ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 8, 2006

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 appeals filed by Sally Ulfsten, Inez and Dave Stone, Peter Harwerth, Ted Ganske, and John Roux with respect to *Environmental Protection and Enhancement Act* Approval No. 141258-00-00 issued to BlackRock Ventures Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Ulfsten et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *BlackRock Ventures Inc.* (8 August 2006), Appeal Nos. 05-025-028 & 05-045-D (A.E.A.B.).

BEFORE:	Dr. M. Anne Naeth, Panel Chair, Mr. Al Schulz, Board Member, and Mr. Alex G. MacWilliam, Board Member.
SUBMISSIONS BY:	
Appellants:	Ms. Sally Ulfsten, Mr. Peter Harwerth, Mr. Ted Ganske, and Mr. John Roux, represented by Ms. Sally Ulfsten; and Ms. Inez and Mr. Dave Stone.
Director:	Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.
Approval Holder:	BlackRock Ventures Inc., represented by Mr. Shawn Munro, Bennett Jones.

EXECUTIVE SUMMARY

Alberta Environment issued an approval to BlackRock Ventures Inc.* authorizing the construction, operation, and reclamation of the Orion enhanced recovery in-situ oil sands project or heavy oil processing plant and oil production site near Cold Lake, Alberta. The Board received Notices of Appeal from Ms. Sally Ulfsten on behalf of Mr. Peter Harwerth, Mr. Ted Ganske, Mr. John Roux, and Mr. Dave and Ms. Inez Stone (collectively the Appellants).

In response to motions raised regarding the Board's jurisdiction to hear the appeals, the Board asked the participants to respond to the following questions:

1. Have valid Statements of Concern been filed by the Appellants?
2. If valid Statements of Concern have been filed by the Appellants with Alberta Environment, are the Appellants directly affected?
3. Has the Alberta Energy and Utilities Board (AEUB) held a hearing or review where the Appellants had the opportunity to participate in that hearing or review at which all of the matters in their Notices of Appeal were adequately dealt with?
4. Can the Stone family rely upon the Statement of Concern filed by the previous landowner?

The Board reviewed the submissions and determined the primary question in these appeals was whether the appellants had the opportunity to participate in a hearing or review by the AEUB at which all of the matters in the Notices of Appeal were adequately dealt with. All of the participants agreed there was a hearing by the AEUB, the Appellants had the opportunity to participate, and most of the appellants did participate in the hearing.

The Board reviewed the submissions as well as the AEUB decision and the Notices of Appeal and determined all of the concerns expressed by the Appellants were adequately dealt with by the AEUB, and it was evident the AEUB panel did consider the issues presented. Therefore, the Board was required to dismiss the appeals pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*. As the Board did not have jurisdiction to hear the appeals, the remaining questions would not affect the outcome of the Board's decision and were not addressed.

---

* On June 2, 2006, the Board was advised by the Appellants that Black Ventures Inc. was being purchased by Shell Canada Ltd. The ownership of project that has been approved has no bearing on the Board's decision.

TABLE OF CONTENTS

I. BACKGROUND

[1] On August 19, 2005, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 141258-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to BlackRock Ventures Inc. (the "Approval Holder") authorizing the construction, operation, and reclamation of the Orion enhanced recovery in-situ oil sands project or heavy oil processing plant and oil production site near Cold Lake, Alberta.[1] On September 19, 2005, the Environmental Appeals Board (the "Board") received Notices of Appeal from Ms. Sally Ulfsten on behalf of Ms. Inez and Mr. David Stone, Mr. Peter Harwerth, Mr. Ted Ganske, and Mr. John Roux (collectively the "Appellants") appealing the Approval and requesting a Stay.

[2] On September 22, 2005, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the "Participants") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and the request for a Stay. The Board requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals, and that the Participants provide available dates for a mediation meeting, preliminary meeting, or hearing. In the same letter, the Board requested that the Appellants respond to the questions in relation to the Stay requests.[2] Submissions were received from the Appellants on October 3, 2005. On October 14, 2005, the Board notified the Participants that it was denying the Stay request, but it advised the Appellants they would be free to reapply for a Stay, if appropriate, after the preliminary motions raised by the Director were

---

[1] On June 2, 2006, the Appellants advised the Board that the Approval Holder, BlackRock Ventures Inc., was being purchased by Shell Canada Ltd. Based on a news release (see: www.blackrock-ven.com/) dated July 10, 2006, this purchase is now complete. The ownership of the project has no bearing on the decision of the Board. Pursuant to section 75 of EPEA, Approvals can be transferred.

[2] The Appellants were asked to answer the following questions:

"1. What are the serious concerns of Ms. Ulfsten, Mr. and Ms. Stone, Mr. Harwerth and Mr. Ganske that should be heard by the Board?

2. Would Ms. Ulfsten, Mr. and Ms. Stone, Mr. Harwerth and Mr. Ganske suffer irreparable harm if the Stay is refused?

3. Would Ms. Ulfsten, Mr. and Ms. Stone, Mr. Harwerth and Mr. Ganske suffer greater harm if the Stay was refused pending a decision of the Board, than BlackRock Ventures Inc. would suffer from the granting of a Stay?

4. Would the overall public interest warrant a Stay?"

dealt with. The Board provided reasons for the Stay decision in its letter to the Participants dated November 10, 2005.

[3] On November 14, 2005, the Board acknowledged receipt of a letter from Ms. Ulfsten advising that Mr. Roux had not been given an appeal number. The Board confirmed this and corrected the error and included Mr. Roux as an Appellant. The Board advised that in reviewing the location of Mr. Roux's property in relation to the project, it did not find any reason to alter its Stay decision.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board ("NRCB") and the Alberta Energy and Utilities Board ("AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative. On October 24, 2005, the AEUB advised the Board that an application made by the Approval Holder for this project was heard in July 2004, from which Decision Report No. 2004-089 (the "Decision Report") was released. The AEUB advised that an application by the Ethel Lake Interveners[3] to review the decision was denied.

[5] On October 3, 2005, the Board received a letter from the Director, advising the Board of the hearing held by the AEUB and stating that the Board lacked jurisdiction pursuant to section 95(5)(b)(i) of EPEA. The Director submitted the preliminary issues of jurisdiction included whether valid statements of concern were filed, whether the filer was directly affected, and whether the AEUB had undertaken a hearing that adequately addressed the issues in the Notices of Appeal. The Director advised the Board that the Director's file was extremely lengthy, and therefore, he would not provide it to the Board until the preliminary issues were resolved.

[6] On October 27, 2005, the Board acknowledged receipt of the Director's October 24, 2005 letter and documents relevant to the issues and advised the Participants that the Board had added the issue as to whether an Appellant can rely on a statement of concern filed by a previous landowner. The Board then set out the written submission process with the following issues to be addressed:

---

[3] The Ethel Lake Interveners as identified in the Decision Report included D. Stone, I. Stone, J. Harwerth, B. Kolhaas, and S. Ulfsten.

"1. Have valid Statements of Concern been filed by the Appellants with Alberta Environment in relation to Approval No. 141258-00-00?

2. If valid Statements of Concern have been filed by the Appellants with Alberta Environment, are the Appellants directly affected by the work authorized under Approval No. 141258-00-00 issued to BlackRock Ventures Inc.?

