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 section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by the Castle-Crown Wilderness Coalition with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 18777-01-01 issued to Castle Mountain Resort Inc. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Castle-Crown Wilderness Coalition* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *Castle Mountain Resort Inc.* (8 August 2006), Appeal No. 03-144-D1 (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair,
Mr. Al Schulz, Board Member, and
Dr. Alan J. Kennedy, Board Member.

SUBMISSIONS:

Appellant:	Castle Mountain Wilderness Coalition, represented by Mr. Cameron D. McLennan, Huckvale Wilde Harvie MacLennan LLP.
Director:	Mr. Dave McGee, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
Approval Holder:	Castle Mountain Resort Inc., represented by Mr. F. Murray Pritchard, Milne Pritchard Law Office.

EXECUTIVE SUMMARY

On September 30, 2003, Alberta Environment issued an Amending Approval to Castle Mountain Resort Inc. for the construction, operation, and reclamation of a wastewater system. The amendment dealt only with the design and operational parameters for the wastewater system.

The Environmental Appeals Board received a Notice of Appeal from the Castle-Crown Wilderness Coalition.

The Board set a submission process to deal with the motion raised by Alberta Environment to dismiss this appeal as the relief requested in the Notice of Appeal was moot. The Castle-Crown Wilderness Association requested the opportunity to amend its Notice of Appeal.

After reviewing the submissions and applicable legislation, the Board determined the appeal was not moot, because reading the Notice of Appeal in its entirety and not just the relief requested provided sufficient information to determine the appellant's reasons for appealing and its desired outcome. However, the Board would not allow the appellant to amend its Notice of Appeal, as certainty in the process applies to all of the participants. Also, there was sufficient information in the Notice of Appeal to determine the issues and possible alternative relief.

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I. BACKGROUND

[1] On September 30, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 18777-01-01 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Castle Mountain Resort Inc. (the "Approval Holder") for the construction, operation, and reclamation of a wastewater system in Pincher Creek, Alberta.[1]

[2] On November 14, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from the Castle Crown Wilderness Coalition (the "Appellant" or "CCWC") appealing the Amending Approval.

[3] On November 17, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal, and for the Participants to provide available dates for a mediation meeting or hearing. A copy of the Record was received on December 5, 2003, and copies were provided to the Appellant and the Approval Holder.

[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. Both boards responded in the negative.

[5] On November 19, 2003, the Director filed a motion with the Board regarding the directly affected status of the Appellant, and he submitted the appeal should be dismissed pursuant to section 95(5)(ii) of EPEA.[2] On December 18, 2003, the Board wrote to the Participants to schedule a written submission process to deal with the directly affected motion.

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[1] The Amending Approval amended Approval No. 18777-01-00 (the "Approval"), which was issued to the Approval Holder on June 22, 1999.

[2] Section 95(5)(ii) of EPEA provides:

[6] On January 8, 2004, the NRCB provided three documents related to the NRCB application by Vacation Alberta Corporation.[3] The Board extended the submission deadlines to allow the Participants to review and incorporate anything from the NRCB documents that they believed was relevant. The Board received submissions from the Participants between January 23 and February 20, 2004.

[7] On March 25, 2004, the Board wrote to the Participants informing them of its intent to hold an oral Preliminary Meeting in order to obtain further evidence from each of the individual members of the CCWC with respect to whether they are personally directly affected by the Amending Approval, how they will be harmed or impaired by the project, and whether the project will harm the natural resources that the Appellant and its members use or their use of the natural resources.

[8] In consultation with the Participants, the Board scheduled a Preliminary Meeting for June 7, 2004.

[9] On May 7, 2004, the Appellant advised the Board that the court decision regarding its judicial review application was pending, and "…proceeding to a preliminary meeting before the judicial review decision is released would be inappropriate."

