2001 ABEAB 75 **Appeal No. 01-062-ID**

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – October 26, 2001

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

-and-

IN THE MATTER OF an appeal filed by Imperial Oil Limited and Devon Estates Limited with respect to Environmental Protection Order #EPO-2001-01 issued on June 25, 2001 by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.*

BEFORE William A. Tilleman, Q.C., Chairman

Appellants Imperial Oil Limited and Devon Estates Limited represented by Mr. Ken Mills and Ms. Bernadette Alexander, Blake, Cassels & Graydon.

Director Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment represented by Mr. William McDonald and Mr. Grant Sprague, Alberta Justice.

Intervenors The City of Calgary represented by Mr. Ron Kruhlak, McLennan Ross.

Calhome Properties Ltd. represented by Mr. Ted Helgeson, Helgeson & Chibambo Law Office.

The Lynnview Ridge Residents Action Committee represented by Mr. Gavin Fitch, Ronney Prentice.

The Calgary Health Region represented by Dr. Brent Friesen.

Rio Verde Properties Ltd. represented by Ms. Debbie Laing.

EXECUTIVE SUMMARY

This is a decision respecting a number of preliminary motions in relation to an appeal filed by Imperial Oil Limited and Devon Estates Limited (a wholly owned subsidiary of Imperial Oil) of an Environmental Protection Order (the EPO) issued to them with respect to the Lynnview Ridge residential subdivision in Calgary, Alberta. Imperial Oil filed its original Notice of Appeal of the EPO on July 3, 2001. On August 22, 2001, the Board issued a decision determining four issues that will be considered by the Board at the hearing of this appeal.

The EPO requires Imperial Oil to submit a remedial options report. On September 11 and 12, 2001, Alberta Environment issued two letters entitled "Decision on Conceptual Framework for Remediation at Lynnview Ridge". On September 18, 2001, Imperial Oil filed a second Notice of Appeal appealing the "decision" of Alberta Environment included in the September 11 and 12, 2001 letters. In the alternative, Imperial Oil asked to amend their original Notice of Appeal or add an additional issue to the hearing of this appeal. Alberta Environment challenged the ability of Imperial Oil to file this second Notice of Appeal, amend their original Notice of Appeal, or add an additional issue to the hearing of this appeal. Imperial Oil also asked the Board to reconsider its previous decision respecting how the Board would address Imperial Oil's request to compel the production of certain documents from the City of Calgary.

Following the receipt of submissions from the parties on these issues, the Board made the following decision:

1. Second Notice of Appeal – The Board has decided that it will not permit Imperial Oil to file a second Notice of Appeal.
2. Amendment of Notice of Appeal – The Board has decided that it will not permit Imperial Oil to amend their original Notice of Appeal.
3. Addition of an Issue – The Board has decided that it will permit the addition of a fifth issue. Issue 5: "Is the EPO reasonable and sufficiently precise in the circumstances up to the date of the hearing?"
4. Document Production – The Board will deal with the issue of document production at the hearing as originally planned. (Following the hearing held in Calgary on October 16 to 18, 2001, the parties have reached an agreement respecting the production of documents.)

TABLE OF CONTENTS

I. BACKGROUND 1

A. The EPO 1

B. The Notice of Appeal 3

C. Procedural History 6

D. The "Second" Notice of Appeal 11

II. ANALYSIS 14

A. Should the Board Accept the New Notice of Appeal? 14

B. Should the Board Accept an Amendment to the Original Notice of Appeal? 16

C. Should the Board Add a New Issue for the Purposes of Deciding the Appeal? 17

1. New Information 17
2. The Scope of the Current Issues Before the Board 19
3. The Power to Include Issues for Determination 20
4. The Inclusion of an Additional Issue Before the Board 21

D. Document Production 22

III. CONCLUSION 24

I. BACKGROUND

[1] This is a decision respecting a number of preliminary motions raised in relation to an appeal filed by Imperial Oil Limited ("Imperial Oil") and Devon Estates Limited ("Devon Estates") under the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act" or "EPEA"). Imperial Oil and Devon Estates (collectively the "Appellants") filed a Notice of Appeal respecting Environmental Protection Order #EPO-2001-01 (the "EPO") with the Environmental Appeal Board (the "Board") on July 3, 2001. The EPO was issued to the Appellants on June 25, 2001 by the Director, Enforcement and Monitoring, Bow Regions, Regional Services, Alberta Environment (the "Director) with respect to the Lynnview Ridge residential subdivision (the "Subdivision") in Calgary, Alberta.

A. The EPO

[2] The EPO states that Imperial Oil ran an oil refinery on the lands that are now the Subdivision between 1923 and 1975. The EPO states that the majority of lands that are now the Subdivision were then transferred to Devon Estates who developed them in conjunction with another company. According to the EPO, Devon Estates is a wholly owned subsidiary of Imperial Oil.

[3] The EPO states that in 1999 and 2000, the City of Calgary undertook a review of the "…numerous environmental assessments that had taken place at the Subdivision…." According to the EPO this review was prompted by previous complaints from residents of the Subdivision. The EPO states that following this review, a monitoring program was implemented that resulted in "…sampling and monitoring for hydrocarbons and lead (the 'Substances')…." The EPO states that the analytical results included in a May 2001 draft report indicate that "…numerous high hydrocarbon vapour concentrations [were] confirmed…" and that "…a number of soil samples taken for lead analysis … ranged over 1200mg/kg, and therefore exceed the Canadian Council of Ministers of Environment (CCME) soil limit of 140mg/kg."