3. Has the Alberta Energy and Utilities Board (AEUB) held a hearing or review where the Appellants had the opportunity to participate in that hearing or review at which all of the matters in their Notices of Appeal were adequately dealt with? and

4. Can the Stone family rely upon the Statement of Concern filed by the previous landowner?"

[7] On November 18, 2005, Mr. and Ms. Stone advised the Board that they wished to represent themselves in this matter. The Board received the Participants' submissions between November 18, 2005 and January 5, 2006. On January 9, 2006, the Board acknowledged a telephone conversation with Ms. Ulfsten, who advised the Board that she is not an Appellant, but that she was representing the remaining Appellants.

II. SUBMISSIONS

A. Appellants

1. Initial Submission

[8] Ms. Sally Ulfsten explained she submitted a Statement of Concern dated October 2, 2001, on behalf of Mr. John Roux and Ms. Helen Head. She stated she no longer represents Ms. Head, but Mr. Roux still lives on his land and wanted Ms. Ulfsten to represent and coordinate his appeal. Therefore, according to Ms. Ulfsten, there is a valid Statement of Concern.

[9] The Appellants stated they had no formal correspondence with Alberta Environment, except in the AEUB hearing process. The Appellants argued Mr. and Ms. Stone should be allowed to represent themselves under the Duckett's Statement of Concern, because the Stones purchased the same land the Ducketts had and they were deemed directly affected for

all past applications by Imperial Oil Resources. They argued this legal right must be transferable.

[10] The Appellants stated they are directly affected by the work authorized under the Approval, as they reside or operate trap lines on lands adjacent to the site. The Appellants explained Mr. Roux's residence is furthest from the site, but Highway 892, the approved access route for the oil industry in the area, divides his property. The Appellants stated the Approval Holder had instructed its contractors to use the Riverhurst Highway to haul gravel and road building equipment onto its lands, even though the Riverhurst Highway was removed from any approved oil industry traffic. The Appellants stated they reported this to the AEUB and the use of the road was stopped. According to the Appellants, Mr. Harwerth was affected by the noise of the gravel trucks day and night, and presently, the Approval Holder is clearing, brushing, and burning on the site.

[11] The Appellants stated there was an AEUB hearing and the Stones and Harwerth families intervened. The Appellants argued that all of the matters in the Notices of Appeal were not adequately dealt with. The Appellants stated they had four Ph.D. expert witnesses at the AEUB hearing, including experts in cumulative environmental assessments, geophysics, groundwater chemistry and contamination, and human health risk assessment. According to the Appellants, the Approval Holder only had one expert with a Ph.D., in human health risk assessment, at the AEUB hearing, and Alberta Environment only had its lawyer present for cross-examination. The Appellants stated the AEUB did not accept any of the testimony provided by their experts, even those with a Ph.D., and the AEUB agreed with the Approval Holder's experts and evidence, "…even if the majority of it was taken directly out of Imperial Oil [Resources'] [Environmental Impact Assessment] and was therefore not site-specific and in some cases had not been verified."[4] They stated the AEUB accepted the evidence of the Approval Holder's groundwater expert over their expert who had a Ph.D. in groundwater contamination and was an advisor to the United States Environmental Protection Agency on arsenic in groundwater. The Appellants submitted the AEUB should not agree with the use of a

[4] Appellants' submission, dated November 14, 2005, at page 3.

technology that will release the natural occurring arsenic into the groundwater as it is not reversible.[5]

[12] According to the Appellants, the table of contents of the Decision Report lists geology and hydrogeology, wellbore and formation integrity, arsenic mobilization and human health, surface water, air, visual and noise impacts, and land values. They stated this may make it appear that they were given the opportunity to participate and have their concerns dealt with, but they had to share the three days of the hearing with two other interveners. The Appellants stated they should have requested an adjournment, but they felt that given the AEUB's experience with the issues and the Memorandum of Understanding, the AEUB would have ensured the Appellants' experts and legal presentation would be given appropriate consideration. The Appellants argued that, "Reading the [A]EUB decision one would not be able to determine what our experts presented by way of testimony or reports, as the decision has been written as if we didn't present a panel of experts or file any written reports."[6]

[13] The Appellants referred to the issue of groundwater monitoring and the requirement to detect arsenic prior to reaching any of the domestic water wells and argued there were discrepancies in the Decision Report regarding distances between heated wellbores and residents' water supply wells. The Appellants referred to the groundwater program that requires the Director to authorize the program. According to the Appellants, the Approval Holder did not provide any site specific evidence as to whether the site is a discharge or recharge zone, and the Director accepted this lack of evidence. The Appellants stated that if arsenic is being released into a recharge zone, the impact would be different than what would occur in a discharge zone. The Appellants referred to the Decision Report where it stated, "…the [AEUB] trusts that [Alberta Environment] will ensure that BlackRock's groundwater monitoring program is designed to ensure that project-specific information related to thermal arsenic mobilization and transport are gathered." According to the Appellants, the word arsenic is used once in the Approval in requiring a proposal to address the potential impacts the project may have on

---

5 See: Appellants' submission, dated November 14, 2005, at page 3.

6 Appellants' submission, dated November 14, 2005, at page 3.

liberating or introducing arsenic into the groundwater. The Appellants commented that Alberta Environment did not have its contaminant hydrogeologist at the AEUB hearing.

[14] According to the Appellants, the Decision Report is full of inconsistencies and the AEUB approval does not reflect any of the testimony presented by the interveners. The Appellants stated the Order-in-Council reflects the problems with the Decision Report, as it reduced the approval for the development from 16 quarters to three, and the Approval Holder is required to provide the information that was not in its application prior to further development. The Appellants pointed out the Approval is for the full 16 quarter sections, and argued the Director either did not read the Order-in-Council or chose to ignore it.

[15] The Appellants stated the AEUB ignored their expert testimony regarding a possible failure of the cap rock and agreed with the Approval Holder, even though there had been reports of oil to surface incidents on lands adjacent to this project.

[16] The Appellants argued the Ducketts filed a Statement of Concern on October 15, 2001, and the legal right captured by that Statement of Concern transferred with the Stones' purchase of the Duckett lands.

2. Rebuttal Submission

[17] The Appellants stated the Director was correct in concluding the Appellants are dissatisfied with the AEUB decision, and this is a common outcome of a public hearing regarding such a large oil extraction facility in a populated area of Alberta. The Appellants stated their dissatisfaction can be supported with new evidence they would provide at the hearing. The Appellants argued that since the Order-in-Council reduced the development area to three quarter sections, their concerns were reviewed by someone after the AEUB decision.