[10] On May 11, 2004, the Board wrote to the Participants requesting the Director and the Approval Holder provide comments with respect to the May 7, 2004 letter from the Appellant. On May 18, 2004, the Board notified the Participants that it would not grant the adjournment of the appeal on the basis of the judicial review, as the issue to be determined at the Preliminary Meeting was the directly affected status of the Appellant and this issue would not be affected by the outcome of the judicial review. However, the Board did grant the adjournment on the basis that the Appellant's counsel was not available on June 7, 2004.

> "The Board may dismiss a notice of appeal if … (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation…."

[3] The three documents provided were: NRCB Pre-Hearing Conference Report (April 8, 1993); NRCB Report on Final Costs Awards (February 9, 1994); and NRCB Decision Report (December 1993).

[11] On July 2, 2004, the Court of Queen's Bench released its decision regarding the judicial review filed by the CCWC.[4] On July 14, 2004, the Board wrote to the Participants requesting they provide their comments regarding the effect that Madame Justice Kenny's July 2, 2004 decision would have on the current appeal, given the relief requested in the Appellant's Notice of Appeal was to "…withhold approval of amendment until after CCWC's motion of the judicial review of the Minister's decision not to order an [Environmental Impact Assessment] has been resolved at Court of Queen's Bench." The Participants provided their submissions between July 16 and 21, 2004.

[12] On October 19, 2004, the Board acknowledged that the Approval Holder and the Appellant were in settlement discussions, and the Board granted an abeyance to allow the discussions to continue. On January 18, 2005, the Approval Holder notified the Board that negotiations had broken down, and the Approval Holder requested the appeal be dismissed or, alternatively, set the matter down for a hearing.

[13] On February 10, 2005, the Board set the submission schedule for the Participants to respond to the following questions:

> "1. Whether to dismiss the appeal for being moot, given the decision of Madame Justice Kenny in relation to the Judicial Review filed by the Appellant and given that the relief requested by the Appellant in their Notice of Appeal appears to have been met by the issuance of that decision?
>
> 2. Whether the Appellant should be permitted to amend the Notice of Appeal?"

[14] On February 11, 2005, the Appellant notified the Board that it objected to the submission process as outlined by the Board. The Board reviewed the Appellant's letter and, on March 11, 2005, notified the Participants that it would proceed in the manner detailed in its February 10, 2005 letter, and address the motions through written submissions. Submissions were received between March 24 and April 18, 2005.

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[4] See: *Castle-Crown Wilderness Coalition* v. *Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resort Inc.* (2 July 2004) ABQB 515.

[15] On August 31, 2005, the Board notified the Participants that the appeal was not moot as a result of the Court of Queen's Bench ruling, and the motion to dismiss the appeal was dismissed. The Board also denied the Appellant's application to amend its Notice of Appeal. These are the Board's reasons.

II. SUBMISSIONS

A. Appellant

[16] The Appellant explained the legal issues raised in the judicial review application filed in the Court of Queen's Bench had not been resolved as the matter was before the Court of Appeal. The Appellant argued the substantive issue before the Board is "…whether or not the amended application to Castle Mountain Resort Inc.'s ("CMR") waste water system approval #004-18777 constitutes implicit acceptance of the CMR's development expansion without the requirement of an E.I.A. as required by the legislation…. That issue has not been resolved."[5]

[17] The Appellant explained its Notice of Appeal referenced its Statement of Concern filed with the Director in June 2003, and therefore, the Statement of Concern was part of the Notice of Appeal.

[18] The Appellant stated the Amending Approval changed the wastewater lagoon capacity from a numbers based limitation on dwellings to a volume-based limitation. The Appellant claimed the Approval Holder had reached its dwelling-based capacity and the amendment, could allow the Approval Holder to expand its development.

[19] The Appellant argued all of the issues are still very alive and are yet to be resolved, as the Appellant is seeking a "…conclusory legal answer to the issues raised in the submissions."[6]

[20] The Appellant submitted the Board has promoted transparency and inclusion, and "Citizen involvement is engendered by the user friendly approach contemplated by the Board

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5 Appellant's submission, dated March 23, 2005, at paragraph 4.

6 Appellant's submission, dated March 23, 2005, at paragraph 11.

procedures regarding access and involvement."[7] The Appellant argued that form would not prevail over the substantive intention of the submission if the issues were addressed.

