

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-D2 (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, 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.

WITNESSES:

Appellant: Mr. James Tweedie; Mr. Andrew Hurly; Mr.
Gordon Petersen; Mr. Mr. Clifford Wallis; and
Mr. Michael Lynch.

Director: Mr. Dave McGee.

Approval Holder: Mr. Jim Harker.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Valerie Myrmo,
Registrar of Appeals; Ms. Marian Fluker,
Associate Counsel; and Ms. Debra Bishop,
Student at Law.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Castle Mountain Resort Inc. regarding the wastewater system for the Castle Mountain Resort.

The Environmental Appeals Board received a Notice of Appeal from the Castle-Crown Wilderness Coalition (“CCWC”).

Alberta Environment took the position that the CCWC was not directly affected by the Alberta Environment’s decision and requested the appeal be dismissed. The Board held a preliminary meeting to determine whether the CCWC was directly affected and the issues that should be heard at the hearing, should one be held.

Based on the submissions and evidence provided, the Board determined the CCWC was not directly affected by the decision of Alberta Environment, and the appeal was dismissed. The CCWC did not provide sufficient evidence that a substantial portion of its membership would be directly affected by the amendment. None of the individual members submitted Notices of Appeal, and none of the members attending the preliminary meeting were able to demonstrate that the amendment would have a direct effect on their activities in the area. The amendment dealt only with the operational parameters for the wastewater system and would not result in any additional environmental footprint. As the appeal was dismissed, the Board did not have to consider what issues should be heard at the hearing.

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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” or the “Act”) 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 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.

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 may be relevant. The Board received submissions from the Participants between January 23, 2004, 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 the individual members of the CCWC with respect to whether they personally are directly affected by the Amending Approval, how they will be harmed or impaired by the project, whether the project will harm the natural resources used by the Appellant and its members, or whether their use of the natural resources will be affected.

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

[9] 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 should not be affected by the outcome of the judicial review. However, the Board did grant the adjournment on the basis that for the Appellant's counsel was not available on June 7, 2004.

[10] On July 2, 2004, the Board acknowledged a letter from the Appellant providing its list of witnesses, including James Tweedie, Gordon Petersen, Michael Taylor, Andrew Hurley and John Hancock. On July 2, 2004, the Court of Queen's Bench released its decision regarding

"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).

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,⁵ in relation to the judicial review filed by the CCWC, 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 E.I.A. has been resolved at Court of Queen's Bench." The Participants provided their submissions between July 16 and 21, 2004.

[11] On October 19, 2004, the Board acknowledged that the Approval Holder and the Appellant were in settlement discussions, and 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.

[12] 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?"

[13] On February 11, 2005, the Appellant notified the Board that it objected to the submission process as outlined by the Board, specifically the requirement of the Appellant and its members provide initial submissions and rebuttal submissions. The Board reviewed the

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. In her decision, Madame Justice Kenny quashed the decision of the EIA director not to order an EIA and returned the matter back to Alberta Environment. The Court of Appeal overturned Madame Justice Kenny's decision and determined that the EIA director's determination that an EIA was not required was reasonable. See: *Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resort Inc. v. Castle-Crown Wilderness Coalition* (9 September 2005) ABCA 283.

⁵ 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.

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.

[14] 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. In the same letter, the Board requested the Participants provide submissions on the question of whether the Appellant has standing and what issues should be considered if a hearing was held. The Board informed the Participants that it would schedule an oral Preliminary Meeting to address these issues. The submissions were received between September 30 and October 31, 2005.

[15] On September 12, 2005, the Approval Holder notified the Board that the Court of Appeal had overturned the Queen's Bench decision and decided in favour of Castle Mountain Resort Inc. On October 4, 2005, the Board notified the Participants that the Preliminary Meeting would be held on November 29, 2005.

[16] On November 25, 2005, the Board requested the following witnesses attend at the Preliminary Meeting on behalf of the Appellant: Mr. Michael Lynch; Ms. Nancy Purdy; Mr. John Hancock; Mr. Gordon Petersen; Mr. James Tweedie; Mr. Clifford Wallis; and Mr. Andrew Hurly. The Preliminary Meeting was held on November 29, 2005, in Lethbridge, Alberta.

II. SUBMISSIONS

A. Appellant

1. Initial Submission

[17] The Appellant explained it is a not-for profit society formed in 1990, and its goal is the "...establishment, restoration, maintenance and environmental protection of the Castle Wilderness as a viable wilderness within the Crown of the Continent Ecosystem."⁶ It stated it

⁶ Appellant's submission January 23, 2004, at paragraph 1.

has been involved in the environmental protection of the area through public education, hands-on stewardship programs, and participation in the public policy processes.

[18] The Appellant explained it currently has a membership of approximately 300 individuals or families and affiliated member groups, of which 63 are residents of the Municipal District of Pincher Creek or are ratepayers in the Municipal District by virtue of owning property or weekend cottages.

[19] The Appellant stated it carries on organized programs of hiking, stewardship, and restoration activities in the Castle Special Management Area. It stated its stewardship program has provided reports based on first-hand observations of CCWC members, and which included recommendations regarding wildlife concerns, erosion issues, and violations of the Castle Access Management Plan. The Appellant explained the CCWC has assisted Alberta Sustainable Resource Development in the ongoing management of the area, and the CCWC has enhanced the capacity of the Alberta Forest Service and the Municipal District of Pincher Creek to address issues such as weed control and erosion that would otherwise be under-funded and under-resourced in terms of available personnel. The Appellant stated it has also written a brochure and a number of special papers addressing topics of interest to the general public relating to the Castle Wilderness. The Appellant explained it has taken a lead role in representing local conservation interests in public multi-stakeholder processes beyond the specific concerns with the town site development in the West Castle Valley. The Appellant stated it participated in the various roundtable discussions and other initiatives in a spirit of collaboration and which was consistent with the government and industry aspirations for forging effective partnerships to address the multi-faceted nature of environmental protection for the public lands in the Castle watershed. It further explained the "...CCWC remains the only local public interest group explicitly committed to the goals of ecological sustainability and the protection of biodiversity that are identified as the priority goals for the management of all activities in the Castle Special Management Area."⁷

[20] The Appellant explained it was the lead non-governmental organization that intervened in the 1993 NRCB public review of the Castle ski hill expansion. The Appellant

further explained it and its members met and had ongoing correspondence with Alberta Environment, Sustainable Resource Development, and Fish and Wildlife over the past decade regarding the sewage lagoon facility and the Castle Mountain Resort expansion. The Appellant also explained it has made numerous presentations to the Municipal District of Pincher Creek council with respect to the incremental expansion of residential development at the Castle Mountain Resort, including providing a solicited opinion on how best to protect municipal lands adjacent to the Castle Mountain Resort.

[21] The Appellant stated it is the volunteer steward under the Volunteer Stewards Program, Alberta Community Development, Parks and Protected Areas Division, for the West Castle Wetlands Ecological Reserve (“Ecological Reserve”), which is located directly adjacent to the wastewater system facility. The Appellant explained that as designated stewards, it continues to fulfill its public interest commitment to the ecological sustainability and maintenance of biodiversity of the Castle Special Management Area.

[22] According to the Appellant, the Parks and Protected Areas officer for the local area and the southwest area manager of Community Development were not aware of the amendment application until the CCWC conservation director informed them, but once informed, they submitted a Statement of Concern to Alberta Environment. The Appellant argued that as Parks and Protected Areas Division takes the CCWC’s involvement as steward for the Ecological Reserve seriously, it is reasonable to expect Alberta Environment to do the same.