[4] The EPO concludes that the Director "…is of the opinion that a release of the Substances has occurred, and that the release of the Substances has resulted in an adverse

effect…." Further, the EPO concludes that Imperial Oil and Devon Estates are "persons responsible" pursuant to section 1(ss)[1] of the Act.

[5] The EPO directs the Appellants to prepare an interim report that: delineates the release of the Substances, identifies short-term measures "…to address any imminent risks of exposure…", and details a communication and consultation plan with residents. The EPO requires that the measures identified in the interim report be carried out by the Appellants once the schedule of implementation has been approved by the Director. Further, the EPO directs the Appellants to prepare a remedial options report (the "Remedial Options Report") that reviews all of the options to remediate the Substances and the associated adverse effects.[2] The EPO requires

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[1] Section 1(ss) of the Act provides:

"In this Act … (ss) 'person responsible', when used with reference to a substance or a thing containing a substance, means

(i) the owner and a previous owner of the substance or thing,

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)…."

[2] The EPO provides:

"4. The Parties shall submit a report containing all options to remediate the Substance and the adverse effects to the Subdivision Lands, and any off-site areas (the 'Remedial Options Report') to the Manager by Wednesday, July 18, 2001. [This date was subsequently extended to August 16, 2001.]

5. The Remedial Options Report shall include:

(a) A detailed summary of each remedial option (the 'Remedial Options') that may be considered to remediate, risk-manage and/or remove and dispose of the Substances and the resulting adverse effects to the Subdivision Lands, and to any off-site areas;

(b) Each Remedial Option shall contain:

(i) The proposed methodology for statistical and laboratory analysis, sampling, monitoring, testing and the proposed remedial procedures;

(ii) The remedial criteria for soils, surface and groundwater for each of the Substances;

(iii) A description of all measures that will be taken to ensure that there is no damage to undisturbed areas;

(iv) The results of the public consultation required by Clause 2(c) regarding that particular Remedial Option; and

(v) A schedule of implementation describing the work planned to implement the Remedial Option."

that the Appellants carry out the option that is accepted by the Director.[3] Deadlines are set with respect to each of the requirements in the EPO. These deadlines were subsequently extended following discussions with the Director.[4]

B. The Notice of Appeal

[6] In the Notice of Appeal, the Appellants object to the EPO in its entirety, and in particular that the Director failed to "…name other persons known to him as persons responsible…." The Appellants also reserve "… the right to continue to challenge more specifically the terms of the Order in the event the appeal is dismissed in whole or in part…."

[7] More specifically, the Appellants identify seven grounds of appeal. These grounds of appeal are:

1. The deadlines in the EPO are unreasonable and impractical.
2. The Director exercised his discretion unfairly by failing to name the City of Calgary, Calhome Properties Ltd. ("Calhome"), Nu-West Development Corporation Ltd. ("Nu-West"), Curtis Engineering & Testing Ltd. ("Curtis"), Entek Engineering Limited ("Entek"), Kidco Holdings Limited ("Kidco"), and others as "persons responsible".
3. The Director exercised his discretion unfairly by failing to take into account a number of facts when he issued the EPO. These facts included:
   (a) ownership of the Subdivision lands by other parties at various times;
   (b) participation in the development process by the City of Calgary in a capacity other than a regulator;
   (c) development, review and approval of remedial measures by other parties prior to development of the Subdivision;
   (d) disposal of the contaminated soil;
   (e) approval by the City of Calgary of zoning changes subject to approval of the remediation;

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3 The EPO provides:

> "6. The Parties shall implement the work set out in the Remedial Option that is accepted by the Manager, in accordance with the applicable remedial criteria and schedule of implementation that are approved by the Manager."

4 With respect to the matter of the deadlines specified in the EPO, the Appellants also requested a Stay from the Board. However, the request for this initial Stay was withdrawn when the Director and the Appellants were able to reach an "…understanding…" as to how these deadlines would be applied. (Letter from the Appellants to the Board dated July 12, 2001.)

(f) timing and extent of business relationships between the Appellants and other parties;
(g) discussions between the City of Calgary and Alberta Environment and subsequent further development of the Subdivision in accordance with remedial measures;
(h) conflicting and additional data regarding contamination and the adverse impact; and
(i) changes in environmental guidelines.

4. Failure by the Director to consider legal precedents from other jurisdictions.

5. The Director improperly exercised his discretion in issuing the EPO pursuant to section 102 rather than section 114 of the Act.[5]

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[5] Section 114 of the Act provides:

"114(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.

(2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following, where the information is available:

(a) when the substance became present in, on or under the site;

(b) in the case of an owner or previous owner of the site,

> (i) whether the substance was present in, on or under the site at the time that person became an owner;
>
> (ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time that person became an owner;
>
> (iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before he became an owner, and whether the owner exercised such due diligence;
>
> (iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship;
>
> (v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it;

(c) in the case of a previous owner, whether that owner disposed of his interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;

(d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;

(e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;

6. The Director improperly exercised his discretion by applying section 102 of the Act retrospectively.[6]

(f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;

(g) what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site;

(h) any other criteria the Director considers to be relevant.