[21] The Appellant stated none of the Participants were taken by surprise or attempted to argue that the issues before the Board were not substantive and of a real concern to all of the Participants, the issues were not justiciable or not understood by the other Participants, or that the other Participants were prejudiced by seeking more clarity on the issues. The Appellant argued the entire submission should be considered, and amendments to pleadings are proper at any stage in the proceeding unless the parties adverse in interest would be substantially prejudiced by the amendment. It further argued the exceptions to the general rule do not apply, as the Participants are not seriously prejudiced, the amendment is not hopeless, it is not seeking to add a new cause of action or party, and there is no bad faith in bringing forth the amendments.

[22] The Appellant argued limiting the opportunity for the Board to address issues to those stipulated in the Notice of Appeal would trump form over substance. The Appellant stated that, pursuant to sections 92 and 93 of EPEA,[8] the Board is authorized to receive additional information and extend the time to respond to the issues before it. The Appellant argued there are no substantive grounds to limiting the context of the appeal to the "…four concerns of the answer framed by the Appellants in the Notice of Appeal."[9]

[23] The Appellant submitted the matters under appeal were not moot, as they have not been resolved and need to be addressed in a merits hearing. It also submitted that it should be allowed to amend its Notice of Appeal to address the merits issues identified in its November 13, 2003 submission and developed in its May 20 and July 27, 2004 letters.

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7 Appellant's submission, dated March 23, 2005, at paragraph 12.

8 Sections 92 and 93 of EPEA provide:

> "92 Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice.
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> 93 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."

9 Appellant's submission, dated March 23, 2005, at paragraph 23.

[24] In its rebuttal submission, the Appellant reiterated that the status of the Amending Approval is a live issue. The Appellant stated its fundamental concern is that the Amending Approval empowers the Approval Holder to build residential units, and the appeal deserves a judgment based on the merits and provided that such is within the Board's mandate and scope.

[25] The Appellant explained the Amending Approval establishes a new means of assessing the capacity of the wastewater system, as the Amending Approval has a volume cap instead of the residential based limit that was in the Approval. The Appellant argued the increase in residential units would increase the volume of wastewater, putting at risk the integrity of the adjacent wetlands.

[26] The Appellant argued a controversy exists, and whether the Amending Approval should be confirmed, reversed, or varied has not been determined, and therefore, the matters under appeal are not moot.

[27] According to the Appellant, the question posed on the Notice of Appeal form, "What would you like the Board to do to resolve your appeal?", suggests remedy considerations not scoping considerations. The Appellant stated it, and its members, wanted an Environmental Impact Assessment ("EIA") done before the Amending Approval became effective. The Appellant explained it wanted the issues connected to an EIA be assessed and addressed, and because the judicial review at the Court of Queen's Bench has not resolved those issues, the need to address the issues has not been overcome.

[28] The Appellant stated it is not asking the Board to deal with a whole suite of water related issues or municipal land use decisions, or to look behind the Director's decision. The Appellant explained it is asking the Board to "…take into consideration that any municipal land use or development authorization issued never intended to consider the impact of any development approval on the wetlands or adjacent wildlands area, or, for that matter, the environment in the broader context…. [I]n the absence of any EIA no decision or amendment to the approval that allows new development should be sanctioned."[10] The Appellant further

[10] Appellant's submission, dated April 18, 2005, at paragraph 10.

explained it wanted the Board to address the propriety of the Amending Approval and to take into account the impact more residential development would have on the immediate area.

[29] The Appellant stated it was requesting the Notice of Appeal be amended to address the merit issues identified in its previous correspondence, including its November 13, 2003 submission, and its May 20 and July 27, 2004 letters.

[30] The Appellant stated the remedy it requested requires a reversal or amendment to the Amending Approval that created volume based capacity of the wastewater treatment system. The Appellant also stated that, if the Board found the impacts of changing to a volume based cap did not consider the environmental impacts, the CCWC wanted the Board to recommend to the Minister that an EIA was required.