[23] The Appellant argued it was unclear whether the Director was aware that the exact location of the Ecological Reserve is across from the sewage lagoon, as maps provided by the Director to the CCWC failed to indicate the presence of the sewage lagoon. The Appellant further explained the Access Management Plan map from Alberta Sustainable Resource Development and the Municipal District of Pincher Creek land use planning maps failed to identify the Ecological Reserve. The Appellant stated it has consistently sought to see the Ecological Reserve be recognized with signage around the perimeter and fencing and in the relevant planning maps for the area.

⁷

Appellant’s submission, dated January 23, 2004, at paragraph 7.

[24] The Appellant argued its stewardship role for the wetlands "...provides a strong argument for the organization being considered a directly affected party in this matter."⁸

[25] The Appellant provided a history of the Castle Mountain Resort and surrounding lands. According to the Appellant, Bill PR 10 – Westcastle Development Authority Act-1985 allowed the local councils to hold property, invest in, and develop their local community and regional ski hill. The Appellant stated the lands on which the sewage lagoon is located were purchased from the Province of Alberta by the Westcastle Development Authority in 1997 and sold to Castle Mountain Resorts in 1998. The Appellant stated the Special Places Committee⁹ described the area for the Ecological Reserve as "...the area delineated by the 1:100 year flood return from the bridge over the Castle River at the West Castle Ski area on the south boundary, north to the narrowing of the wetlands into a defined channel at the access trail."¹⁰ The Appellant explained a map showed the road and bridge and Secondary Highway 774 as the west boundary, with the exception of a small section of wetlands at the north end and a jog in SE 25-4-4-W5M that was excluded to accommodate a pre-existing logging operations landing. According to the Appellant, the Order in Counsel establishing the Ecological Reserve described the area as the "...1:100 year flood contour at the 1402 metre (4,600 ft) contour elevation."¹¹ The Appellant stated the Castle Mountain Resort purchased 7.58 acres of SE 25-4-4-W5M to accommodate the sewage lagoon, and approximately half of this area was below the 1402 metre elevation. The Appellant further stated the sewage lagoon development was in direct contravention of the development plan that precluded any development on the east side of the road.

⁸ Appellant's submission, dated January 23, 2004, at paragraph 20.

⁹ Alberta's Special Places program, an initiative to complete a network of protected areas to preserve the province's environmental diversity, began in 1995. Albertans were invited to nominate additional parcels of provincial Crown land. At the provincial level, a multi-stakeholder Special Places Provincial Coordinating Committee (the "PCC") was appointed by the provincial government to review public nominations, provide overall direction for the program, and submit candidate sites for detailed consideration. The PCC represented the broad interests of Albertans and included representatives from more than twenty provincial stakeholder groups, including local governments, industry and environmental organizations. The PCC completed its mandate on March 26, 1999, after identifying and recommending candidate sites for local committee review in all six of Alberta's natural regions.

¹⁰ Appellant's submission, dated January 23, 2004, at paragraph 26.

¹¹ Appellant's submission, dated January 23, 2004, at paragraph 27.

[26] The Appellant submitted the close proximity of the sewage lagoon to the Ecological Reserve, and the interconnectedness of the municipal and the Director's jurisdictions, are relevant in considering the CCWC to be directly affected. The Appellant argued its stewardship of the Ecological Reserve as well as its responsibility to represent the interests of its members in the municipal and regulatory processes are significant grounds to consider the CCWC directly affected.

[27] According to the Appellant, Ms. Jillian Flett and Mr. Alan Pentney of Alberta Environment told the Appellant that because there was no requirement for an Environmental Impact Assessment ("EIA") report, the "...CCWC should be able to get standing for the water allocation and wastewater issues."¹² The Appellant also referred to the June 1999 correspondence from Ms. Annette Trimby, Director, Environmental Assessment, in which she stated that any changes to accommodate future plans beyond the 88 residential units, "...would require an amendment of the approval including public consultation as well as municipal approval."¹³ The Appellant also referred to a July 2004 letter from Dr. Roger Palmer, then Deputy Minister of Environment, where he stated that "...a thorough review of potential environmental effects will be completed before any decisions are made on whether to issue the required approvals for this proposed development. There will be an opportunity for individuals directly affected by the development to be involved in the review."¹⁴

[28] The Appellant argued that few individuals, if any, can be included in a review of the project if a strict, narrow interpretation of directly affected is held, as the Approval Holder holds an island of privately deeded land surrounded by public lands. The Appellant also argued that it seemed none of the government agencies responsible for the decision-making appeared to recognize the existence of the Ecological Reserve. The Appellant stated the issue of regional and transboundary cumulative effects was essentially ignored through the fragmented approval process for the development of the area.

¹² Appellant's submission, dated January 23, 2004, at paragraph 44. Ms. Jillian Flett is the Director of Environmental Assessment and Compliance Division of Alberta Environment, and is the Director under EPEA who determines whether an Environmental impact assessment is required for a project. Mr. Pentney is the Director, Southern Region, Alberta Environment.

¹³ Appellant's submission, dated January 23, 2004, at paragraph 46.

¹⁴ Appellant's submission, dated January 23, 2004, at paragraph 47.

[29] The Appellant referred to its judicial review of the decision of the Director of Regulatory Assurance and the Minister of Alberta Environment at which the CCWC was accorded standing to pursue the motion before the Courts. The Appellant submitted that "...it is inconsistent that AENV should insist that the CCWC is not a directly affected party with respect to this Amendment."¹⁵

[30] The Appellant stated it was the lead non-governmental organization in the Westcastle Ecosystem Coalition that intervened and appeared before the NRCB review of the Westcastle shi hill expansion in 1993. The Appellant recognized that the Board is not bound by the rulings of the NRCB, but as there was no formal public review of the expansion of the Castle Mountain Resort and no EIA was prepared for impacts on public lands adjacent to a 225 housing unit development, the Appellant contended that the NRCB Decision Report is the only public planning document that addresses the environmental and ecosystem consequences of the development, particularly the effects on the wetlands. The Appellant stated the NRCB Decision Report recognized the need to coordinate land use decisions between several jurisdictions. The Appellant argued the Amending Approval is the only opportunity for those individual members who were accorded standing by the NRCB in 1993 to now provide input into the Director's decision-making process to address their concerns regarding the amendment.

[31] The Appellant referred to a decision of the AEUB regarding the Alpine Club of Canada, in which the AEUB was prepared to recognize the Alpine Club as an intervener "...on the grounds that the Alpine Club was the Volunteer Steward of the Cardinal River Divide Natural Area and therefore held a special relationship to the Natural Area..." and "...the responsibilities of a Volunteer Steward for a Natural Area make that relationship to the specified land unique and special."¹⁶ The Appellant recognized the Board is not bound to such a ruling by the AEUB, but finding the CCWC directly affected as volunteer steward of the Ecological Reserve would be consistent with the AEUB ruling and the purposes of EPEA.

[32] The Appellant stated individuals sharing a concern for the sustainability of the Castle watershed coordinated their efforts in the most effective method available, and the

¹⁵ Appellant's submission, dated January 23, 2004, at paragraph 50.