(3) In issuing an environmental protection order under subsection (1) the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 109.

(4) An environmental protection order made under subsection (1) may

(a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 102,

(b) contain provisions providing for the apportionment of the cost of doing any of the work or carrying out any of the measures referred to in clause (a), and

(c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site."

[6] Section 102 of the Act provides:

"102(1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an adverse effect,

the Director may issue an environmental protection order to the person responsible for the substance.

(2) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval or registration or the regulations, the Director may not issue an environmental protection order under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued or the regulations were made, as the case may be.

(3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

7. In the event that the Director was entitled to issue the EPO under section 102 of the Act, the Director improperly exercised his discretion by naming the Appellants as "persons responsible" under the Act because there has not been a release and in the event there has been a release, the release will not cause an adverse effect.

C. Procedural History

[8] The Board acknowledged the appeal on July 3, 2001 and requested that the Director provide the records (the "Records") related to this appeal. The Board received the Records on July 5, 13, and 23, 2001 and subsequently provided copies to the Appellants and other parties to this appeal. Copies of these Records were also made available for review by the public by placing a copy in the Calgary Public Library.

[9] In its letter of July 3, 2001, the Board also requested that the parties identify other parties that may have an interest in this appeal. The other parties that were identified were the City of Calgary, Calhome, Nu-West, Curtis, Entek, Kidco, and the Lynnview Ridge Residents Action Committee (the "Residents Committee"). The Board subsequently received intervention requests from the City of Calgary, Calhome, and the Residents Committee, the Calgary Health Region and Rio Verde Properties Ltd. The City of Calgary, Calhome, the Residents Committee, and the Calgary Health Region were subsequently granted full party status, while Rio Verde Properties Ltd. was granted intervenor status only.

[10] Further, 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.

[11] In consultation with the parties, on July 27, 2001, the Board set a hearing for September 12, 13, and 14, 2001 in Calgary and published notice in the Calgary Herald and the Calgary Sun on July 31, 2001 and August 1, 2001.

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order."

[12] On July 31, 2001, the Appellants filed an application with the Board to compel the production of certain documents in the possession of the City of Calgary. On August 2, 2001, the Appellants also provided a legal brief regarding the Board's jurisdiction to compel the production of the documents.

[13] In response to this application the Board decided hold a conference call between the Board's General Counsel and the legal counsel for the various parties.[7] Following the conference call, on August 8, 2001, the Board wrote to the parties and established a procedure to receive submissions on what the issues the Board would consider pursuant to sections 87(2), (3) and (4)[8] of EPEA. Following a consideration of these submission, on August 22, 2001 the Board decided that the issues that will be considered at the hearing are:

> "Issue 1: 'Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.'
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> Issue 2: 'Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?'

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[7] The parties involved in the conference call were the Appellants, the Director, the City of Calgary, Calhome, and the Residents Committee.

[8] Section 87(2), (3), and (4) of the Act 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:
>
> (a) whether the matter was the subject of a public hearing or review 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 65(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."

> Issue 3: 'Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?'
>
> Issue 4: 'Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?'"[9]

[14] During the course of its deliberation on the issues, the Board observed:

> "[44] The Board also notes the concern expressed by the Director with the statement that the Appellants '...reserves the right to continue to challenge more specifically the terms of the EPO in the event the appeal is dismissed in whole or in part….' The Board notes the two possible interpretations put forward by the Director. The first is that the Appellants want to reserve the right to raise additional grounds of appeal in the event they are unsuccessful on the grounds they have raised. The Director would object to this on the basis that raises '…concerns about the integrity of the appeal process….' The second interpretation is that the Appellants are reserving the right to 'appeal' future decisions of the Director. The Director argues that if this is the case, such considerations are hypothetical and premature.
>
> [45] On this point the Board will deal with future appeals as they arise, and not before. When such an appeal is filed, the Board will review it in the ordinary course. However, the Board wishes to make it clear that this hearing scheduled for September 12, 13, and 14, 2001 is the only hearing with respect to this particular EPO. The Appellants should not expect to be able to later raise additional grounds of appeal respecting this EPO in the event that they are unsuccessful on the merits. There is of course the reconsideration power found in section 92.1 of the Act, but that power has been narrowly construed by the Board in the past."[10]

[15] On August 23, 2001, the Board received a letter from the Director requesting clarification with respect to Issue No. 2. The Director asked "…whether the Board requires evidence on the effects of these substances, hydrocarbon vapours and lead as to be able to come to a determination that the presence of these substances would cause an adverse effect within the meaning of the legislation."

[16] On August 24, 2001, the Board wrote to the parties in response to the Director's request for clarification and stated: "The Board confirms that it views Issue 2 as principally

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[9] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID at paragraph 46.

being legal in nature. However, if the parties wish to bring evidence to support their legal arguments, they are free to do so."