[31] The Appellant argued denying it the opportunity to amend its Notice of Appeal would champion form over substance and would overlook the real issues, which the other Participants have been reasonably apprised of after reading the Appellant's submissions and correspondence.

[32] In response to the Approval Holder's statement that the Board process is akin to an appellate matter and there was an adjudication of the facts in the first instance, the Appellant explained there was no presentation of facts or weighing of the evidence. It stated there was no trial or adjudication in the first instance, and the appeal was the CCWC's first and only opportunity to have its position considered and adjudicated.

[33] The Appellant argued the legislation and the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") does not confine the Board's ability to amend a Notice of Appeal. The Appellant also noted that, in the Board's Notice of Appeal form, it states "…'if you fail to state all of your solutions to your appeal here, you *may* be prevented from raising them later in your appeal.'"[11] [Emphasis in original.]

[34] The Appellant argued the Board is not restricted from amending the Notice of Appeal, and "To do so in this appeal would be to exercise negative discretion, unduly restrict the

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[11] Appellant's submission, dated April 18, 2005, at paragraph 27.

Appellant and undermine the Boards (*sic*) administrative law responsibility, to decide appeals on the merits."[12]

B. Approval Holder

[35] The Approval Holder stated there was no request in the Notice of Appeal to strike the Amending Approval or the Approval, and the only relief requested was to have approval of the Amending Approval be withheld until after the judicial review of the Minister's decision not to order an EIA had been resolved at the Court of Queen's Bench. The Approval Holder argued that, since the decision was released on July 2, 2004, the relief requested is moot and the appeal should be struck. The Approval Holder argued the Appellant failed in its pleadings in the Notice of Appeal.

[36] The Approval Holder stated citizen participation does not necessarily allow for the disregard of the Board's procedures. According to the Approval Holder, the Notice of Appeal form clearly outlines that "…failure to state all of the objections, reasons or solutions to the appeal, could result in an inability to raise them later."[13] The Approval Holder argued the Appellant did not provide any evidence or arguments to explain why it did not request the Amending Approval be overturned rather than just postpone the Amending Approval pending the judicial review decision. The Approval Holder further argued the Appellant retained counsel shortly after the Notice of Appeal was filed, and an application to amend the Notice of Appeal could have been brought forward at a much earlier stage rather than 16 months after the Notice of Appeal was filed.

[37] The Approval Holder stated the cases provided by the Appellant deal with applications to amend at trial rather than as part of an appeal, and the courts have treated amendments on appeal differently than amendments to other pleadings. According to the Approval Holder "…an amendment of pleadings on appeal will only be allowed in very limited circumstances and in particular when clearly authorized by statute."[14] Therefore, according to the Approval Holder, there must be statutory authority in EPEA for the Board to permit an

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12 Appellant's submission, dated April 18, 2005, at paragraph 28.

13 Approval Holder's submission, dated April 1, 2005.

amendment of a Notice of Appeal. The Approval Holder stated there is no power listed in section 95 of EPEA, in the Regulation, or the Rules of Practice, that provides the same powers as that given to the Alberta Court of Appeal in Rule 512 of the *Alberta Rules of Court*.[15]

[38] The Approval Holder submitted the Board should refrain from authorizing an amendment to the Notice of Appeal, and it cannot authorize an amendment due to its lack of legislative authority to grant such an amendment. The Approval Holder submitted the Board should be reluctant to allow an amendment to a Notice of Appeal except in exceptional cases. The Approval Holder stated the Appellant has an obligation to properly set out the issues and relief required in a clear and concise manner. It argued amendments to a Notice of Appeal results in delays, additional costs, and potential abuse of the appeal process.

[39] The Approval Holder submitted the appeal should be dismissed, and the Appellant's application to amend its Notice of Appeal should be denied.

C. Director

[40] The Director stated the issue of mootness arises due to the nature of the relief requested by the Appellant. The Director questioned what the Appellant's real dispute was and whether the dispute concerns the Director's decision to issue the Amending Approval or if the dispute concerns the EIA Director's decision not to require an EIA.