[18] The Appellants claimed the Decision Report failed to consider the interveners' expert witness' evaluation of the Environmental Impact Assessment ("EIA"). They stated the Decision Report did not mention the interveners' witness who testified the EIA failed to address the serious cumulative impacts in any meaningful or professional manner. The Appellants stated the Decision Report did not refer to the interveners' witness who testified there was no such

thing as a zero risk for casing failures under the lakes, and the EIA used models and data from other companies with no site specific geological information. The Appellants argued Imperial Oil Resources wrote a letter to the AEUB after the decision that does not support the AEUB's conclusion regarding the arsenic issue. The Appellants stated the Decision Report does not refer to the Appellants' witness' human health risk assessment that determined the "…farmer receptor in our community had a 3.5 greater risk of cancer from their exposure to groundwater with elevated arsenic."[7]

[19] The Appellants stated the Decision Report did record many of the environmental issues the Approval should address. They referred to the recommendation that the Director will ensure the groundwater monitoring program is designed to gather project specific information related to thermal arsenic mobilization and transport but, they argued, the Approval has not included this. The Appellants submitted it was unacceptable that the Approval Holder proposed to monitor groundwater at only two of its proposed multi-well pads given the elevated arsenic levels found at monitoring wells north of the project site.

[20] The Appellants argued the Director failed to consider all of the evidence presented in the AEUB hearing, and he failed to complete a proper review of the EIA as it did not present adequate cumulative impact assessments. According to the Appellants, the Approval fails to support the protection, enhancement, and wise use of the environment, therefore they should all be granted standing in these appeals.

[21] According to the Appellants, if the Director only reviewed the Decision Report, the interveners' panel, experts, and closing arguments, they were not adequately dealt with in the Approval.[8] The Appellants argued the Approval does not address the concerns they brought forward or the purposes of EPEA, and that is the reason they are appealing.

[22] The Appellants noted the Director only had his lawyer present at the AEUB hearing, and his environmental experts were not there to cross-examine the Approval Holder or

---

7 Appellants' submission, dated January 5, 2006, at page 2. The Board is unclear as to what the comparison is being made to as the Appellants did not fully develop this argument.

8 The Board notes that the test in this case is not whether the Director adequately addressed the Decision Report in the Approval, but whether the AEUB adequately addressed the Appellants issues in their hearing process. See: section 95(5)(b)(i) of EPEA.

the interveners' witnesses. The Appellants argued section 92.1 of EPEA[9] provides the Board the power to reconsider any decision, and therefore, the Board should allow the appeals of all of the Appellants to proceed, thereby providing the Director an opportunity to show how he determined the terms and conditions in this Approval would adequately address the purposes of the EPEA.

[23] The Appellants questioned why no request was made to confirm the Federal Government's acceptance of the project was included in the application considering the project is adjacent to Indian Reserve #149 and Ethel Lake's only outflow traverses the reserve, and considering the EIA looked at impacts on surface water, fish habitat, and wetlands.

[24] The Appellants referred to section 68(4)(a) and (b) of EPEA,[10] and argued the Approval failed to consider all of the evidence that was before the AEUB. The Appellants stated they would file the interveners' experts' submissions if granted a hearing before the Board and explain why they are not satisfied with the AEUB decision.

[25] In response to the Approval Holder's submission, the Appellants argued the quantity of experts is not the same as quality of the end results. The Appellants explained there were time constraints placed on the AEUB hearing, and the interveners' experts had less than three weeks to receive and review the EIA and to prepare submissions. The Appellants stated the AEUB hearing was limited to three and a half days, which they were not aware of until the opening of the hearing.

[26] The Appellants explained they all had the opportunity to participate in the AEUB hearing, except for Mr. Holmes and Mr. Roux. The Appellants argued this is an extremely

---

[9] The Board noted the Appellants were referring to section 92.1, *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3, which has been renumbered in *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 to section 101, which provides: "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."

[10] Sections of EPEA 68(4)(a) and (b) states:

"In making a decision under this section, the Director

(a) shall, in addition to any criteria that the Director is required by the regulations to consider, consider any applicable written decision of the Energy Resources Conservation Board, the Board, as defined in the Agricultural Operation Practices Act, under Part 2 of that Act or the Natural Resources Conservation Board in respect of the subject-matter of the approval or registration, and

unusual case because of the time lag between the original application in 2001 and the actual AEUB hearing process in July 2004 and the Approval in 2005. They stated any person who became new landowners within the area after October 2001, including Mr. and Ms. Stone, Mr. Harwerth, Mr. Holmes, and Mr. Ganske, have missed the deadline to file a Statement of Concern, but they still meet the criteria for directly affected. The Appellants argued that if the AEUB and Alberta Environment "…stall a project for enough years there will be no one who meets the [EPEA] criteria."[11] The Appellants questioned why, if the project was safe, the application/approval process took so long.

[27] The Appellants explained the map provided with their November 14, 2005 submission demonstrates how the proposed project, including the multi-well pads, the roads required for daily operations, and the steam and oil lines, are adjacent to the Appellants' homes and to lakes and streams. The Appellants stated Mr. Harwerth is less than 300 metres from the site, and there are 20 domestic wells, including five on new lots since 2001, within 300 metres of the project.

[28] The Appellants stated they must live with the knowledge that their domestic water supply is considered a future receptor for arsenic, and in Mr. Roux's case, a test of his well in 1998 showed arsenic levels of 0.049 mg/l. The Appellants expressed concerns that the Approval Holder is not required to provide baseline data on the surrounding wells.

[29] The Appellants argued their homes are close enough to the project that they will experience odours and air emissions that can cause human health impacts. The Appellants explained Ms. Stone and her daughter have health conditions that are impacted by environmental factors. The Appellants stated concern regarding the cumulative emissions from other large facilities in the basin and how the emissions can remain at a sufficiently low elevation that the plume distribution would affect the neighbours of the facility. According to the Appellants, all of them own or have a legal right, including trap lines, to make use of the lakes and the surrounding public lands.

(b) may consider any evidence that was before the Energy Resources Conservation Board, the Board, as defined in the Agricultural Operation Practices Act, under Part of that Act or the Natural Resources Conservation Board in relation to that written decision."

[11] Appellants' submission, dated January 5, 2006, at page 6.

[30] According to the Appellants, Mr. Roux has no objection to his neighbours forming a group and having Ms. Ulfsten represent them. They explained Mr. Roux only wants to participate to protect his community. The Appellants stated all of them live in the geographic vicinity of the project and can be described as an organization called the Ethel Lake Intervener's. The Appellants believed the right to due process ensures the Board will consider it appropriate to give all of the persons who filed Notices of Appeal an opportunity to make representations.

[31] Ms. Ulfsten confirmed she is not an intervenor or an appellant in these appeals. The Appellants argued the Duckett Statement of Concern was legally transferred to the Stone family, and therefore, they can participate in the appeal process.

[32] The Appellants stated oilfield traffic past any farm, including Mr. Roux's, is a direct personal issue. They argued diesel emissions from the trucks can impact human health and traffic noise can affect sleep patterns. They explained Mr. Roux's cattle, horses, and dogs can be impacted, and pointed out that Mr. Roux's children and grandchildren have to cross the busy intersection if they want recreation at Hilda Lake.

[33] The Appellants raised the issue of economic interests should Mr. Roux decide to sell his farm. They stated the domestic wells are down gradient of the project. According to the Appellants, the Approval does not contain the actual terms and conditions of the groundwater monitoring program, and therefore, Mr. Roux and all of the Appellants are impacted by the granting of the Approval.

