. Anne Naeth, Board Member

“original signed by”
Ted C. Fisher, Q.C., Board Member