[41] The Director argued that, if the Board determines there is a live dispute regarding the Amending Approval, the only issues before the Board will be the Director's decision to issue the Amending Approval and not the other issues and concerns the Appellant has regarding the development.

[42] The Director stated it was unclear whether the Appellant wanted to stay the proceedings until the judicial review was completed at the Court of Queen's Bench or until the judicial review process was completed through all levels of court review.

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[14] Approval Holder's submission, dated April 1, 2005, at page 4.

[15] Rule 512 of the *Alberta Rules of Court* provide: "The notice of appeal may be amended at any time by leave of the Court on a judge on such terms as may be considered just."

[43] The Director referred to the Board's previous decision of *Kievet et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (16 April 2002), Appeal Nos. 01-097, 098, and 101-D, (A.E.A.B.). The Director pointed out the need for administrative finality and certainty in the process. The Director argued form cannot defeat substance, but substance cannot be disguised as form in allowing any amendments to the Notice of Appeal.

[44] The Director stated the Appellant has not provided a proposed amended Notice of Appeal to review, and the Appellant has not specified the nature of the proposed amendment. He stated it could be assumed the Appellant wanted to amend the relief requested to have the Amending Approval modified or cancelled or the Amending Approval stayed until the judicial review has been concluded through all levels of court.

[45] In response to the Appellant referring to case law relating to amendments to pleadings before the courts, the Director stated the "…*Alberta Rules of Court* generally apply to claims to be heard by a court with inherent jurisdiction. The EAB is a statutory administrative tribunal with its jurisdiction set by the terms of the legislation."[16] The Director argued Rule 132 of the *Alberta Rules of Court* is not directly applicable to an amendment of a Notice of Appeal dealing with the Director's decision to amend the Approval.[17]

[46] The Director emphasized that, if the appeal is heard, the Board would not have jurisdiction to review anything regarding the decision of the EIA Director and the Minister that an EIA was not required, any municipal land use or development authorization, any decisions made under the Approval, any matters dealing with the general whole suite of water related issues, and any matters touching the 1992 NRCB decision. The Director stated any amendments would have to be limited to those directly related to the Amending Approval.

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[16] Director's submission, dated April 5, 2005, at page 4.

[17] Rule 132 of the *Alberta Rules of Court* provide: "The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties."

III. ANALYSIS

A. Mootness

1. Judicial Analyses of Mootness

[47] The Courts have extensively analyzed the issue of mootness. In the leading case, *Borowski* v. *Canada (Attorney General*) *(No. 2),*[18] the Court stated that "…if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."[19] In *Borowski* the Court stated that it may decline to decide a case which raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028, the Alberta Court of Appeal stated, "…an appellate court cannot order a remedy which could have no effect."[20]

[48] The Supreme Court of Canada has identified a two-step process in assessing if a moot issue should be heard. The first step is to determine whether the tangible and concrete dispute has disappeared and the issue is now legally or factually moot, thus making the issue academic. If the answer is yes, then it is necessary to determine if the court should exercise its discretion to hear the case. The Court stated that a case is moot when it fails to meet the "live controversy" test. For example, the Court in *Borowski* stated the matter was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.[21]

[49] In *Borowski*, the Court set out a process to determine when, even though the issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some

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[18] *Borowski* v. *Canada (Attorney General*) *(No. 2),* [1989] 1 S.C.R. 342 ("*Borowski*").

[19] *Borowski* v. *Canada (Attorney General*) *(No. 2),* [1989] 1 S.C.R. 342 at paragraph 15.

[20] *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028 at paragraph 30.

[21] *Borowski* was asking the court to declare section 251 of the Criminal Code of Canada invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

practical effect on the rights of the parties); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[50] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, also referred to as judicial economy, the Court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

1. where the outcome of the case will have a practical effect on the rights of the parties;
2. where the circumstances giving rise to the case are of a recurring nature but brief duration, thus rendering a challenge inherently susceptible to becoming moot; and
3. where the case raises an issue of public importance where a resolution is in the public interest.