[17] On August 24, 2001, the Board also wrote to the parties with respect to motion by the Appellants to compel the production of documents from the City of Calgary. The Board advised:

> "As determined by the Board following the August 7, 2001 conference call, the Board was of the view that *before* it would be in a position to provide further direction regarding the production of documents, it was necessary to first determine what issues would be considered at the hearing of this appeal. Those issues have now been determined in the Board's Decision of August 22, 2001.
>
> Now that these issues have been determined, the Board would like to receive the comments from the parties as to whether it should compel the production of the documents, taking into account the four issues that have been determined. However, having regard to these issues, the Board is of the view that it should receive these comments, not now, but at the hearing.
>
> The Board is of the view that prior to making a decision as to whether to compel the production of documents, it should *first* hear what evidence is currently available. As a result, the Board will be proceeding to the hearing scheduled for September 12, 13, and 14, 2001. At the hearing, the Board will hear the evidence that is currently available, hear the legal arguments respecting the issues, and then hear arguments as to whether further information is necessary and whether the documents requested should be produced. The Board is of the view that only then will it be in a position to make a proper decision regarding the Appellants' request to order the production of documents. It may be that once the Board has heard this information, that it will not be necessary for the Board to order the production of these documents. The Board is mindful that locating, producing and reviewing these documents will require a considerable investment of resources.
>
> Therefore, the Board requests that the parties include in their written submissions, arguments respecting each of the documents that have been requested. These arguments should address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtain in some other way. Once the Board has heard the evidence that is currently available regarding the four issues, heard the legal arguments respecting these issues based on this evidence, and heard the arguments respecting the documents, the Board will determine whether it has sufficient information to

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[10] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID at paragraphs 44 and 45.

continue with the appeal and make its Report and Recommendations or alternatively determine that further information is necessary and therefore order the production of documents."

[18] On August 27, 2001, the Board received a letter from the Appellants advising:

"As Imperial has stated in earlier correspondence to the Board, we believe that absent the additional documents, Imperial is significantly prejudiced in its ability to put forth its case at the hearing. Imperial will be further prejudiced in the event that any of the issues decided in advance of all evidence being before the Board.

Finally, as the party who is not in possession of the documents meeting a test for relevance can be done only by providing an explanation of what Imperial expects the documents to show, in the context of the approval and development of Lynnview Ridge. Requiring any more of Imperial would result in a further unfairness."

The Board acknowledged receipt of this letter on September 5, 2001.

[19] The Board reiterated its direction regarding the production of documents issue in its September 5, 2001, letter which also detailed the procedure that would be followed at the hearing.

[20] In preparation for the hearing that was scheduled for September 12, 13, and 14, 2001, the Board had established a process for receiving affidavits, response affidavits, and written arguments from the parties. During the period from August 31, 2001 to September 7, 2001 the Board received these various submissions.

[21] On September 11, 2001, the Director wrote the Appellants a letter (the "September 11, 2001 Letter") which indicated that it was a "Decision on Conceptual Framework for Remediation at Lynnview Ridge". On September 12, 2001, the Director provided an additional letter to the Appellants (the "September 12, 2001 Letter").[11]

[22] On September 11, 2001, the Board received a letter from the Appellants which indicated that:

"…the Director has this morning issued a letter [the September 11, 2001 Letter] which contains a decision on the Remedial Options Report provided by Imperial

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[11] The Appellants subsequently provided the Board with copies of the September 11, 2001 Letter and the September 12, 2001 Letter (collectively the "September 11 and 12, 2001 Letters"). The Appellants frequently refer to these letters as the "Director's Decision".

on August 16, 2001. The letter directs Imperial to take certain steps as part of the conceptual framework for the remediation at Lynnview Ridge.

Imperial expects that, once it has had an opportunity to review and seek clarification on the Director's letter of September 11, 2001, some or all of the steps required by the Director may be the subject of further appeal by Imperial.

…Imperial requests an adjournment of the hearing to properly deal with all matters which Imperial wishes to place before the Board. This will include those aspects of the Director's letter of September 11, 2001 that Imperial seeks to appeal."

[23] Following discussions with all of the parties, the Board granted the Appellants' adjournment request and advised that it would reschedule the hearing as soon as possible.

[24] Following consultation with the parties, by letter dated September 17, 2001, the Board asked the parties to hold October 15 to 19, 2001 for the rescheduled hearing.[12]

D. The "Second" Notice of Appeal

[25] On September 18 2001, the Appellants submitted a second Notice of Appeal (the "Second Notice of Appeal") to the Board, appealing the September 11 and 12, 2001 Letters.[13]

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[12] By letter dated September 19, 2001, the Board subsequently confirmed the dates of October 16 to 18, 2001 for the rescheduled hearing. In its letter of September 17, 2001, the Board also asked the Appellants to bring any of the motions referred to in their September 11, 2001 letter by September 18, 2001. (In doing so, the Board was mindful of section 84(4)(a) of the Act.)

[13] In the second Notice of Appeal, the Appellants stated that the details of the decision to which the Appellants object are:

"1. The Appellants object to installing sub-slab depressurization systems on all private residential property for vapour management, object to submitting any plan for installation of the sub-slab depressurization systems by October 31, 2001, and object to the requirement that all systems be installed before the onset of winter;

2. The Appellants object to the removal of the top 0.3m of soil in those instances where it is not required to meet the 140ppm guideline previously specified by Alberta Environment. Furthermore, the Appellants object to removal of soil beneath residential driveways and sidewalks;

3. The Appellants object to replacing all soil above the CCME 140ppm guideline in the 0.3 to 1.5 metre depth range with clean fill;

4. The Appellants object to providing additional site data beyond that additional data to be provided as part of the final lead and hydrocarbon delineation data proposed to be provided by the Appellants;

5. The Appellants object to paragraphs B5 and B6 of the Decision concerning testing and/or cleaning of furniture, rugs and drapes;

[26] In a September 18, 2001 letter attached to the Second Notice of Appeal, the Appellants requested that the Board: (1) accept the Second Notice of Appeal as an appeal of the September 11 and 12, 2001 Letters, (2) alternatively accept the Second Notice of Appeal as an amendment to the original Notice of Appeal, or (3) alternatively accept the Second Notice of Appeal as a request to reconsider the Board's Decision of August 22, 2001.[14] The September 18, 2001 letter also requested "…a stay of the Director's Decision [(the September 11 and 12, 2001 Letters)] or alternatively of the entire EPO to the extent the Director's Decision forms an amendment to the EPO." Finally, the September 18, 2001 letter requested that the Board deal with the issue of the production of documents from the City of Calgary in advance of the new hearing dates.