¹⁶ Appellant's submission, dated January 23, 2004, at page 16.

government recognized their efforts by consulting with the group and giving the CCWC a stewardship role for the Ecological Reserve. The Appellant referred to the Updated Integrated Resource Plan for the Castle Sub-Region, which the Appellant explained government regulators and agencies consider to be the guiding document, to point out the Stewardship section which provides:

“Responsible stewardship is the willing commitment of user groups to conduct themselves, and to carry out their activities, in a manner which prevents unacceptable environmental impairment and which maintains fully functioning ecosystems at all levels (from the local site to the larger landscape). Shared stewardship implies a collaborative approach among user groups in managing and caring for the land and its resources so that they can be passed on to future generations unimpaired. Shared stewardship requires that government agencies – having a legislated mandate for land and resource management – work cooperatively with disposition holders, resource users, interest groups and individuals to achieve common stewardship goals. An ‘operating principle’ of Alberta Environment is ‘Shared Responsibility: We share the responsibility for managing and protecting the environment with all Albertans and all levels of government.’”¹⁷

[33] The Appellant referred to the Board’s previous decisions regarding the Lake Wabamun Environmental Protection Association (“LWEPA”) in which the Board granted standing to LWEPA, and the Appellant specifically identified one of the reasons LWEPA was found to be directly affected was that LWEPA was created for the express purpose of engaging in the regulatory process.¹⁸ The Appellant submitted this was one of the CCWC’s roles it has played for its members since its formation in 1991, and the CCWC has been fully engaged at various levels of decision-making to help prevent the degradation of the ecosystem integrity.

[34] The Appellant stated it has had a long history in monitoring the activities that are the subject of the wastewater Approval. It stated it has acted in good faith in its consultations with Alberta Environment, but the Appellant believed the Director was wrong to fast track the amendment without any acknowledgment of the concerns raised by the CCWC in its Statement of Concern or any discussion with the CCWC before issuing the Amending Approval.

¹⁷ Appellant’s submission, dated January 23, 2004, at pages 17 and 18.

¹⁸ See: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (13 March 2001) Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-D (A.E.A.B.) at paragraph 56.

[35] The Appellant stated the Director considered two questions to be determinative of whether CCWC is directly affected, and the questions focused solely on the design and operation parameters of the system, not the relationship the CCWC may have with the surrounding lands.

[36] The Appellant explained the integrity of the ecosystem is a fundamental concern to the CCWC, but "...wider issues related to further incremental expansions of the lagoon system, the irrigation areas and the residential townsite construction discussed in the 'Statement of Concern' remain a major concern to the CCWC and its members as Volunteer Stewards of the Wetland Ecological Reserve."¹⁹ The Appellant submitted that its members who enjoy the wetlands for its vibrant birdlife activity, natural history, and biodiversity, will be directly affected by even this "minor" decision, as the Amending Approval has the potential to add threats to the wetlands and the adjacent hillside where irrigation will occur.

[37] The Appellant explained some of its members spent hundreds of hours pulling invasive weeds in the vicinity of the Castle Mountain Resort, and weed infestation following land disturbances associated with the irrigation system and operation of the sewage lagoon remains a concern.

[38] The Appellant argued the Director's narrow approach of dismissing the CCWC's concerns precludes any challenge to the Director's decision on environmental grounds, as the arguments normally voiced by persons or groups of persons who live nearby will not be heard. The Appellant stated "...there should be an opportunity for those concerns to be heard if the purposes of EPEA are not to be frustrated."²⁰

[39] The Appellant concluded by stating: "If the test for standing for the CCWC has to be based on a purely human-centred approach to the effect of this amendment on our members, collectively or individually, couched in terms of its engineering details and its immediate and direct affects on the adjacent lands, then the NRCB was correct in seeing the possibility of the continued degradation of the area occurring."²¹

¹⁹ Appellant's submission, dated January 23, 2004, at page 21.

²⁰ Appellant's submission, dated January 23, 2004, at page 22.

²¹ Appellant's submission, dated January 23, 2004, at page 22.

2. Initial Rebuttal

[40] The Appellant stated the Approval Holder downplayed the significant discrepancy regarding the precise boundaries of the Ecological Reserve that it had attempted to draw to the attention of the regulators since the sewage lagoon system was first contemplated in 1998. It argued the Ecological Reserve is designated appropriately by contour elevation parameters rather than administrative coordinates.

[41] The Appellant questioned the process that allowed the sale or the building of the sewage lagoons on the Westcastle Development Authority option lands.

[42] The Appellant explained that it has not interfered with the decisions of Alberta Community Development. It submitted that, as the southwest area manager filed a Statement of Concern in response to the Amending Approval, Alberta Community Development, Parks and Protected Areas Division, was appreciative of the Appellant's involvement in its stewardship duties.

[43] The Appellants argued the Board "...was formed to hear substantive concerns of, among others, conservation organizations with legitimate interests in an area."²² It argued the burden of proof to establish standing is much greater with respect to matters relating to public lands.

[44] The Appellant stated it was not aware of the category of a "directly affected statement of concern filer" that was raised by the Director as a precondition to filing an appeal. The Appellant explained it filed its Statement of Concern, and after the Director made his decision, he provided the Appellant with notice of the decision and gave his opinion how the decision affected or did not affect the Appellant.

[45] The Appellant submitted that in this case, where the decision related to an isolated island of private development surrounded by public lands, the Appellant's standing would be similar to the example of a community league referred to in Alberta Environment's Program Policy, Environmental Sciences #ES 99-PP3 that addresses "Acceptance and Acknowledgement of Statements of Concern," in which it states "Any organization that has a portion of its members

²² Appellant's submission, dated February 20, 2004.

living in the geographic and vicinity of the activity will also be considered directly affected....”²³ The Appellant stated no person can live in the Ecological Reserve or in the immediate vicinity of the Castle Mountain Resort other than leaseholders. Given the context of public lands, the Appellant considers itself it is as closely equivalent to an organization as in the Alberta Government policy.

[46] The Appellants argued it is not “...just another general public interest environmental group...,” and it has a very specific and unique interest in the matters relating to the Castle Mountain Resort development. The Appellants stated it would be difficult to think of any individual or group that was more directly affected, as only the inmates of the Alberta Corrections Minimum Security Facility located at the confluence of the West Castle and South Castle Rivers would hope to meet the geographically specific test. The Appellants argued that if the Board decided the Appellant was not directly affected, there was no avenue for public input into private developments that affect public lands in the Castle region, and this would be contrary to the aims of the Board and frustrate the provisions under EPEA for significant issues affecting public lands to be publicly addressed.

[47] The Appellant argued the combined effects of the new wording of Clause 4.1.2 and the volume-based operating conditions “...create a significant level of uncertainty regarding the jurisdictional disconnect between the Municipal District of Pincher Creek’s responsibilities for subdivision approvals within the Castle Mountain Resort and the provision of what is equivalent to a municipal wastewater system.”²⁴ The Appellant stated the Amending Approval fragments the planning processes for future developments at the Castle Mountain Resort, and Clause 4.1.2 should reference the 225 limit on housing units to be served by the Amending Approval. The Appellant argued “de-linking” the number of housing units from the Amending Approval isolates the approvals process from public review.

[48] The Appellants stated it is appealing the particular wording of a single clause in the Amending Approval. It also stated it was given assurances in the past by Alberta Environment at various levels and consistently over time that there would be an opportunity for

²³ Appellant’s submission, dated February 20, 2004.

²⁴ Appellant’s submission, dated February 20, 2004.

public review should the Approval be amended. The Appellant stated it is not asking the Approval be changed, but that the Amending Approval be consistent with the Approval.

[49] The Appellant argued the direct causation test is not the test to use in this case, "...given the labyrinth that the expansion of the former Westcastle Ski Hill has now become."²⁵ The Appellant stated the issues of the location of the sewage lagoon so close to the water table of the wetlands of the Ecological Reserve needs to be resolved before further residential development at the site is contemplated.

[50] The Appellant stated its ongoing activities and stewardship and monitoring roles demonstrates its unique and significant participation in protecting the ecological values of the Castle Special Management Area. The Appellant explained it is the protection of the ecological values in the specific area that is the focus of commitment for its membership, and it is not some generalized public interest in general environmental protection that all Albertans may or may not share.