Not all three situations have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

[51] The third step is for the decision-maker to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

2. The Board's Analysis of Mootness

[52] Section 95(5)(a) of EPEA states:

> "The Board (a) may dismiss a notice of appeal if
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> (i) it considers the notice of appeal to be frivolous or vexatious or without merit …
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it …."

[53] The Board has considered when an issue is moot in previous decisions. For example, in the *Butte Action Committee*,[22] the Board stated: "By moot, the Board means that,

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[22] *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment* re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical."[23]

[54] The moot issue was also discussed in *Kadutski*,[24] where the Board stated: "An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect."[25]

3. Application to These Appeals

[55] In the Notice of Appeal, the Appellant stated the relief requested as follows:

> "CCWC petitions that the Alberta Environmental Appeal Board to withhold the approval for Amendment Application No. 004-1877 of CMR Inc.'s Waste Water Approval No. 1877-01-00 until such time as the Court of Queen's Bench has ruled on the motion for judicial review."

[56] The Approval Holder and the Director argued that since the relief requested in the Appellant's Notice of Appeal has been achieved, the appeal is now moot and should be dismissed. The Appellant had filed a judicial review with the Court of Queen's Bench because the EIA Director and the Minister did not require the Approval Holder to undertake an EIA as part of the application for the Amending Approval. The Court released its decision on July 2, 2004, ordering the EIA Director's decision be quashed and the matter returned to the EIA Director. The Board notes the Queen's Bench decision was overturned by the Alberta Court of Appeal, and the Court of Appeal confirmed the EIA Director and the Minister's decision not to require an EIA.[26] What the Board must decide is whether the appeal is moot in these circumstances.

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[23] *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment* re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

[24] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

[25] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

[26] See: *Castle-Crown Wilderness Coalition* v. *Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resorts Inc*. (9 September 2005) ABCA 283.

[57] Using the three part test outlined in *Borowski*, there is no question other issues could be determined if the appeal proceeded and the Board had jurisdiction to hear the appeal. The Appellant raised concern regarding the effect of the wastewater lagoon on the adjacent ecological reserve and the people who use the ecological reserve. These remain live issues. As to the second part of the test, judicial economy, the issue of environmental protection is an issue of public importance. Although the circumstances are not short term and the Appellant's rights are not being affected, the Board will accept the potential impact on the environment as sufficient reason in these circumstances to not dismiss the appeal as moot. The role of the Board is to hear appeals from those directly affected by the Director's decision, and if the Board has jurisdiction to hear the appeal, it can make a decision on whether the Amending Approval should be confirmed, reversed, or varied.

[58] The Appellant suggested the question posed on the Notice of Appeal form, "What would you like the board to do to resolve your appeal?", suggests remedy considerations not scoping considerations. The question is on the form to allow an appellant to explain what they would like to see happen to the approval or licence. In most instances, an approval is not rejected forthright; instead, the Board often amends the approval or licence. By including this question in the Notice of Appeal, it provides the appellant the opportunity to suggest ways in which the approval or licence can be amended to deal with the potential impacts. It also provides the appellant with the opportunity to explain to the Board what their real issues and concerns are with the approval or licence.

[59] The remedy sought by an appellant tells the Board what the appellant is seeking to satisfy his or her concerns. If the remedy sought is achieved, it would seem reasonable the appellant would not continue with the appeal. However, the Board also recognizes that many appellants who fill out the Notice of Appeal are not experienced with dealing with the Board and do not realize that if they do not list all of the possible remedies, it may affect their ability to pursue the appeal. Answering all of the questions on the Notice of Appeal form provides the Board with additional information as to the reasons behind the appeal. The legislation allows the Board to provide recommendations that will assist the Minister in deciding whether to confirm,

reverse, or vary the approval issued. By providing as much information as possible, it provides all participants and the Board with options to consider, because there are, in most cases, alternatives available in varying an approval.