[27] On September 19, 2001, the Director responded to the Second Notice of Appeal and the September 18, 2001 letter from the Appellants. The Director expressed the view that "…there is no jurisdiction for the purported appeal attached to Mr. Mills' letter." The Director argued that the September 11, 2001 Letter "…is part of the implementation of the Order issued to Imperial and Devon… [and that this] process is contemplated by the provisions of section 102(3)…."[15] Further, the Director indicates that the real issue before the Board is: "…[s]hould

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6. The Appellants object to the requirement for further confirmatory sampling of soils other than what has been previously agreed to with the Director; and

7. The Appellants object to the deadlines stipulated in the Decision as being unreasonable and impractical."

[14] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID.

[15] Section 102(3) of the Act provides:

"An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

the Appellants be permitted to expand the hearing beyond the issues determined to be heard by the Board." The Director submits that the answer to this question is "no".

[28] On September 19, 2001, the Board sent letters to the parties to this appeal requesting submissions on the motions made by the Appellants in the second Notice of Appeal. Specifically, these motions were:

> "1. Should the Board accept the new Notice of Appeal appealing the '...Director's decision dated September 11, 2001 [and supplemented by the letter of September 12, 2001]...'? Are there any jurisdictional concerns with this new Notice of Appeal?
>
> 2. Should the Board accept an amendment to the original Notice of Appeal on the basis that the '...Director's Decision is an amendment of EPO 2001-01, and in conformance with paragraph III.4 of the original appeal...'?
>
> 3. Should the Board reconsider its decision dated August 22, 2001 and add the issue set out in the new Notice of Appeal?
>
> 4. Should the Board reconsider its decision to deal with the request by Imperial to compel the production of documents from the City of Calgary at the hearing?
>
> 5. Should the Board grant a Stay of the '…Director's Decision [of September 11, 2001 and September 12, 2001] or alternatively of the entire EPO to the extent the Director's Decision forms an amendment to the EPO…'?"

The Board then established a process to receive submissions on these questions and subsequently received these submissions.

[29] On October 10, 2001, the Board wrote to the parties and advised that the Appellants' request for a Stay had been denied and that written reasons would be provided shortly. (The Board's written reasons for denying the Stay will provided in another decision.)

[30] On October 12, 2001, the Board wrote to the parties and advised that:

> "1. Second Notice of Appeal – The Board has decided that it will not permit the Appellants to file a second Notice of Appeal.

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order."

2. Amendment of Notice of Appeal – The Board has decided that it will not permit the Appellants to amend their original Notice of Appeal.

3. Addition of an Issue – The Board has decided that it will permit the addition of a fifth issue (the 'Fifth Issue'). The Board is currently formulating this Fifth Issue, however, it will relate to the concerns expressed by the Appellants in relation to the Director's letter of September 11th and September 12th, 2001 and the reasonableness of those directions.

4. Document Production – The Board will deal with the issue of document production at the hearing as originally planned."

The letter went on to indicate that the Board's written reasons would be provided shortly. These are the Board's reasons.

II. ANALYSIS

[31] In this decision, the Board will address the first four questions identified in Board's letter of September 19, 2001.

A. Should the Board Accept the New Notice of Appeal?

[32] By letter dated September 18, 2001, the Appellants state that they seek to appeal the September 11 and 12, 2001 Letters. The Board must determine whether it has jurisdiction to accept the Second Notice of Appeal. The Board has no inherent jurisdiction to hear an appeal. The Board derives its authority from EPEA and can only hear those appeals identified by this piece of legislation.

[33] The Second Notice of Appeal states that it is submitted pursuant to sections 84(1),[16] 84(4),[17] and 89(2)[18] of EPEA, and section 3 of the Environmental Appeal Board

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[16] The relevant portions of section 84(1) of the Act provides:

"84(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances: … (h) where the Director issues an environmental protection order, (except an environmental protection order directing the performance of emergency measures under section 103, 144 or 153 and an environmental protection order referred to in clause (g)) the person to whom the order is directed may submit a notice of appeal…."

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

Regulation.[19] Section 84(1) of EPEA lists the specific circumstances in which a notice of appeal may be submitted to the Board. None of the provisions under section 84(1) provide a general avenue of appeal against a Director's "decision." Section 84(1)(h) provides that a person to whom an order is directed, may submit a notice of appeal against an environmental protection order. However, the Appellants have not claimed that the September 11 and 12, 2001 Letters constitute a new environmental protection order.