[51] The Appellant argued the Board's past decisions on standing were put in terms of how the particular decision would directly affect a person or so many members of an organization rather than how the decision would affect directly or indirectly the environment. The Appellant argued the "...administrative decision to isolate the amendment of this wastewater approval from the context in which it is taking place, both geographically and administratively, is fundamentally erroneous, under EPEA, regardless of whether the CCWC has rights to standing...."²⁶

[52] The Appellant stated it acted in good faith in its interactions with Council for the Municipal District to ensure there was recognition of the implications the Municipal District's decision would have on the surrounding public lands, which it does not have control over. The Appellant explained the issue of the number of residences to be serviced by the wastewater system was a key matter considered by the Municipal District.

²⁵ Appellant's submission, dated February 20, 2004.

²⁶ Appellant's submission, dated February 20, 2004.

[53] The Appellant considered it ironic the Approval Holder draws its visitors, developers, and leaseholders from across the province and beyond, but the equally diverse membership of CCWC is provided as a reason why it may not be considered as directly affected by the Director's decision. The Appellant continued: "The logic seems to be that if you drive from Calgary to ski at CMR [Castle Mountain Resort] and use the urinals your rights are somehow different from the member of the CCWC who drives from Calgary to watch the wildlife or the birds on the public lands in the vicinity of the ski hill."²⁷

[54] The Appellant stated it provided its membership list to be open and transparent, and it noted that at least 65 of its members live within the Municipal District of Pincher Creek. It explained its membership as a whole is concerned with the ecological integrity of the Ecological Reserve wetlands and the potential adverse effects that may occur on those wetlands and the public lands in the vicinity of the wastewater system.

[55] The Appellant argued it has bona fide interests that may be affected by the Amending Approval, and those interests support the purposes outlined in EPEA to ensure the continued and sustainable viability of the Westcastle Valley and Ecological Reserve wetland ecosystems.

3. Supplemental Submission

[56] The Appellant explained the Municipal District of Pincher Creek approved the area structure plan in 2002 on the condition that no housing units beyond the 88 approved units would be constructed until after the Approval was amended and allowed for an increase in wastewater.

[57] The Appellant stated it consulted Alberta Environment regarding the need for an environmental impact assessment ("EIA"), and the director responsible determined an EIA was not required. The Appellant stated it then asked the Minister of Environment to order that an EIA be done, and in declining to make such an order, the Deputy Minister wrote to the Appellant on July 24, 2002, stating: "... 'a thorough review of potential environmental effects will be

²⁷ Appellant's submission, dated February 20, 2004.

completed before any decisions are made on whether to issue the required approvals for this proposed development.”²⁸

[58] According to the Appellant, at the time the Deputy Minister wrote to the CCWC, the Approval was in existence but the process to consider the application for the Amending Approval had not been initiated.

[59] The Appellant stated it filed a Statement of Concern regarding the application to amend the Approval. The Appellant argued the Director and the Approval Holder knew the removal of the clause limiting the inflow of the existing lagoon through limits to housing units and replacing it with a volume based limit would allow 225 housing units to be constructed.

[60] According to the Appellant, the Director accepted the CCWC has interests in the Ecological Reserve, and the Ecological Reserve is located in the vicinity of the wastewater system.

[61] The Appellant explained it is a legally registered not for profit society in the Province of Alberta whose purpose is “...‘the establishment, restoration, maintenance and environmental protection of the Castle Wilderness as a viable wilderness within the Crown of the Continent Ecosystem.’”²⁹ The Appellant submitted the Board has to consider whether the Appellant has a distinct purpose that is unique enough to differentiate itself from the interests of the general public. The Appellant stated it is “...only concerned with and has used its organization as a society to establish a viable wilderness in the Castle Wilderness.”³⁰

[62] The Appellant explained the Castle Mountain Resort, owned and operated by the Approval Holder, is located immediately adjacent to the Castle River, and the sewage lagoons arguably encroach on the Ecological Reserve.

²⁸ Appellant’s submission, dated September 29, 2005.

²⁹ Appellant’s submission, dated September 29, 2005, at paragraph 26.

³⁰ Appellant’s submission, dated September 29, 2005, at paragraph 28.

[63] The Appellant explained that, pursuant to the *Societies Act*, R.S.A. 2000, c. S-14, it has all the powers, rights, and immunities as a corporation,³¹ and pursuant to section 16(1) the *Business Corporations Act*, R.S.A. 2000, c. B-9, "...corporations [societies] have 'the capacity and, subject to this Act, the rights, powers and privileges of a natural person.'"³² The Appellant stated section 28(1)(nn) of the *Interpretation Act*, R.S.A. 2000, c. I-8, states that when the term person is used, it should be interpreted to include a corporation. Therefore, according to the Appellant, there is no legal basis that would suggest that section 91 of EPEA only applies to natural persons to the exclusion of corporations and societies.

[64] The Appellant accepted that directly affected must be something more than a general effect on the general public. The Appellant argued the Approval Holder's attempt to consider the CCWC as a general interest advocate ignores the CCWC's reason for being and its past effort. The Appellant stated it and its members are "...only about preserving and protecting the environment of the Castle Wilderness as it moves forward to facilitate the establishment of the Castle Wilderness as a viable wilderness area."³³ The Appellant argued no other person has the same sole purpose or has worked exclusively to achieve the same goal.

[65] The Appellant argued the Approval Holder acknowledged the CCWC, as a steward of the wetland, is directly involved and directly affected, but the Approval Holder claimed the CCWC's interest should be subsumed in favour of the government department responsible for enforcing violations of government standards.

[66] The Appellant submitted the Approval Holder's position of disenfranchising a volunteer steward overlooks that the CCWC was established as a legislated steward to alert Alberta Community Development of the unique management needs of the site cared for.

[67] The Appellant stated that by filing its own Notice of Appeal, it is not interfering with the decision-making by Alberta Community Development. The Appellant claimed "...an amendment to volume limits in a sewage lagoon immediately adjacent to wetlands it is [*sic*] has

³¹ Section 14 of the *Societies Act* of Alberta states: "From the date of the certificate of incorporation, the subscribers to the application and the other persons that from time to time become members of the society are a corporation and have all the powers, rights and immunities vested by law in a corporation."

³² Appellant's submission, dated September 29, 2005, at paragraph 35.

³³ Appellant's submission, dated September 29, 2005, at paragraph 41.

a direct interest in and accountability for as an advisor to [Alberta Community Development] makes it directly affected.”³⁴

[68] The Appellant argued that, even though the court in *Kostuch*³⁵ stipulated that directly affected requires an individual demonstrate a personal interest is impacted, it is incorrect to assume that individual appellant means appellants in their status as a natural person. The Appellant stated any person, including the CCWC, who demonstrates a personal interest is directly affected would have standing. The Appellant submitted it is disingenuous for “...anyone to conclude that a society or other corporation cannot have a personal interest that is directly affected by a decision of a Director.”³⁶

[69] The Appellant stated the most obvious personal interest is an interest in property, but the most direct personal interest the CCWC can assert in the adjacent lands is as volunteer steward of the Ecological Reserve. The Appellant explained one of its members, Mr. Andrew Hurley, is an academic at the University of Lethbridge who studies hummingbirds in the area. The Appellant explained Mr. John Hancock, also a member of the CCWC, is a biologist with an interest in spiders, and his research has regularly involved the Castle Wilderness and, in particular, the Ecological Reserve. According to the Appellant, Mr. Hancock has felt a film from the lagoon settle on his face, and the sheen was transported over the Ecological Reserve from the lagoon by the wind.