[60] Another reason the Board asks for the appellant to respond to this question is to provide the other participants the opportunity to prepare a rebuttal argument if it goes to a hearing. Even if the appeal goes to mediation, by providing the remedies sought, it can open the door to options that may be available to all participants to consider.

[61] The Board will not usually dismiss an appeal on the sole grounds of the remedy not being feasible or moot, providing there is some indication within the Notice of Appeal of what the appellant is actually seeking. It must also be noted that the Board will not hold an appellant to the remedy specified, because time and knowledge may change the appellant's perspective. Also, many appellants only list "reject the approval" as the remedy they will accept, ignoring the ability to amend approvals to mitigate concerns. In the Board's decision process, its options are not limited to those specified in the relief sought section of the Notice of Appeal. The Board realizes not all appeal filers, particularly those who are not represented by counsel, would be able to provide all of the alternatives available.

[62] Each question in the Notice of Appeal was included for a specific reason. It is important for appellants to consider the information they are including in the Notice of Appeal, realizing it is the document that reserves their right to be heard by the Board. The Board wants an appellant to consider exactly what it is they are appealing and why they are appealing. When the Board asks for the remedy being sought, they want the appellant to consider exactly what they are asking for, but also to get the appellant to start thinking of alternatives that may mitigate or alleviate their concerns. When a remedy is narrowly worded, as it was in this Notice of Appeal, the appellant is limiting the scope of the issues that can be considered as well as the recommendations the Board may consider.

[63] However, the Board will adhere to the scope of the Notice of Appeal, particularly when determining the issues that should be heard. The Appellant had only requested the Amending Approval be withheld until the Court made its decision. As the Court has made its decision, the relief requested is now moot. There is nothing the Board can do for the Appellant

based on the relief requested, because what has been requested has been achieved – the Court has ruled on the motion for judicial review. Although the relief requested may be moot, the Notice of Appeal does raise issues that the Board could, if the Board has jurisdiction, address by recommending the Minister confirm, reverse, or vary the Director's decision. The issues remain viable even though the relief stated on the Notice of Appeal may not be attainable, but other possible relief can be found in the Notice of Appeal. The Appellant repeated in the Notice of appeal its concerns of changing the amount of wastewater allowed into the wastewater lagoon from a resident-based number to a volume based number. By stressing this concern, it would appear one of the remedies being suggested by the Appellant is to have the Amending Approval revert back to a housing unit cap.

[64] The Board will not dismiss the appeal on the basis of the remedy identified is now moot. Substance is more important than form. However, the Appellant must remain aware that the issue of whether or not an environmental impact assessment should have been completed is not appealable to this Board and will not be an issue at the hearing, should one be held, nor should it be raised as a possible issue at the preliminary meeting.

B. Amending Notice of Appeal

[65] In its submission, the Appellant referred to the Alberta Civil Procedure Handbook, where it states, "The general rule is that any pleading can be amended at any time, no matter how careless or late is the party seeking to amend."[27] Appeals before the Board are not civil proceedings, and therefore, the Rules of Court do not apply. What the Board does adhere to are the principles of administrative law and natural justice.

[66] The basic principle of administrative law and natural justice requires fairness to all parties concerned, whether it be the appellant, the approval holder, or the Director. Allowing an appellant to amend his or her Notice of Appeal introduces an element of uncertainty into the appeal process, which also reduces the fairness of the process to the approval holder and the Director. One of the purposes of a Notice of Appeal is to identify the specific concerns of an appellant and how the Director's decision will affect them. By clearly stating the concerns, an

appellant is also notifying an approval holder of the issues. Clarity gives the approval holder an opportunity to respond to the appellant and perhaps create dialogue and a solution to the issues which eliminates the need for a full hearing. Allowing amendments would create a shifting target – the approval holder would never know what issues it would be required to address, either in the appeal process or outside of the appeal process. The Board would allow the amendment of a Notice of Appeal only in very specific circumstances. However, the Board will ask appellants to provide more information to clarify what issues they want the Board to consider.