[34] The September 11 and 12, 2001 Letters are in reference to the Remedial Options Report produced by the Appellants under the requirements of the EPO. The Director identified what he perceives as inadequacies with the Remedial Options Report and directed the Appellants to undertake additional or alternative remediation works. Paragraph 6 of the EPO specifically contemplated that the Director will review the Remedial Options Report.

[35] The Appellants submitted on September 24, 2001, that the September 11 and 12, 2001 Letters derive their authority from the EPO and as it is effectively part of the EPO, the Board has authority to hear an appeal with respect to the Second Notice of Appeal pursuant to section 84(1)(h) of EPEA. However, the Board notes that the Appellants have already submitted a notice of appeal with respect to the EPO – the original Notice of Appeal. The Appellants do not contend that the present factual circumstances should give rise to two separate appeal hearings. Indeed, the Appellants request that the "…Second Notice of Appeal be heard concurrently with the hearing of the Appeal ... as there are common issues to be decided by the Board." In the Board's view, EPEA contemplates a timely hearing of appeals related to environmental protection orders, evidenced by the short 7 day period for submitting a notice of appeal,[20] which multiple appeals relating to the same environmental protection order would not promote.

"A notice of appeal must be submitted to the Board (a) not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h)…."

18 Section 89(2) of the Act provides:

"The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

19 Section 3 of the Environmental Appeal Board Regulation, A.R. 114/93, provides:

"Where the Board receives more than one notice of appeal in respect of a decision, it may combine the notices of appeal for the purposes of dealing with them under this Regulation."

20 See section 84(4)(a) of the Act.

Further, the Board's receipt of additional notices of appeal triggers processes under the Environmental Appeal Board Regulation, which are incongruous with the Board's conduct of a current appeal by the same appellants in respect of the same environmental protection order. The Board is not satisfied that any circumstances exist that would support the Second Notice of Appeal, by the same Appellants, with respect to an EPO already subject to appeal.

[36] Thus, the Board finds that the September 11 and 12, 2001 Letters do not constitute a decision for which a new notice of appeal may be submitted pursuant to section 84(1).

B. Should the Board Accept an Amendment to the Original Notice of Appeal?

[37] By letter dated September 18, 2001, the Appellants alternatively seek to amend the original Notice of Appeal on the basis that the Director's letters dated September 11 and 12, 2001 constitute an amendment to the EPO. The Director's letters do not purport to amend the EPO and the Director submits that they are part of the implementation of the EPO.

[38] As already discussed the jurisdiction of the Board to hear an appeal to an EPO is established in section 84(1) of EPEA. Section 84(1) is silent on the matter of hearing an appeal as an amendment to an EPO. Further, section 229(1)[21] of EPEA, which authorizes the Director to amend an environmental protection order, is also silent on the matter of whether an amendment may be appealed. As the Board noted in *Legal Oil and Gas Ltd.* v. *Director of Land Reclamation Division, Alberta Environmental Protection*[22] ("*Legal Oil*") section 84(1) specifically recognizes the right to appeal an amendment to an approval and the right to appeal an amendment to a reclamation certificate. It does not specifically recognize the ability to appeal an amendment to an environmental protection order. Therefore, it is difficult to accept the

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[21] Section 229(1) of the Act provides:

"The Director may

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an environmental protection order,

(b) cancel an environmental protection order, or

(c) correct a clerical error in an environmental protection order."

[22] *Legal Oil and Gas Ltd.* v. *Director of Land Reclamation Division, Alberta Environmental Protection* (December 22,1997), EAB Appeal No. 97-024.

Appellants argument that the omission of the right to appeal an amendment to an environmental protection order was merely an oversight.

[39] The Appellants refer to the Board's comment in *Legal Oil* to the effect that while there is no explicit authority under section 84(1) allowing for the appeal of an amendment to an environmental protection order, the Board would have been strongly inclined to hear an appeal from an amended environmental protection order. However, this comment was made with respect to a formal amendment issued under section 229 of EPEA, in the context of an appellant who had not appealed the original order or the formal amendment. Beyond this, the issue was not considered in depth in the *Legal Oil* decision. In that decision, the Board ultimately held that a letter implementing the EPO was not an amendment to the EPO.

[40] The Board finds that it does not have jurisdiction to hear an appeal against an amendment to an environmental protection order in these circumstances and therefore will not allow the Appellants to amend their original Notice of Appeal.

C. Should the Board Add a New Issue for the Purposes of Deciding the Appeal?

[41] The Appellants submit that all of the issues raised by the second Notice of Appeal should be heard with the original four issues identified by the Board. The Appellants claim that the inclusion of the additional issues outlined in the second Notice of Appeal would promote the public interest and would not result in a delay. However, the Appellants make these submissions on the basis that if the Board does not extend the issues for consideration in the appeal, it will need to schedule a further hearing to hear the issues raised under the second Notice of Appeal. As already noted, the Board's view is that the Director's letters do not give rise to any inherent right of appeal under EPEA.

1. New Information

[42] While the Board does not agree with the Appellants' submissions on this issue, the Board *does* agree that the parties should have the opportunity to present all relevant evidence at the hearing of this appeal. Therefore, the Board is prepared to consider whether evidence related to the Remedial Options Report and other information relevant to the issues for

determination, which may only have come to light after the Director's decision to issue the EPO or even after the Appellants submitted their Notice of Appeal, can be presented at the hearing.