[70] The Appellant explained its members, such as Mr. Hurley and Mr. Hancock, regularly use the wetlands to study hummingbirds and spiders and have a direct benefit in academia and for the study of these creatures.

[71] It stated the direct impacts of the Amending Approval include an increased volume of wastewater in the lagoon, increased vehicular traffic on Highway 744, and a substantial increase in human activity at the resort and adjacent public lands.

³⁴ Appellant’s submission, dated September 29, 2005, at paragraph 46.

³⁵ *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

³⁶ Appellant’s submission, dated September 29, 2005, at paragraph 55.

[72] The Appellant argued the Director's view, that there will be no change in the footprint of the lagoon and therefore no change in the impact, refuses to address that the utility of the lagoons and physical and chemical impacts of the increased volume will have effects. The Appellant stated that prior to the Amending Approval, there was a sheen on the wetlands caused by wastewater effluent, and with the Amending Approval the regularity and scope of the sheen will increase. The Appellant argued that groundwater absorption will be accelerated as irrigation occurs more often, and more emissions from vehicle traffic in and out of the resort will inundate the wetland more often. The Appellant argued it is inaccurate to state the direct impact of the increase in volume does not raise the risk of berm failure or spill over from volume exceedences.

[73] The Appellant questioned the extent the Director considered the cumulative impacts on the environment as a result of increased wastewater volume and human activity. The Appellant argued those considerations were not undertaken "...despite assurances in 2002 from the Director of Regulatory Assurance and the Deputy Minister of the Environment that the EPEA approvals process would effectively review the likely environmental consequences of such growth and expansion."³⁷

[74] The Appellant argued that if the Board limits its consideration to the impact on individuals who make up the group, would, if allowed to continue, prevent any society or corporation from having standing in its own right as a person recognized by law. The Appellant submitted it is "...capriciously arbitrary to assert that personal interests denoting a direct effect could not be shared by the community at large."³⁸

[75] The Appellant argued that group numbers should not be the only or primary measure to determine if an organization is personally impacted. It argued less than a majority of a group of 300 members may be personally impacted due to geographic separation without diminishing the overall impact felt by the organization in its own capacity as a legal entity with its own powers, rights, and immunities created by law. The Appellant argued it is "...inequitably arbitrary to determine a group's standing on the sole or primary basis of how many group members are, in their own legal right, 'individually and personally impacted by the

³⁷ Appellant's submission, dated September 29, 2005, at paragraph 61.

³⁸ Appellant's submission, dated September 29, 2005, at paragraph 67.

project.”³⁹ It stated the definition of a directly affected person needs to be broad enough to include organizations such as the CCWC that have a unique and distinctive purpose as demonstrated by its past and present actions.

[76] The Appellant argued it would be directly affected if the Board refuses to grant the CCWC standing, and the impact would be real, direct, and personal to the CCWC and its members. The Appellant explained it is seeking to establish the Castle Wilderness as a viable wilderness, and denying it standing would prevent the Board from assessing the impacts of wastewater volume and human activity on the Ecological Reserve, Castle River, and proximate areas of the Castle Wilderness, and would thwart the CCWC’s right to legally participate in the review of the Project.

[77] The Appellant argued the Approval Holder and the Director inaccurately attempt to frame the CCWC as “...just another environmental activist group bent on restricting development.”⁴⁰ The Appellant explained it was incorporated many years before the Approval Holder was organized and more than a decade before the Approval Holder applied to amend the Approval that authorized expansion of the resort.

[78] The Appellant stated it is not asking the Board to change a prior approval, and the issues should be limited to the environmental effects directly or indirectly resulting from the Amending Approval. It explained the direct results include expansion of the number of housing units, increase in wastewater volume, more vehicular traffic next to the Ecological Reserve, and more irrigation of wastewater on lands adjacent to the Ecological Reserve. The Appellant stated the indirect results stem from more human activity on the public lands more of the time, thereby affecting the ecosystem and causing the flora and fauna to abandon the proximate areas.

[79] The Appellant argued its concerns are environmental, not political. The Appellant referred to the Alberta Court of Appeal decision, *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)* (9 September 2005) ABCA 283, where the Court of Appeal determined the Director of Regulatory Assurance Division communicated to the CCWC in letters dated May 1 and June 17, 2002, that “...while an

³⁹ Appellant’s submission, dated September 29, 2005, at paragraph 70.

⁴⁰ Appellant’s submission, dated September 29, 2005, at paragraph 75.

EIA was not required as a precursor to submission of applications that could authorize CMR's expansion 'future applications under the EPEA and the Water Act all mandated environmental reviews.'"⁴¹

[80] The Appellant stated its intent was to have the Board report to the Minister on whether:

- "1. the mandated environmental reviews were completed during the course of the application to amend the Approval;
2. whether the environmental consequences are acceptable, and if so;
3. what amelioration is being implemented to respond to foreseeable environmental consequences."⁴²

[81] The Appellant submitted that it has met the requirements of section 91 of EPEA, as it submitted a Statement of Concern in a timely fashion and it is a person directly affected by the Director's decision.

4. Supplemental Rebuttal

[82] The Appellant submitted that the Board was established to hear appeals of certain decisions made by Alberta Environment, and the Board was conceived to offer a level playing field to the regulated community and persons directly affected by those decisions. It argued much effort in the past has tried to limit who the Board should listen to in responding to appeals. The Appellant pointed out that "directly affected" is not defined in EPEA. The Appellant argued the Director would narrowly conclude the appeal without determining the facts, evidence, and circumstances of this case without any flexibility as to whether the CCWC is a directly affected person.

[83] The Appellant argued the Director's approach is to limit the ability to appeal to an individual and approval holders. The Appellant submitted that under this approach, groups need not apply, even if they are, on the facts of the case, directly affected, because groups lack the ability to be directly affected. The Appellant stated that based on this reasoning, only human beings can be directly affected, so group membership and a determination of whether the

⁴¹ Appellant's submission, dated September 29, 2005, at paragraph 80.

majority of the human beings in the group are personally and directly affected needs to be referenced. The Appellant submitted this interpretation arbitrarily removes a number of persons at law, including inanimate right-holders, from the jurisdiction of the Board. It stated these rights-holders can institute legal actions, have the courts or administrative tribunals take injury to the right-holder into account, and relief can run to the benefit of the right-holder.

[84] The Appellant reiterated there was no legal basis for concluding the CCWC is not, at law, a person. The Appellant argued a person in Alberta has a right to appeal the decision making of the Director. The Appellant argued the practice of determining a group's standing based on an assessment of the number of individual members of an organization that are themselves directly affected, is "...disingenuous with AEPEA's legislative mandate."⁴³

[85] The Appellant stated it had sufficient material to establish on the facts and circumstances that it has a singular purpose (to establish the Castle Wilderness as a viable wilderness); it is distinctively connected to the subject matter by its role as volunteer steward for the Ecological Reserve; and its focus is the environment in the Castle Wilderness and the area immediately adjacent to the Castle Mountain Resort.

[86] The Appellant argued it is directly affected because of its direct interest in and would be directly affected by any decision that addresses a matter that has a real impact on the Castle Wilderness. It argued the Board's legislative mandate to hear appeals on environmental decision making would be undermined if there was a limited and inequitable approach to establishing who the Board may hear from.

[87] The Appellant requested the Board assess the status of the CCWC in its own right as a legally recognized person who is directly affected, and not assess the status of the individual group members to determine standing. The Appellant explained the area surrounding the Castle Mountain Resort is public lands and unavailable for residential access. Therefore, according to the Appellant, "Clinging to group residence location as a necessary measure for defining whether

⁴² Appellant's submission, dated September 29, 2005, at paragraph 82.