3. Mr. Dave and Ms. Inez Stone

[34] Ms. Inez and Mr. Dave Stone argued section 93 of EPEA[12] gives the Board the power and the jurisdiction to allow time extensions, and if such an extension was allowed, they would submit their own Statement of Concern. In the alternative, they argued they could use the Duckett's Statement of Concern. Mr. and Ms. Stone explained they purchased their property from the Ducketts in September 2002, and they questioned whether the Statement of Concern

[12] Section 93 of EPEA states: "The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so."

belongs to the landowner, the land, or both to the exclusion of all else. Mr. and Ms. Stone stated the AEUB found them to be directly and adversely affected by the AEUB's decision regarding the Approval Holder's application.

[35] Mr. and Ms. Stone argued the AEUB did not undertake a hearing, as it did not follow the rules of due process with regard to timelines. They stated their request for a review of the decision was not completed until after the Order-in-Council was granted, and this denied them due process.

[36] Mr. and Ms. Stone referred to a letter sent from Imperial Oil Resources to the AEUB, in which Imperial Oil Resources commented about the AEUB's decision and "…making 'clarifications regarding statements about results from Imperial Oil's investigation into arsenic mobilization by thermal bitumen recovery processes…'" and "'Imperial Oil would simply like to ensure that the public record is clarified with regards to Imperial Oil data and study results.'"[13] Mr. and Ms. Stone interpreted this to mean Imperial Oil Resources felt these matters were not adequately dealt with at the AEUB hearing. They requested the Board clear up these serious issues and set the public's mind at ease.

[37] In their response submission, Mr. and Ms. Stone argued the Director and the Approval Holder failed to show how concerned the Appellants are for the water, air, land, and animals that surround them. Mr. and Ms. Stone stated they have not made the effort to be heard simply because they are dissatisfied. They argued these are exceptional circumstances, and the spirit of the law must be adhered to rather than the letter of the law.

[38] Mr. and Ms. Stone explained the Approval Holder intends to drill about 250 wells on wetlands, old growth forest, and under two lakes that area residents live on and use all year round. They stated their review of the EIA, AEUB approval, the Approval, relevant documents, as well as living on the adjacent land, breathing the air, and using the water should be sufficient to grant them the right to voice their concerns. Mr. and Ms. Stone argued their families, water, air, land, animals, and crops will be directly and adversely affected, and the Approval Holder's EIA states this. Mr. and Ms. Stone stated many issues were dealt with by the AEUB, but some

---

13 Ms. Inez and Mr. Dave Stone's submission, dated November 14, 2005.

issues remain. They stated recent surface water data from Imperial Oil Resources indicate high levels of toxic substances in Ethel and Hilda Lakes are being found, and there were concerns about the toxic emissions in the area and the effect on residents' health.

B. Approval Holder

[39] The Approval Holder submitted the appeals should be dismissed. It stated Mr. Ganske, Mr. Harwerth, the Stones, and Ms. Ulfsten did not file Statements of Concern and are not entitled to file Notices of Appeal. They stated Mr. Roux filed a Statement of Concern and a Notice of Appeal, but failed to demonstrate his personal interests are potentially directly affected by the Approval, and he had the opportunity to participate in an AEUB hearing where all of his issues were adequately dealt with. The Approval Holder acknowledged that Mr. Grant Duckett filed an objection to the application, which could constitute a Statement of Concern, but he did not file a Notice of Appeal. The Approval Holder submitted Mr. Duckett's Statement of Concern cannot be relied upon by any of the Appellants.

[40] The Approval Holder clarified the Statement of Concern filed by Ms. Ulfsten dated December 10, 1999, related to an application made by the Approval Holder to operate an experimental project and is not related to the current application under appeal.

[41] The Approval Holder argued Mr. Harwerth, Mr. Ganske, and Mr. and Ms. Stone did not submit Statements of Concern, and Ms. Ulfsten did not file a Statement of Concern on her own behalf. The Approval Holder submitted this situation does not warrant the Board ignoring the normal legislated appeals process by permitting an appeal be filed in the absence of a Statement of Concern. Therefore, according to the Approval Holder, these Appellants are not entitled to file a Notice of Appeal and their appeals should be dismissed.

[42] The Approval Holder argued the only potential Statement of Concern filed was the document filed by Ms. Ulfsten on behalf of Mr. Roux. The Approval Holder stated the December 5, 2001 Statement of Concern filed by Ms. Ulfsten on behalf of Ms. Helen Head and Mr. John Roux makes a vague reference to Mr. Roux's concerns, specifically his concerns regarding increased traffic. The Approval Holder argued Mr. Roux did not demonstrate he is directly affected by the application. According to the Approval Holder, it is impossible to

discern from the information provided whether Mr. Roux is directly affected by the works allowed under the Approval in a manner different from the public as a whole. The Approval Holder stated the submission does not provide any information how Mr. Roux's personal interests are directly impacted, other than to say that Mr. Roux's property is divided in half by Highway 892, which the Appellants claimed is an approved access route for all oil industry in the area. Therefore, according to the Approval Holder, Mr. Roux has not satisfied the onus of demonstrating his personal interests are directly affected by the issuance of the Approval.

[43] The Approval Holder argued Mr. and Ms. Stone are not entitled to rely on the Statement of Concern filed by Mr. Grant Duckett, because a Statement of Concern is not tied to the land. The Approval Holder argued many concerns in Mr. Duckett's Statement of Concern are of a personal nature, and it would be inappropriate to attribute those concerns to another individual. The Approval Holder said a Statement of Concern sets out that person's concerns with the application, and it is not intended to set potential concerns of future landowners. The Approval Holder argued a "…Statement of Concern is not an asset that is transferable from one party to another."[14] It explained that during the legislated timeframe for filing Statements of Concern, Mr. and Ms. Stone were not directly affected by the project and would have no right to file a Statement of Concern.

[44] The Approval Holder submitted that even though there may be a reasonable argument that the Stones are now potentially directly affected, the right to file an appeal is not limited to a determination of whether the person is directly affected; they also must either have filed a Statement of Concern or be able to demonstrate circumstances of such an exceptionally rare nature that the Board should permit the Notice of Appeal be filed in the absence of a Statement of Concern. The Approval Holder stated exceptional circumstances do not exist in the current matter, and Mr. and Ms. Stone did not demonstrate they intended to file a Statement of Concern. The Approval Holder argued it would be inappropriate to extend the timeline to allow Mr. and Ms. Stone to file a Statement of Concern, pointing out that Mr. and Ms. Stone did not contact the Director to express an intention of filing a Statement of Concern or express their concerns in a letter when they became aware of the application. The Approval Holder stated Ms.

---

[14] Approval Holder's submission, dated December 12, 2005, at page 8.