[43] Section 87(2) of EPEA states:

> "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:
>
> ... (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.…"

[44] In *Williams* v. *Inspector, Land Reclamation Division, Alberta Environmental Protection* re: *Gulf Canada Resources Ltd.*[23] ("*Williams*"), the Board interpreted EPEA by reference to section 87(2) and other sections, as allowing the Board to consider information which becomes available after the decision subject to appeal was made. In *Williams*, the Board granted an appeal against the issuance of a reclamation certificate on the basis of evidence that only came to light after the reclamation certificate was issued. Upholding the Board's decision, Justice Kenny of the Court of Queens Bench stated:

> "This new information which came before the Board was properly before the Board pursuant to the Act. The applicant argues that to consider this information was contrary to the criteria set up by the Act. I disagree. In my view, the Board was following the same criteria and undertaking the same process which the inspectors and the director would have followed. Had this information been available at the time to the inspectors about the discernable growth problem and the pockets of white substance on the surface of the soil, I am satisfied that the inspectors would have come to a different conclusion and would likely have directed, as the Board did, that the applicant provide additional information to deal with these issues with its application for a Reclamation Certificate."[24]

[45] The present appeal is similar to that before the Board in *Williams* to the extent that it considers a decision based on knowledge that evolves as more information is collected. In *Williams*, the Board had the benefit of additional information because EPEA provides that a notice of appeal may be submitted up to one year after receipt of a copy of a reclamation

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[23] *William* v. *Inspector, Land Reclamation Division, Alberta Environmental Protection* re: *Gulf Canada Resources Ltd.* (July 7, 1995), EAB Appeal No. 95-014.

certificate. In this appeal, the Board should have the benefit of additional studies and reports that the Appellants have commissioned in a relatively short period pursuant to the EPO and as a result of the adjournment of the hearing. Even though these are unique circumstances, the Board is of the view that in this appeal the parties should have the opportunity to present all information which becomes available, up to the date of the hearing, to enable the Board to provide its recommendations fully to the Minister. Obviously the information must be relevant to the issues before the Board.

2. The Scope of the Current Issues Before the Board

[46] The issues for determination that were identified by the Board in its decision on August 22, 2001were:

> "Issue 1: 'Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.'
>
> Issue 2: 'Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?'
>
> Issue 3: 'Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?'
>
> Issue 4: 'Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?'"[25]

[47] These issues relate to the decision of the Director to issue an EPO to the Appellants that requires them to undertake potentially extensive and costly remediation work at the Subdivision. The issues identified by the Board relate primarily to the Director's discretion to issue the EPO in the manner he chose, rather than the actual terms of the EPO. That said, the terms of the EPO do bear a relationship to the issues. The question of whether the release has caused an adverse effect is directly relevant to the terms of the obligations imposed by the

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[24] *Gulf Canada Resources Ltd.* v. *Alberta (Minister of Environmental Protection)* (April 25, 1996), Action No. 9601 00113 (Alta.Q.B.), paragraph 31.

[25] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID at paragraph 46.

Director under the EPO. The Appellants also submitted that the issue of whether there may be an adverse effect will ultimately determine the scope of the remediation to be carried out.

[48] However, in the Board's view, while the issues raised by the Appellants in the Second Notice of Appeal are not outside the general scope of the issues for determination, they do not neatly fit within any one of the issues.

[49] Therefore, the Board finds that, if the issues alluded to by the Appellants in the Second Notice of Appeal are to be heard by the Board, the Board must include an additional issue for determination at the hearing.

3. The Power to Include Issues for Determination

[50] Section 92.1 of EPEA states:

> "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

The Board does not invoke this power lightly. As, the Board stated in *Whitefish Lake First Nation*,[26] "… the power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider." The Board noted that exceptional and compelling reasons are required: "…reconsideration power is an exception to the general rule that decisions are intended to be final ... [and it] is not to be used just to reargue the same issues the second time."[27] In *Bailey*, the Board confirmed that the factors it will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error in law that would change the result, and whether there is new evidence not reasonably available at the time

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[26] Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd.*) EAB Appeal No. 99-009 at paragraph 7.

[27] Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd.)* EAB Appeal No. 99-009 at paragraph 7.

of the previous decision.[28]

[51] Relying on *Whitefish Lake First Nation* and *Bailey*, the Board finds that the issues raised by the Appellants in the Second Notice of Appeal arose because of the collection and production of new information pursuant to the EPO. The information was not available to the Board when it determined the issues for this appeal. Further, this is not a situation where the Appellants are attempting to reargue issues already rejected by the Board. Not only that; the original decision was a preliminary decision only, made for the purposes of processing this appeal. The Board's Issues Decision thus does not warrant the same element of finality as would a Report and Recommendations to the Minister after a hearing. Finally, the Board finds that the public interest would not be served if it refused to hear new information, and the corresponding issues raised by that information, that was available to the Board.

[52] In hearing appeals, at least of this type, the Board's ultimate job is to prepare a report and recommendations for the Minister pursuant to section 91(1) of EPEA.[29] The Board is of the view that by taking this additional issue into consideration, it will be able to provide the best possible advice to the Minister. The Board finds that while some delays may occur through the hearing of an additional issue, the delays are less significant than the potential disservice to the Minister, the public interest and the parties in this appeal, if the Board does not hear all relevant information brought by the Appellants in providing its recommendations to the Minister. We must therefore add another issue.