⁴³ Appellant's submission, dated October 28, 2005, at paragraph 10.

some person is directly affected is an inappropriate limiting factor that does not, of itself, determine the issue.”⁴⁴

[88] The Appellant explained that its organizational mandate and past conduct clearly establishes that the CCWC was established to engage in the regulatory process, and over the past 12 years, it has engaged in the regulatory process to address its mandate.

[89] The Appellant distinguished itself from the Southern Alberta Environmental Group (“SAEG”),⁴⁵ because, according to the Appellant, SAEG has a broader reach, an unlimited mandate, and it addresses a number of environmental concerns in southern Alberta. The Appellant did not agree with the Director’s assertion that the interests of the CCWC are the same as the general public, as the CCWC was established as a distinctive voice for its members independent of the general public. The Appellant stated it is “...‘the volunteer steward...” for the Ecological Reserve, and as such, it is not a diffuse general volunteer.⁴⁶

[90] The Appellant stated the Director of Regulatory Assurance Division and the Deputy Minister of Environment “...unequivocally represented that the AEPEA approval process would thoroughly address the potential environmental affects before any decisions are made in issuing the required approvals.”⁴⁷

[91] The Appellant stated the CCWC is representative of its membership and are impacted and affected by circumstances that are material to them. The Appellant argued if the Approval Holder “...can be acknowledged as having a direct vested interest, in its own capacity, in the outcome of this appeal, then the Board must recognize that the same is true for CCWC.”⁴⁸

[92] The Appellant argued that applying the Director’s issues would too narrowly limit the Board’s assessment of the impacts of the Director’s decision on the environment and the scope of the decision making process itself.

⁴⁴ Appellant’s submission, dated October 28, 2005, at paragraph 18.

⁴⁵ See: Board’s decision: *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment* re: *St Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.). (“*Jericho*”).

⁴⁶ Appellant’s submission, dated October 28, 2005, at paragraph 22 (Emphasis in original.).

⁴⁷ Appellant’s submission, dated October 28, 2005, at paragraph 23.

⁴⁸ Appellant’s submission, dated October 28, 2005, at paragraph 30.

[93] The Appellant stated it is not asking the Board to review other legislative processes or municipal decisions. According to the Appellant, the Board can assess what impacts those decisions would have on the proposed amendment or the impact of the amendment on the environment given the circumstances the Director should have been aware of at the time he made his decision.

[94] The Appellant conceded that its individual members did not submit their own Statement of Concern, but it asked the Board to consider how the CCWC would be impacted and to take into account the particular impacts on members of the CCWC. The Appellant explained the affidavits of two of its members, Mr. Andrew Hurley and Mr. John Hancock, demonstrate how their professional involvement will be impacted by the Amending Approval.

[95] In response to the Director's submission, the Appellant submitted that amelioration is a prudent alternative and an appropriate consideration.

[96] In response to the Approval Holder's submission, the Appellant stated a formal EIA and a thorough review of potential environmental impacts are not the same thing. The Appellant stated the Court of Appeal did not review the decision of the Director, and it would be appropriate for the Board to do so.

B. Approval Holder

1. Response Submission

[97] The Approval Holder acknowledged the Appellant has a 14-year history of actively promoting the establishment, maintenance, and environmental protection of a wilderness area within the Castle region, and the Appellant has been granted status as volunteer stewards under the Volunteer Stewards Program.

[98] The Approval Holder argued the Appellant's concern that the lagoon facility is within the boundaries of the Ecological Reserve is not a relevant issue. The Approval Holder emphasized that the Amending Approval merely alters the operating conditions of the existing waste water facility, and therefore, the Appellant cannot raise concerns with respect to the

original approval that determined the location, size, and type of operating system to be implemented.

[99] The Approval Holder stated the lagoons are not located in the Ecological Reserve, and the Director's Record shows the Director considered the Ecological Reserve borders the land dedicated for the lagoons. The Approval Holder explained the metes and bounds⁴⁹ description of the Ecological Reserve attached to the Order in Council failed to recognize that the lands the lagoons are situated were not publicly owned in 1998 when the Order in Council was approved, and the lands were owned by the Westcastle Development Authority, a body corporate established by a special act of the Legislature in 1985. The Approval Holder explained the relevant legislation clearly states that an ecological reserve can only be created on public lands and, therefore, excludes the land purchased by the Approval Holder from the Westcastle Development Authority.⁵⁰

[100] The Approval Holder argued the Appellant's interests are not sufficient to create standing. The Approval Holder acknowledged the Appellant's historical involvement is proof of the Appellant's significant interest in any activities that may have an environmental impact within the Castle region, but this does not mean it is directly affected.

[101] The Approval Holder stated the Appellant's argument that its involvement as a volunteer steward results in it being directly affected fails to recognize the limitations placed on its position as volunteer steward. The Approval Holder explained the volunteer steward program provides assistance to government departments, including Alberta Community Development by monitoring conditions at sites such as the Ecological Reserve. The Approval Holder stated that: "Volunteer Stewards have no enforcement responsibilities. Although they do not represent the government legally, their observations alert us to the unique management needs of the sites they care for."

⁴⁹ Metes and bounds is defined as: "The boundary lines of land, with their terminal points and angles. A way of describing land by listing the compass directions and distances of the boundaries." (*Black's Law Dictionary*, 6th ed., under the word "metes and bounds.")

⁵⁰ The Approval Holder referred to section 4 of the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, c. W-9, which provides: "The Lieutenant Governor in Council, in order to preserve public lands for ecological purposes, may by regulation designate as an ecological reserve any area of public land...."

[102] The Approval Holder argued that, if there was a directly affected party, it would be the department responsible for the administration of ecological reserves, which is Community Development Parks and Protected Areas Division of Alberta Community Development. The Approval Holder explained the responsible department was aware of the amendment application and decided not to appeal the Amending Approval after receiving the information contained in the Director's decision. The Approval Holder stated the Appellant was "...significantly overstepping its duties as a Volunteer Steward by interfering with the decisions of Alberta Community Development."⁵¹

[103] The Approval Holder distinguished the intervenor test under the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 from the test under EPEA.

[104] The Approval Holder submitted there is a significant difference between an organization being directly affected, which contemplates a direct impact upon the individual, and an organization having an interest in land that is or may be directly and adversely affected, which contemplates a speculative impact upon the land itself.

[105] The Approval Holder submitted that EPEA, and particularly section 91(1)(a)(i) of EPEA, "...does not contemplate that public hearings and general public input should be available or required at the regulatory approval level of decision making pursuant to [section] 70 of the EPEA."⁵² The Approval Holder stated that only those parties that have a personal interest and are directly affected by the decision are granted the right to intervene in regulatory decisions.

[106] The Approval Holder explained the Appellant had its opportunity to voice its concerns as part of the environmental assessment process, and it would be inappropriate and "cripple" the environmental assessment process if the Appellant was allowed to raise the same arguments at every stage of the approval process.

2. Supplemental Submission

[107] The Approval Holder relied on its previous submission.

⁵¹ Approval Holder's submission, dated February 9, 2004, at page 9.

⁵² Approval Holder's submission, dated February 9, 2004, at page 10.

[108] The Approval Holder argued the issues raised by the Appellant extended beyond the relief sought in the Notice of Appeal, and the issues must be limited to the issues raised in the Notice of Appeal and the relief sought. The Approval Holder stated the Court of Queen's Bench and the Court of Appeal ruled that the proposed development could proceed without an environmental impact assessment, and therefore, there should be no issues remaining that are relevant to the relief sought in the Notice of Appeal.

C. Director

1. Response Submission

[109] The Director argued the Appellant is not directly affected and should not have standing to maintain a Notice of Appeal.