Stone did not contact the Director until August 22, 2005, years after they acquired the Duckett land and years after the deadline for filing a Statement of Concern. The Approval Holder submitted the "…regulatory certainty that is achieved through the establishment of timeframes would be undermined if the fact that new parties had acquired an interest in the area of the proposed project reopened the deadlines for submissions."[15]

[45] The Approval Holder noted the Appellants did not make any claims that they were not provided with adequate notice of, or did not have the opportunity to participate in, the AEUB hearing held regarding the Approval Holder's application. The Approval Holder stated Mr. and Ms. Stone and Mr. Harwerth actively participated in the AEUB hearing through their membership in the Ethel Lake Interveners Group, which was coordinated by Ms. Ulfsten and which was represented by counsel. The Approval Holder stated Mr. Ganske and Mr. Roux did not actively participate in the AEUB hearing, but notices were published and they had an opportunity to become aware of and participate in the proceedings and to raise issues of concern. The Approval Holder argued that, since Ms. Ulfsten has represented Mr. Roux since 1999, "…there is little doubt that Mr. Roux had a reasonable chance to make his views known to the AEUB."[16] The Approval Holder submitted that Mr. Roux chose not to participate in the AEUB proceedings, and "…a party that has had such an opportunity to participate in a comprehensive AEUB hearing should not be allowed to complain that issues of concern to him were not adequately dealt with at the hearing."[17]

[46] The Approval Holder argued the AEUB hearing adequately dealt with all of the issues raised in the Notices of Appeal, and most of the issues were discussed in considerable detail during the AEUB hearing process. The Approval Holder stated that, even though an issue was not discussed in detail at the oral portion of the hearing, it should not be viewed as an indication the issue was not adequately dealt with during the proceedings. The Approval Holder explained there was an extensive pre-hearing process, including filing the application, reports and written submissions, and the interveners had every opportunity to test the Approval Holder's evidence and to present their own evidence on outstanding issues.

---

15 Approval Holder's submission, dated December 12, 2005, at page 9.

16 Approval Holder's submission, dated December 12, 2005, at page 5.

[47] The Approval Holder listed its various experts who attended the AEUB hearing and were available for cross-examination by the interveners. This list included experts in the fields of human health risk assessment, air quality and human health, hydrogeology, geomechanics, fish habitat, wildlife, vegetation, and noise issues.

[48] The Approval Holder explained Mr. and Ms. Stone, Mr. Harwerth, and Ms. Ulfsten participated in the witness panel of the Ethel Lake Interveners Group, and Mr. Harwerth "…provided a detailed outline of their environmental concerns with the proposed project on air quality, noise, hydrogeology, hydrology, water quality, fish and fish habitat, and wildlife and human health."[18] The Approval Holder stated Mr. Harwerth gave oral testimony outlining his concerns; Mr. Stone gave a detailed explanation of his family's concerns, including the project's potential impact on the quality of life in the area; and Ms. Ulfsten addressed the issue of cumulative impacts. The Approval Holder stated the interveners had experts provide testimony on air quality, the effect of heat from steam injection well bores on arsenic, health effects of arsenic in groundwater, and health issues. Therefore, according to the Approval Holder, it is evident by the witnesses presented that all of the environmental issues identified in the Notices of Appeal were adequately dealt with during the AEUB proceedings. The Approval Holder explained the AEUB explicitly stated it had given serious consideration to all of the evidence presented during the proceedings.

[49] The Approval Holder stated the Decision Report specifically addressed topics such as arsenic mobilization and human health, surface water quantity and quality, water management, air quality issues, and visual and auditory impacts on local residents. The Approval Holder explained the AEUB has a mandate to consider environmental issues and the Director is obligated to consider the AEUB decision. The Approval Holder submitted section 95(5)(b)(i) was adopted to promote efficiency and fairness and prevent duplication when an appellant had a reasonable chance to participate in the AEUB review.

[50] The Approval Holder submitted the appeals should be dismissed, as the issues identified in the Notices of Appeal were adequately dealt with by the AEUB, and while "…Ms.

---

17 Approval Holder's submission, dated December 12, 2005, at page 5.

18 Approval Holder's submission, dated December 12, 2005, at page 7.

Ulfsten and Ms. Stone are clearly unhappy with the outcome of the AEUB hearing and the fact that certain testimony was perhaps preferred over the testimony of the Ethel Lake Interveners Group's witnesses, this does not amount to a valid reason to reevaluate subject matter that was front and center at the AEUB hearing."[19]

C. Director

[51] The Director explained the Approval Holder submitted an application jointly to the AEUB and Alberta Environment to undertake an in situ oil sands, heavy oil processing plant and oil production site. The Director said a Statement of Concern was filed by Ms. Sally Ulfsten on behalf of Ms. Helen Head and Mr. John Roux, and Mr. Grant and Ms. Beatrice Duckett filed a Statement of Concern.

[52] The Director explained the Statement of Concern filed by Ms. Ulfsten was not filed on her own behalf but on behalf of Ms. Head and Mr. Roux. The Director stated it was clear Ms. Ulfsten had not intended to file a Statement of Concern on her own behalf. He argued Ms. Ulfsten has not indicated how she personally would be directly affected; therefore her appeal should be dismissed. He argued the appeals of Mr. Harwerth, Mr. Ganske, and Mr. and Ms. Stone also must be dismissed, as they did not file Statements of Concern.

[53] The Director explained he undertook a series of communications with Mr. Roux and Ms. Ulfsten, and he was satisfied that a prima facie case could be made that Mr. Roux was directly affected, and therefore, the Director treated his submission as a Statement of Concern. According to the Director, the first element of the test set out in section 91(1)(a)(i) has been met for Mr. Roux. The Director referred to a map attached to the November 14, 2005 letter from the Appellants, on which notations were made indicating the location of the Appellants. The Director argued "…a simple assertion that one lives in the vicinity of a project without highlighting what impacts the project will have on them would be insufficient to demonstrate

---

[19] Approval Holder's submission, dated December 12, 2005, at page 8.

that the interest of that person is any greater than that of a member of the general public."[20] The Director stated it is unclear from the map what impacts would be addressed by the Appellants.

[54] The Director stated that simply because he accepted Mr. Roux's Statement of Concern, it is not binding on the Board. He argued it is the responsibility of Mr. Roux to demonstrate he is personally affected in a manner that exceeds that of the general public. The Director submitted the Board will have to determine if the proximity of Mr. Roux's residence to the project site meets the directly affected test. The Director submitted all of the Appellants failed to meet the onus of demonstrating they are directly affected by the Director's decision.

[55] The Director stated that, at the time of the public notice of the application, the Stones were not directly affected and lacked the status to file a Statement of Concern. The Director explained Mr. Grant Duckett filed a comprehensive Statement of Concern that set out how he and his family were personally directly affected by the application. The Director submitted that a Statement of Concern is "…a personal right and it is not a property right that runs with the land. It is up to an individual to demonstrate how that individual is directly affected by a proposed project."[21] The Director argued section 73 of EPEA[22] does not prescribe a Statement of Concern as a property right that can be transferred upon the sale of property. The Director submitted it was not necessary to answer the question whether the Stones can rely on the Ducketts' Statement of Concern, because the Stones participated in the AEUB proceedings.

[56] The Director stated the AEUB held a hearing on July 13 through15, 2004, and the Decision Report was issued, finding the project to be in the public interest and could proceed subject to an approval issued by the AEUB and an approval issued by the Director under EPEA. The Director stated interventions were filed by D. Stone, I. Stone, J. Harwerth, and B. Kolhaas,

---

20 Director's submission, dated December 12, 2005, at paragraph 38.

21 Director's submission, dated December 12, 2005, at paragraph 76.

22 Section 73 of EPEA states:

> "(1) Where notice is provided under section 71(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change.
>
> (2) A statement of concern must be submitted within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice."

and these interveners and Ms. Ulfsten appeared as witnesses. The Director stated an objection was filed by E. Duckett and family, but they did not attend the hearing. The Director stated he has no record of any correspondence being received about the public notice from Ms. Inez Stone, Mr. David Stone, Mr. Peter Harwerth, Mr. Ted Ganske, or Mr. Ron Holmes.