[67] The legislation requires a Notice of Appeal to be filed within a specific period of time. One of the reasons is to let the approval holder know whether it should proceed with the proposed project or not. It provides a degree of certainty into the appeal process. The same is true to amending a Notice of Appeal. If allowed to amend the Notice of Appeal at any time, there would be uncertainty for all participants concerned and for the Board, because it would not be clear as to when or on what basis the appeal process could proceed.

[68] If the Appellant was asking to change the Notice of Appeal to provide clarity to its position, the Board may be more willing to accept it. In fact, the Board has in previous appeals asked appellants to provide additional information as allowed under section 92 of EPEA.[28] However, if the Appellant wants to amend the Notice of Appeal, resulting in a change in the scope of the issues, the Board recognizes this could create unfairness for the other parties.

[69] The Board questions whether an amendment of the Notice of Appeal is required in this appeal, or whether the Board can interpret the Notice of Appeal in order to find the concerns that have been presented, albeit not distinctly. The Board has reviewed the Statement of Concern and the Notice of Appeal filed and notes a number of concerns have been alluded to. Although the Board prefers more clearly stated issues, in reviewing the Notice of Appeal and included Statement of Concern, the issues are there, even if loosely stated.

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[27] Appellant's submission, dated March 23, 2005, at paragraph 17, citing Wm. A Stevenson and Jean E. Cote, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2004) at page 117.

[28] Section 92 of EPEA provides: "When the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice."

[70] The basic principle has been that the Board does not allow an appellant to change the Notice of Appeal, because this would result in shifting targets, which would not be fair to the other participants to an appeal. Only in a rare case would the Board consider an amendment to the Notice of Appeal, and the appellant would have to show rationally that there is a clear need.

[71] The Appellant's intent can be determined by reading the Notice of Appeal and attached Statement of Concern. Although the Appellant clearly stated its concerns regarding the lack of an EIA, there are other concerns listed in the Notice of Appeal, in particular the potential effects of the wastewater lagoon on the Wildland Ecological Reserve, which is adjacent to the lagoon. The Approval Holder and Director can surmise what the Appellant's intentions are. It would be better if the Appellant's issues and preferred remedies were clearly stated, but the Appellant was unrepresented at the time the Notice of Appeal was filed and the Appellant did what it thought was best and reasonable at that time. At a preliminary meeting, and based on the information in the Notice of Appeal, the issues could be narrowed down to what the Board can actually hear, should a hearing be held.

[72] The Appellant has not provided sufficient reason to allow it to amend its Notice of Appeal. Given the information provided in the Notice of Appeal, the Board does not believe an amendment is required in these circumstances.

IV. CONCLUSION

[73] Based on the submissions provided and the applicable legislation, the Board has determined the appeal is not moot, even though the state relief requested by the Appellant on the Notice of Appeal form has occurred. There is sufficient information in the Notice of Appeal to determine the Appellant's desired objective. However, the Board will not allow the Appellant to amend the Notice of Appeal, because certainty is required for all participants to an appeal. In addition, there is sufficient information in the Notice of Appeal to determine the issues of concern to the Appellant.

[74] The Board held a preliminary meeting to hear arguments on the directly affected issue and the matters that should be heard at a hearing, should one be held. In determining the issues, the Appellant was reminded that what has been appealed is the Amending Approval, not

the Approval. Therefore, arguments presented needed to indicate how the Appellant is directly affected by the Amending Approval. Municipal development issues and matters resulting from the Approval were not being considered, nor did they assist the Appellant in its arguments relating to the directly affected status. In its rebuttal submission, the Appellant argued there should be no approval without an EIA. It is important for the Appellant to recognize that the Board cannot grant this remedy, as the Board does not have jurisdiction to hear appeals of a decision on whether or not to conduct an EIA.

[75] The Board denies the request to dismiss the appeal for being moot. The Board also denies the request of the Appellant to allow it to amend the Notice of Appeal.

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

"*original signed by*"

Dr. Steve E. Hrudey
Chair

"*original signed by*"

Mr. Al Schulz
Board Member

"*original signed by*"

Dr. Alan J. Kennedy
Board Member