[110] The Director stated the "essence" of the Amending Approval sets out what action must be taken when the elevation of water in the storage cell reaches a certain elevation. The Director explained there are no changes to the physical outline, nature, or construction of the storage cell, and the Amending Approval only deals with some of the operational parameters of the existing storage cell.

[111] The Director stated that on September 30, 2003, he advised the Appellant of his decision to issue the Amending Approval and that he was not accepting the Appellant as a directly affected Statement of Concern filer. The Director also explained the Amendment requires the wastewater system to operate to a stricter standard than required under the applicable Code of Practice for Waterworks Systems Using High Quality Groundwater ("Code of Practice") which came into effect on October 1, 2003. The Director stated he explained the nature of the amendment to the Appellants and advised the Appellant that he was aware of the location of the Ecological Reserve in relation to the lagoon.

[112] The Director argued the Appellant does not meet the Board's test for a group or organization to have standing; the mandate of the Appellant is that of a general public interest environmental group and is not sufficient to obtain standing; and there is no factual basis to support that the Appellant is directly affected by the nature of Amending Approval.

[113] The Director argued the Appellant did not demonstrate a factual direct impact on any individual member or members of the CCWC, and there was no demonstration that a majority of the individual members are individually and personally impacted by the Amending Approval. The Director referred to the Appellant's membership list in which 300 members were listed. The Director pointed out the majority of the Appellant's members reside in the City of Calgary, the City of Lethbridge, the City of Edmonton, or out of the Province of Alberta. The Director argued that by geographical distance alone, the majority of the members cannot demonstrate a direct impact.

[114] The Director argued the mandate of the Appellant, "...of 'role as Volunteer Steward, and on behalf of its members rights to enjoy these Wetlands' and the 'responsibility of the organization to represent the interests of its members in the Municipal and AENV regulatory processes'..."⁵³ is similar to the types of concerns put forward by appellants in other appeals who were found not to be directly affected. The Director recognized that while they were genuine concerns, they were not sufficient to meet the directly affected test.

[115] The Director argued there is no demonstration of a direct impact to the Appellant or any of its individual members by the Amending Approval. The Director emphasized that the existing capacity and storage structure of the storage cell is not being changed, it does not require any construction, and the Amending Approval does not change the external impacts.

[116] The Director submitted that, in determining if the Appellant is directly affected, the Board needs to be convinced of the individual and personal impact of the project allowed under the Amending Approval and not any other activity. The Director argued the Appellant has not demonstrated an individual and personal impact by the Amending Approval. He argued, "Aspects of the unamended portions of the 1999 EPEA approval, future possible approval amendments and/or EIA decisions, are not within the scope of this amendment review. Further,

⁵³ Director's submission, dated February 11, 2004, at paragraph 21. The Director referred to the Board's decision in *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (23 August 1995) Appeal No. 94-017 (A.E.A.B.).

possible ‘direct effects’ from these other activities are not sufficient for an organization to gain standing in this particular amendment situation.”⁵⁴

[117] The Director stated the Amending Approval does not deal with irrigation, residential construction, or the physical expansion of the lagoon system, and therefore, the environmental concerns raised by the Appellant are not connected to the Amending Approval and are not sufficient to meet the direct effect test.

[118] The Director argued the majority of the Appellant’s submission relates to its involvement in processes which are not reviewable by the Board and do not make the Appellant directly affected, including municipal processes, Alberta Sustainable Resource Developmental processes, and past NRCB processes.

[119] The Director explained the NRCB review, at which the Appellant was granted intervenor status, was for a project much larger in scope than the existing development. The Director also explained that an ecological reserve can only be on public lands, and the lagoon is located on private lands, so this issue is not relevant to a determination of standing.

[120] According to the Director, the Appellant did not demonstrate any direct effect from the Amendment.

2. Supplemental Submission

[121] The Director maintained his position and arguments put forward in his February 11, 2004 submission, and stated the Appellant is not directly affected by the Amending Approval.

[122] The Director argued the Appellant does not meet the Board’s test for group standing. The Director distinguished the Appellant from the LWEPA and the Hazeldean Community Association, both groups that were found to be directly affected in previous decisions,⁵⁵ by stating the previous groups were a defined group of residents living in very close

⁵⁴ Director’s submission, dated February 11, 2004, at paragraph 28.

⁵⁵ See: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re TransAlta Utilities Corporation* (13 March 2001) Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID

proximity to the proposed activity that were formed specifically in response to proposed activities under EPEA.

[123] The Director argued the Appellant has a broad based mandate with multi-faceted concerns and matters and is involved in meeting a general environmental goal. The Director stated the Appellant is involved in a wide breadth of activities, and the affidavits filed by the individual members demonstrate a wide range of general environmental concerns within this region of the province and their variety of uses of these lands. The Director stated the Appellant members' concerns range from the Amending Approval "...to the entire Castle Mountain Resort development, to wildlife viewing, spiritual retreat, water quality, fishery, impact on hunting, connection with nature, impacts to flora and fauna from this development, off highway vehicle usage, etc...."⁵⁶

[124] The Director referred to the Board's previous decision of *Jericho* and argued the Appellant's concerns and uses of the area are similar to those in the *Jericho* case. The Director submitted the Board should reach the same conclusion and find the Appellant does not meet the legislative requirement for standing.

[125] The Director submitted that because the Appellant is a volunteer steward under the Alberta Community Development program is not sufficient to obtain standing, as the role of a volunteer steward is to assist Alberta Community Development monitor conditions at select parks and protected areas. The Director stated being a volunteer steward does not give the Appellant a possible property right, and general volunteer activities are not sufficient to show a group or individual is directly affected by the proposed activity.

[126] In response to the Appellant's argument that if it could not appeal then no one could, the Director referred to the Board's *Jericho* decision, arguing that such an argument does not demonstrate the appellant is directly affected.

[127] The Director explained he chose to make a decision on the application before the Code of Practice came into effect so that stricter standards would be applied to the facility.

(A.E.A.B.) ("*Bailey*"); and *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.) ("*Hazeldean*").

⁵⁶ Director's submission, dated October 17, 2005, at paragraph 13.

According to the Director, under section 3.2 of the Wastewater and Storm Drainage Regulation, the Director has the authority to notify an approval holder whose activity is governed by the Code that some or all of the applicable Code now governs the activity. The Director stated he has not done so and the Approval Holder has not requested the activity be governed by the Code of Practice.

[128] The Director stated the individuals named by the Appellant, specifically Mr. Andrew Hurly, Mr. Mike Taylor, Mr. John Hancock, Mr. Gordon Petersen, and Mr. James Tweedie, did not submit Statements of Concern, and specific information about these individuals was not before the Director in his deliberations.

[129] The Director submitted that "...if the Board recommends to the Minister that certain terms and conditions be modified or added, the appropriate standard is 'to address or mitigate' an environmental impact or specific concern. 'Ameliorate' is not the proper standard to be met. The balancing of competing interests, pursuant to s. 2 of the [EPEA], cannot, at all times, to (*sic*) lead to amelioration."⁵⁷

[130] The Director reiterated that the Appellant should not be granted standing as it is not directly affected.

III. DIRECTLY AFFECTED

A. Relevant Legislation

[131] Before the Board can accept a Notice of Appeal as being valid, the person filing the appeal must show that he or she (or it) is directly affected by the Director's decision.⁵⁸ The Board has examined the term "directly affected" in a number of previous appeals and has developed a framework to determine if appellants should be given standing to appear before this Board. Although this framework is in place, the Board recognizes there must be some flexibility

⁵⁷ Director's submission, dated October 17, 2005, at paragraph 39.