[57] The Director stated the hearing participants listed in the Decision Report, include D. Stone, I. Stone, J. Harwerth, and S. Ulfsten. The Director stated it is clear these Appellants attended and participated in the AEUB hearing. He submitted that even though the Decision Report does not indicate whether Mr. John Roux attended or participated in the AEUB proceedings, Ms. Ulfsten stated she was representing Mr. Roux, and therefore, her participation at the AEUB hearing indicates Mr. Roux did participate or had the opportunity to do so.

[58] The Director pointed out that in the their November 14, 2005 submission, the Appellants explained the Harwerth and Stone families intervened and participated in the AEUB hearing, and four expert witnesses were presented on behalf of the interveners.

[59] The Director submitted that the prohibition set out in section 95(5)(b)(i) has been reached, as the Appellants either participated in or had the opportunity to participate in the AEUB process and all matters set out in the Notices of Appeal were dealt with by the AEUB. The Director argued the "…Appellants are simply dissatisfied by the decision of the [A]EUB, and want the opportunity to re-argue the issues before the [Board]."[23] The Director stated timelines to file documents are legislated to ensure the process is fair and efficient.

[60] The Director referred to the AEUB letter dated October 24, 2005, in which the AEUB denied a request to reconsider the AEUB's decision, indicating that no new evidence had been presented. The Director also referred to the AEUB letter of May 25, 2005, in which the AEUB stated that Ms. Ulfsten had the opportunity to present her concerns, and the AEUB gave serious consideration to all of the evidence and argument before it, including that of the Ethel Lake interveners.

[61] The Director explained the Approval could not be considered by the AEUB because section 68(4) of EPEA requires the Director to consider the AEUB report in his

---

[23] Director's submission, dated December 12, 2005, at paragraph 71.

decision. The Director submitted the simple assertion by setting out an approval condition is not sufficient to demonstrate the matter was not adequately considered by the AEUB. The Director explained the Approval was granted based on the information contained in the application, including the EIA and the Decision Report. The Director stated the AEUB, in its Decision Report, indicates clearly that cumulative effects were considered and were included in the EIA.

[62] The Director stated the liberation of arsenic into groundwater was considered by the AEUB and addressed in section 7.1 of the Decision Report. The Director stated the issue of the potential impact on the recharge zone for the Sand River and Ethel Lake formations was considered by the AEUB in sections 6.2 and 7.1 of the Decision Report and was addressed in the Approval by implementing a project specific groundwater monitoring program.

[63] The Director pointed to the Decision Report where, in section 6.2, a detailed shallow groundwater monitoring plan is required to be provided to Alberta Environment in the EPEA approval process. The Director referred to section 7.2 of the Decision Report where the surface water and monitoring of the regional lake is discussed.

[64] In response to the Appellants' concerns arising from casing failures and the possible contamination of drinking water through the release of arsenic in the ground, the Director referred to section 6.33 of the Decision Report, where the AEUB noted the "…project is a SAGD process as opposed to cyclic steam stimulation used by other operators in the vicinity…" and "…the BlackRock process places less stress on the casing making the possibility of casing failure unlikely."[24]

[65] The Director stated the Appellants did not set out what matters in the Notices of Appeal were not adequately dealt with by the AEUB. The Director argued the Appellants' submission indicates they are dissatisfied with the decision of the AEUB finding the project was in the public interest and could proceed, and the Appellants were generally dissatisfied that the evidence they presented to the AEUB did not result in the AEUB decision that the Appellants desired.

---

[24] Director's submission, dated December 12, 2005, at paragraph 59.

[66] The Director referred to the Appellants taking umbrage with the academic qualifications of some of the Approval Holder's witnesses, and referred to section 7.4 of the Decision Report, which stated, "The [AEUB] was made aware of the interveners' theory of arsine gas formation and emission from the project, but as the theory was not supported by any empirical evidence or detailed explanation, the Board does not find [that this] has been established as a plausible concern."[25]

[67] The Director stated the AEUB conducted a hearing to determine the public interest, and it clearly considered issues related to arsenic and arsenic mobilization. The Director stated the AEUB considered arsenic in groundwater, and the Appellants submission clearly indicates it was considered when the Appellants stated the AEUB accepted the testimony of the Approval Holder's expert over the Appellants' experts. The Director stated the AEUB dealt with the issue through its approval conditions and recommendations to Alberta Environment. The Director stated the AEUB considered arsenic mobilization under section 7.1 of the Decision Report, which requires the Approval Holder to design a mitigation component through its groundwater monitoring program. The Director referred to the Appellants' submission when they stated sufficient evidence was presented to the AEUB by qualified experts regarding heat liberating naturally occurring arsenic. The Director stated the AEUB considered it under section 7.1 of the Decision Report.

[68] In response to the Appellants' argument that the AEUB ignored the Appellants' expert testimony regarding formation integrity and the possible failure of the cap rock, the Director referenced section 6.3 of the Decision Report to demonstrate the AEUB considered evidence on formation integrity.

[69] The Director argued the submission filed by Mr. and Ms. Stone demonstrates their dissatisfaction with the decision of the AEUB. The Director stated "…the appropriate remedy, if there is an allegation with respect to the manner in which the Energy and Utilities Board conducted its hearing is to undertake an appeal under [section] 26 of the *Alberta Energy and Utilities Board Act* to the Alberta Court of Appeal."[26]

---

[25] Director's submission, dated December 12, 2005, at paragraph 62.

[26] Director's submission, dated December 12, 2005, at paragraph 69.

III. ANALYSIS

1. Statutory Basis

[70] In this particular case, the Board will first consider the third question, whether the AEUB held a hearing or review where the Appellants had the opportunity to participate and at which all of the matters in the Notices of Appeal were adequately dealt with. If the Board finds the Appellants did have the opportunity to participate and all matters were adequately dealt with, the Board loses jurisdiction and cannot make a determination on the remaining questions.

[71] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if it has been heard and adequately dealt with by the AEUB and the person had the opportunity to participate in the hearing. Section 95(5)(b)(i) states:

> "The Board shall dismiss a notice of appeal if in the Board's opinion the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…."

2. Discussion

[72] There are two basic conditions that have to be met for the Board to lose jurisdiction in these appeals. The steps are to determine whether: (1) the Appellants received notice of, participated in, or had the opportunity to participate in an AEUB review of the project at issue; and (2) the AEUB adequately dealt with all the matters raised by the Appellants in their Notices of Appeal.

[73] In its October 24, 2005 letter to the Board, the AEUB stated that it had considered an application by BlackRock Ventures Inc. for an approval to construct and operate a thermal bitumen recovery project. A hearing took place in July 2004, and the Decision Report was released in 2005. The AEUB explained the Ethel Lake Interveners, of which most of the Appellants are members or were represented by members, requested a reconsideration of the AEUB decision, but the request for the review was denied.