4. The Inclusion of an Additional Issue Before the Board

[53] The issues raised by the Appellants relate to the Director's treatment of the Appellants' proposals under the Remedial Options Report. The Remedial Options Report was

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[28] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 94, (*sub nom. Bailey* v. *Director, Northeast Boreal Region, Environmental Service, Alberta Environment*) EAB Appeal Nos. 00-074, 077, 078 and 01-001-005ID at paragraph 63.

[29] Section 91(1) of the Act provides:

> "In the case of a notice of appeal referred to in section 84(1)(a) to (j) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the Water Act, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

required under the EPO. The Board finds that the September 11 and 12, 2001 Letter in relation to the Remedial Options Report relates to and therefore forms part of the Director's decision on the terms of the EPO. Therefore, rather than include each of the issues raised by the Appellants in the second Notice of Appeal, the Board has decided to include a single issue limited to the reasonableness of the Director's terms under the EPO. The Board expects that the parties' submissions to the Board on this issue will not be overly-technical but will focus on the appropriateness of the Director's terms.

[54] The Board notes that this decision to include a further issue for determination at the appeal is limited to the specific circumstances of this matter. The Board does not propose to generally review the Director's implementation of his decisions. What the Board is prepared to consider, in situation such as this, is whether the original terms of the EPO were too broad or vague, such that the Director's subsequent implementation decisions are without a proper foundation. This is what makes the information that has subsequently become available relevant to the EPO's original terms. The Board has decided to consider this issue in this appeal because of the production of substantial new information that was not before the Director when he issued the EPO and the fact that he has made directions under the EPO in relation to this information. The Board is also in the unique position of having this information available to it because of the tight schedule for implementation of the EPO and the adjournment of the appeal for reasons beyond the parties' control. The Board considers that it is in the public interest to consider this information with respect to the EPO.

D. Document Production

[55] The final matter that the Board will consider in this decision is the request by the Appellants to reconsider its decision to deal with the request for document production from the City of Calgary at the hearing.

[56] As stated above, on August 24, 2001, the Board wrote to the parties and advised that:

> "The Board is of the view that prior to making a decision as to whether to compel the production of documents, it should *first* hear what evidence is currently

> available. ...At the hearing, the Board will hear the evidence that is currently available, hear the legal arguments respecting the issues, and then hear arguments as to whether further information is necessary and whether the documents requested should be produced. The Board is of the view that only then will it be in a position to make a proper decision regarding the Appellants' request to order the production of documents. It may be that once the Board has heard this information, that it will not be necessary for the Board to order the production of these documents. The Board is mindful that locating, producing and reviewing these documents will require a considerable investment of resources.
>
> Therefore, the Board requests that the parties include in their written submissions, arguments respecting each of the documents that have been requested. These arguments should address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtain in some other way. Once the Board has heard the evidence that is currently available regarding the four issues, heard the legal arguments respecting these issues based on this evidence, and heard the arguments respecting the documents, the Board will determine whether it has sufficient information to continue with the appeal and make its Report and Recommendations or alternatively determine that further information is necessary and therefore order the production of documents."

[57] In the September 24, 2001 Submission, the Appellants argue that the Board should reconsider the decision to defer the document production matter so "…that the Board is presented with a complete record of the facts in order to decide the issue on appeal." The Appellants point to the submissions they filed for the purposes of the hearing of this appeal as indicating that the documents requested "…are necessary to define and delineate the City's role…" in this matter and argues that "…the Board now has evidence before it on which to base its decision on document production." The Appellants argue that the evidence currently before the Board demonstrate that the "…documents are relevant, material and necessary and cannot be obtained from any other source…." Finally, the Appellants argue that a reconsideration is warranted in these circumstances because: (1) reconsideration would promote the public interest, (2) new information is available, and (3) not requiring production at this stage would cause delay in the consideration of this appeal.

[58] As stated previously, section 92.1 of EPEA states:

> "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

Again, in *Whitefish Lake First Nation*,[30] the Board stated "… the power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."

[59] At the heart of the Board's decision, to deal with the document production issue at the hearing is the fact that the compelling the production of documents from a party such as the City of Calgary is an extraordinary power that the Board rarely exercises. And before exercising this power, the Board wants to be in the best position possible to make such a decision. We believe this is best achieved if the Board can "…*first* hear what evidence is currently available." Further, the Board will also "…hear the legal arguments respecting the issues, and then hear arguments as to whether further information is necessary and whether the documents requested should be produced." The Board expressed the view that it "…may be, that once the Board has heard this information, that it will not be necessary for the Board to order the production of these documents." On the other hand, if it is necessary to order the production of documents, once we have this information at the hearing, we will order production.

[60] At this time, the Appellants have not provided any new arguments in relation to the procedure proposed by the Board and we will stick with this procedure.

III. CONCLUSION

[61] Pursuant to section 87(2) of the Act, the Board determines that the following matters will be included in the hearing of the appeal:

> Issue 5: "Is the EPO reasonable and sufficiently precise in the circumstances up to the date of the hearing?"

[62] Further, the Board confirms its previous direction regarding how the document production issue is to be addressed.[31]

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[30] Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd.)* EAB Appeal No. 99-009 at paragraph 7.

[31] The Board notes that at the October 16 to 18, 2001 hearing, the Appellants, the City of Calgary, and the Director reached an agreement with respect to the procedure that would be used to address the document production issued.

Dated on October 26, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C., Chair