[74] In response to the first part of the question, the Appellants acknowledged there was a hearing held by the AEUB. The AEUB listed "D. Stone. I. Stone, J. Harwerth and B. Kolhaas" as interveners to the hearing. It received an objection from E. Duckett and family, but they did not attend the hearing. Based on the wording by the AEUB, it appears Mr. and Ms. Stone and Mr. Harwerth attended the AEUB hearing and presented arguments and evidence. They and Ms. Ulfsten were listed as hearing participants in the AEUB decision (the Ethel Lake Landowners). The Board notes Ms. Ulfsten has represented Mr. Roux since 1999, and therefore, it is reasonable to believe his concerns were brought to the AEUB through Ms. Ulfsten's intervention. At the least, Mr. Roux had the opportunity to participate in the AEUB hearing process. Even if a concerned person does not actually participate in an AEUB hearing, the test is whether they were given the opportunity to participate.

[75] Therefore, the Board finds the first part of the test has been met, as the AEUB held a hearing. The Appellants had the opportunity to participate in that hearing, and most did participate. They requested a reconsideration of the decision, which the AEUB denied. The reconsideration process before the AEUB constitutes a review within the meaning of section 95(5)(b)(i). Therefore, the Appellants participated in both a hearing and a review by the AEUB.

[76] The Board must now determine whether all of the issues in the Notices of Appeal were adequately dealt with by the AEUB. On its October 25, 2005 letter, the AEUB explained to Ms. Ulfsten that in its decision, it is not required to specifically address every argument and piece of evidence raised during the hearing, and even though specific arguments are not addressed in its reasons, it does not mean it did not consider the arguments.

[77] In the May 25, 2005 letter to Ms. Ulfsten and the Ethel Lake Interveners, the AEUB stated that in its consideration of their request for a review, the AEUB noted that "…you were provided an opportunity to present your concerns regarding the proposed project during the public hearing." The AEUB explained it gave serious consideration to all the evidence and arguments placed before it, and the conditions included in the approval resulted from the arguments and evidence presented at the hearing. The Appellants stated in their January 5, 2006 submission that the Decision Report did record many of the environmental issues the Approval

should address. This indicates to the Board that the Appellants' concerns were considered by the AEUB, but the Appellants did not receive the results they wanted from the AEUB.

[78] In a previous decision, *Carter Group* v. *Director of Air and Water Approvals, Alberta Environment Protection*,[27] the Board noted that what is now section 95(5)(b)(i) was intended to avoid duplication in the hearing process. The Board stated:

> "The jurisdiction of this Board to become involved in a 'review' of [Energy Resources Conservation Board ("ERCB") (now AEUB)] decisions that led to approvals which are eventually appealed here is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence."[28]

The Board stated: "The Board interprets section 87(5)(b)(i) [(now section 95(5)(b)(i))] of the *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually."[29] The Board concluded that: "...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB [(now AEUB)]."[30]

[79] The matter of how adequately the AEUB considered the issues was further discussed in the Board's previous decision, *Smulski et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074-082-D (A.E.A.B.), where the Board explained:

> "As the Board stated when considering section 95(5)(b)(i) in the *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection,*[31] the Board is mindful of the judgment of the Alberta Court of Queen's Bench in *Slauenwhite* v. *Alberta Environmental Appeal Board*.[32] In

---

[27] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) (the "*Carter Group*").

[28] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 6.

[29] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 7.

[30] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 10.

[31] *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.) ("*Graham*").

[32] *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.), ("*Slauenwhite*").

> *Slauenwhite,*[33] Justice Wilkins emphasized that subsection 6(1) of the *Approvals Procedure Regulation*[34] imposed a duty on the Director in his approval decision to consider the environmental impacts of the entire project in question. Justice Wilkins stated that it would be patently unreasonable for the Board to conclude that it was precluded from determining whether the environmental impacts of the whole project had been weighed in accordance with EPEA and the regulations.
>
> As in *Graham,*[35] the Board believes that it was correct in its interpretation of what is now section 95(5)(b)(i) in the *Carter Group*[36] decision and, notwithstanding the substantive result in *Slauenwhite,* this approach is consistent with that case on the basis of a full reading of Mr. Justice Wilkins' decision. In *Slauenwhite,*[37] the Court concluded that the environmental impacts of a significant part of the natural gas processing facility in question had not been considered by either the ERCB or the Director. Unlike *Slauenwhite,*[38] there is no similar question here of failure of the NRCB or the Director to assess environmental impacts of a significant physical component of the Approval Holder's expansion."[39]

[80] The Appellants are not satisfied with the decision of the AEUB. They are now trying to use the appeal mechanism before this Board to have the same issues reheard. This cannot be done; the legislators included section 95(5)(b)(i) of EPEA to prevent such appeals from occurring. Essentially what the Board can look at is the process of the AEUB to determine whether there was a hearing or review, and then to determine if the issues in the Notices of Appeal were adequately dealt with in the process. The Board cannot judge or assess the merits of the AEUB decision to see if the Board agrees with the decision; it only reviews the decision to see if the issues raised were discussed or reviewed. Even if the Board does not agree with a decision of the AEUB, it cannot gain jurisdiction if all the matters in the Notices of Appeal were adequately dealt with and the appellants were given the opportunity to participate. The legislators included section 95(5)(b)(i) of EPEA to prevent opponents of projects from trying to

---

33 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

34 *Approvals Procedure Regulation*, Alta. Reg. 113/93.

35 *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.).

36 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.).

37 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

38 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

39 *Smulski et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074-082-D (A.E.A.B.) at paragraphs 41 and 42.

use different tribunals to have multiple hearings. The legislators did not want opponents to have the ability to pit one tribunal against another or to give an opponent the ability to shop for a tribunal of their liking.

[81] In their Notice of Appeal, Mr. and Ms. Stone questioned how a project can be in the public interest when the majority is against it. The public interest is determined by the AEUB based on all of the information provided during its process. When the AEUB assesses an application, it reviews socio-economic matters as well as the potential effect of the project on the environment; it essentially reviews the whole picture. The AEUB has a broad public interest mandate, and the Board is not authorized to challenge the AEUB's decision on whether a project is in the public interest.

[82] The AEUB hearing process gave the Appellants the opportunity to present their concerns, evidence, and arguments. The Appellants were provided the opportunity to cross examine the Approval Holder's experts. At this time all of their concerns should have been presented. It is not part of the process to split issues between different boards. If a hearing is held by the AEUB, it is important for those who have concerns to participate in the process and to present all of their concerns.

[83] The Appellants did not argue that they did not have the opportunity to present evidence regarding their concerns to the AEUB. Rather, they argued that the AEUB did not refer to their experts' testimonies in the Decision Report. Although boards will often discuss why they accepted an expert's evidence, it is not required and it certainly does not mean the board did not consider all expert testimony. When a board panel is presented with expert testimony it must make a determination which expert has provided the most reliable testimony, based on the evidence provided and the data and information used to support the evidence. An expert must provide evidence that is plausible and should not be advocating a particular position regarding how the Board should decide the main issue of an appeal. The panel may accept all of the testimony of one expert over another, or it may accept parts of different expert testimony and reach a conclusion somewhere in between the positions presented. The Board was not at the AEUB hearing and cannot comment on the testimony of the experts. The AEUB made its determination based on the submissions received and the evidence presented. The AEUB clearly

stated to the Appellants in its May 25, 2005 letter to Ms. Ulfsten that it had given serious consideration to all of the evidence and argument placed before it in the hearing process. There is nothing in the documents provided or in the submissions that contradict this statement. The Appellants have only provided statements of dissatisfaction with the outcome of the AEUB hearing.

[84] The second part of the test under section 95(5)(b)(i) of EPEA only requires that the issues identified in the Notices of Appeal be adequately dealt with. It does not require the AEUB to agree with the Appellants arguments or to discuss every argument in detail in the Decision Report. The Board has to determine whether the AEUB dealt with the issues in the Notices of Appeal. In their Notices of Appeal, the Appellants raised concerns regarding the lack of site-specific data, cumulative impacts, liberation of arsenic into local groundwater, monitoring of groundwater, risk assessments, surface water, wetlands, air quality, and wildlife. The Appellants presented their evidence to the AEUB. The Appellants stated they had experts providing testimony on the issues of arsenic in groundwater, arsenic mobilization, cumulative effects, casing failures, site-specific geological information, human health risk assessment, and groundwater monitoring. These are the issues raised in the Notices of Appeal.

[85] In reviewing the approval issued by the AEUB and the Decision Report, the Board believes the AEUB adequately dealt with all of the issues in the Notices of Appeal plus other issues raised by the interveners in the AEUB hearing process.

[86] In the approval issued by the AEUB, the Approval Holder is required to provide a groundwater monitoring program (Condition 10) and monitor wells for casing integrity (Condition 12). These conditions clearly coincide with the issues raised by the Appellants. In the Decision Report, the AEUB discussed the geology of the site and the position of the groundwater aquifers in relation to the project. The AEUB recognized the Appellants' concern regarding monitoring, stating: "The interveners expressed concern that the details of BlackRock's groundwater monitoring system were not included in its application. They indicated that this information would have been helpful to them in their review of the application."[40] The AEUB

[40] Decision Report 2004-089 at page 4.

recommended the Approval Holder explain the design of the monitoring system to the interveners and provide results of the monitoring when it becomes available.

[87] The AEUB, in section 6.2, discusses casing failures and noted the interveners acknowledged the likelihood of casing failures related to steam assisted gravity drainage ("SAGD") operations was lower than that associated with cyclic steam operations. The AEUB obviously considered the Appellants' concerns regarding casing failures. As for groundwater concerns, the AEUB noted in section 7.1 the Approval Holder's commitment to sample the water supply of landowners adjacent to its operations. This would provide baseline data, another issue raised by the Appellants. When the Approval Holder makes such commitments, the AEUB expects the Approval Holder to honour them. The AEUB discussed the release of arsenic and the potential of affecting water wells in section 7.1. The AEUB referred to the intervenors' submission regarding arsenic and health concerns.

[88] In section 7.2 the AEUB discussed surface water and quality. The AEUB stated the Approval Holder addressed landowner concerns regarding the possibility of reservoir fluids being released to Hilda and Ethel Lakes due to a breach of the cap rock. The AEUB concluded the operations would unlikely result in a release of production fluids to the lakes, and that regulations are in place to deal with any potential surface spills.

[89] The AEUB discussed the interveners' concerns regarding emissions from the project, specifically the cumulative effects. The AEUB found the interveners did not provide any empirical evidence to support their hypothesis regarding fugitive emissions of hydrogen sulphide and the creation of dimethyl sulphate from sulphur dioxide. The AEUB did not expect odour issues from hydrogen sulphide.

[90] In section 7.5, the AEUB considered the visual and auditory impact on the residents and accepted that the noise levels would satisfy the EUB ID 99-08 and would not pose a significant problem for residents in the area. The AEUB explicitly referred to the Harwerth property, and explained a tree buffer would prevent the phase 2 production pads from being visible from his property. The AEUB accepted the Approval Holder's testimony that tree height and clearing in the area will impact the visibility of the flare stacks.

[91] The AEUB referred to the interveners' concerns regarding land values, and it did not agree that land value impacts would occur.

[92] The Appellants argued that even though all of their issues were mentioned in the Decision Report, their issues were not adequately dealt with. The AEUB referred to the arguments presented by the interveners; they listened but chose not to refer to the testimony of the interveners' experts. The test remains "adequately dealt with," and the Appellants could not demonstrate how the AEUB did not deal with their issues.

[93] If the Appellants were dissatisfied with the AEUB decision and the denial of their reconsideration request by the AEUB, the proper channel was to seek an appeal of the AEUB decision by the Court of Appeal. The Appellants' concerns regarding the AEUB process, such as limited time to prepare and present submissions, is not a matter this Board can review. If the Appellants thought the principles of administrative justice were not adhered to, they had a right to file an appeal to the Alberta Court of Appeal pursuant to section 26 of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17.[41] There is not right of appeal of an AEUB decision to this Board.

[94] The Appellants referred to section 68(4) of EPEA and argued this section requires the Approval to incorporate the evidence that was before the AEUB. It is important for the Appellants to understand that at this stage of the appeal process, what the Board has to determine is whether the AEUB adequately dealt with the issues identified in the Notices of Appeal, not whether the Director considered all of their concerns when drafting the Approval. This part of the test does not apply to the Director's decision to issue the Approval or to the terms and conditions the Director decides to include in the Approval.

[95] The Appellants argued the Board can rely on section 101 of EPEA as a basis to rehear the matter. This Board does not reconsider decisions of other Boards. The AEUB is a board independent to this Board. Section 101 of EPEA refers to this Board's decisions; it has the ability to reconsider its own decision, but only if special circumstances exist.

---

[41] Section 26(1) of the *Alberta Energy and Utilities Board Act* provides: "Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law."

[96] The AEUB held a hearing, the Appellants participated in or had the opportunity to participate in the AEUB process, and all of the issues identified in the Notices of Appeal were adequately dealt with by the AEUB. All aspects of the test required under section 95(5)(b)(i) have been met. Therefore, pursuant to section 95(5)(b)(i) of EPEA, the Board must dismiss the appeals. As the Board does not have jurisdiction in these matters, the questions regarding the validity of the Statements of Concern, whether the Appellants are directly affected, and whether Mr. and Ms. Stone can rely on the Statement of Concern filed by the previous landowner are moot.

[97] The Board recognizes the concerns of the Appellants, particularly with the issue of groundwater in the area. The Board is confident the Director will take these concerns seriously and will enforce the conditions in the Approval to ensure these concerns are addressed and mitigated.

IV. CONCLUSION

[98] The AEUB held a hearing on this Approval application, and all of the Appellants participated in or had the opportunity to participate in the AEUB hearing process. On review of the Participants' submissions, the Notices of Appeal filed, and the AEUB Decision Report No. 2004-089, the Board has determined all of the issues raised in the Notices of Appeal were adequately dealt with by the AEUB. Therefore, pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, the Board must dismiss the appeal.

Dated on August 8, 2006, at Edmonton, Alberta.

"*original signed by*"

_____

Dr. M. Anne Naeth
Panel Chair

"*original signed by*"

_____

Mr. Al Schulz

Board Member

"*original signed by*"

_____

Mr. Alex G. MacWilliam
Board Member