⁵⁸ Contrary to the suggestions of the Appellants, the Board has not made a distinction between the ability of a natural person and a corporation or society to file an appeal. The Board accepts that both are persons at law, and as such both have a "*in personam*" and an estate. Both of these types of interests can be directly affected. However, as the Board has discussed in numerous decisions, in relation to the standing of groups, that it is more difficult to demonstrate how the "*in personam*" aspect of a corporation or society can be directly affected.

in determining who is directly affected, and it will be governed by the particular circumstances of each case.⁵⁹

[132] The test for determining a person's directly affected status has two elements - the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,⁶⁰ the Board stated "...the word 'directly' requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question."⁶¹

[133] The principle test for determining directly affected was stated in *Kostuch*:

"Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' means the person claiming to be 'affected' must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."⁶²

[134] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "...must have a substantial interest in the outcome of the approval [or

⁵⁹ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

⁶⁰ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246, Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*").

⁶¹ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28, Appeal No. 94-017 (A.E.A.B.).

⁶² *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35, Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

licence] that surpasses the common interest of all residents who are affected by the approval.”⁶³ In *Kostuch*, the Board considered its previous decision in *Ross*,⁶⁴ saying directly affected “...depends upon the chain of causality between the specific activity approved ... and the environmental effect upon the person who seeks to appeal the decision.”⁶⁵

[135] Further, in *Kostuch* the Board stated the determination of directly affected is a

“...multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act.”⁶⁶

The Board further stated that:

“If the person meets the first test, then they must go on to show that the action by the Director will cause a direct effect on the interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified.”⁶⁷

[136] A similar view was expressed in *Paron* where the Board held the

“...Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar

⁶³ *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) (“*Ross*”).

⁶⁴ *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.).

⁶⁵ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33, Appeal No. 94-017 (A.E.A.B.).

⁶⁶ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38, Appeal No. 94-017 (A.E.A.B.).

⁶⁷ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39, Appeal No. 94-017 (A.E.A.B.).

approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”⁶⁸

[137] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the appellant. In *Paron*, the Board held that:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”⁶⁹

The Board’s Rules of Practice also make it clear the onus is on the appellant to prove it is directly affected.⁷⁰ The onus or burden of proof issue, in a slightly different context, was upheld in the Court of Queen’s Bench.⁷¹

[138] Under the two-step approach to determining a person’s directly affected status, the individual must pass both parts of the test. It is not enough to show that a person is affected by an activity, as arguments can be presented to show that for populated areas or areas of high use, countless individuals are affected by the Director’s decision, but in reality, normally only a few can show they are *directly* affected.

[139] In the *Court*⁷² decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

⁶⁸ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) (“*Paron*”).

⁶⁹ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

⁷⁰ Section 29 of the Board’s Rules of Practice provide:

“Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

⁷¹ See: *Imperial Oil Ltd. v. Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

⁷² *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) (“*Court*”).

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”⁷³

[140] Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”⁷⁴

[141] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The

⁷³ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“Bildson”); *Mizera et. al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

⁷⁴ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the Appellant to present a *prima facie* case that it is directly affected.⁷⁵

[142] The Court of Queen's Bench in *Court*⁷⁶ stated an appellant only needs to show there is a potential for an effect on their interests. This potential effect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[143] The effect does not have to be unique in kind or magnitude.⁷⁷ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.⁷⁸ Under EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision, it intended it be something narrower.

[144] The Board uses the basic framework for assessing whether a person is directly affected and applies this framework to groups and organizations. The Board does not make a distinction between the right of a natural person to appeal or the right of a group or organization to appeal. However, different information is required when a group files a Notice of Appeal and the group, as a distinct entity, seeks directly affected status before the Board.

⁷⁵ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁷⁶ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁷⁷ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

⁷⁸ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[145] There are two pivotal cases in which the issue of a group filing an appeal was addressed - *Hazeldean*⁷⁹ and *Graham*.⁸⁰ In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. Two other appeals were also received in the *Hazeldean* case, the first on behalf of an individual and an environmental association, and the second from an individual. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

[146] In *Hazeldean*, the Board stated:

“The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person

⁷⁹ *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.).

⁸⁰ *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection*, (1996) 20 C.E.L.R. (N.S.) 287 (“*Graham*”). This case was judicially reviewed and then taken to the Court of Appeal. See *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1997), 22 C.E.L.R. (N.S.) 141 (Alta. Q.B.) and (1997) 23 C.E.L.R. (N.S.) 165 (Alta. C.A.).

would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.”

[147] The group in *Hazeldean* showed the Board who the members were and provided the results of the survey that was taken to support their position. The major factor in accepting the *Hazeldean* group was that individual members of the group would probably have been determined directly affected since they lived in close proximity to the project.

[148] The *Graham* case involved appeals filed by three organizations. Mr. Graham filed his appeal on behalf of the Alberta Trappers Association. The other two organizations that appealed were the Lesser Slave Lake Indian Regional Council and the Toxics Watch Society (which later withdrew its appeal). The appeals related to an approval granted to the hazardous waste treatment facility located at Swan Hills. In *Graham*, the Board ruled that only one individual represented and specifically identified by one of the organizations was directly affected. This individual, Mr. Charlie Chalifoux, was a trapper that regularly trapped adjacent to the facility. The appeal proceeded accordingly.

[149] It has been the exception rather than the general rule to have a group deemed to be directly affected. One exception has been the LWEPA. In the Board decision, *Bailey*,⁸¹ LWEPA was a group that was found to be directly affected. LWEPA provided a membership list to the Board, and the Board determined that LWEPA “...was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which the (*sic*) many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process.”⁸² In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its

⁸¹ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID (A.E.A.B.) (“*Bailey*”).

⁸² Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

[150] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 91 of EPEA, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean* or *Bailey*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced that the individual members of the organization (effectively the “*in personam*” of the organization) are individually and personally impacted by the project.⁸³

[151] It is also important for appellants to realize that if they can meet the directly affected test, they can have an organization or association represent them if they wish. However, they also must be aware the evidence and arguments permitted by the Board will be limited to the issues as defined by the Board, and these are determined by the concerns expressed in the Notices of Appeal. A group, if they are representing an individual, cannot argue its own agenda.

B. Analysis

[152] The Appellant argued a person has a right to appeal the decision making of the Director. The Board accepts this argument with certain limitations. There is nothing stopping a person from filing an appeal with the Board regarding certain decisions made by Alberta Environment Directors. However, the legislation limits the Board’s jurisdiction to hear only appeals from those persons who are directly affected by the decision of the Director. That is what at issue here – whether the Board has the jurisdiction to hear the appeal based on whether or not the appeal was filed by a person who is directly affected.

[153] The Appellant is appealing the Amending Approval. The concerns it raised should have been raised when the Approval was issued in 1999. The size of the lagoon and its proximity to the Ecological Reserve were matters that could have been raised at the Approval

⁸³ “*In personam*: Against the person. Action seeking judgment against the person involving his personal rights and based on the jurisdiction of his person, as distinguished from his property.” (*Black’s Law Dictionary*, 6th

stage. This Amending Approval does not change the prior approved structure in any way; the location and size of the lagoon are not altered. The cumulative amount of wastewater allowed into the lagoon is not changing as a result of the Amending Approval. The rate wastewater enters the lagoon may change, but this is insufficient grounds to find the Appellant, or its members, directly affected because inlet rate does not change the discharge rate for this type of lagoon. As it is only the Amending Approval that can be appealed, and not the Approval, the Board can only look at the whether, as a result of the amendment, the Appellant is now directly affected by the amendment of the Approval. It cannot look at the Approval and its effects; it can only look at the effect on the Appellant, if any, resulting from the Amending Approval.

[154] The Board does not question that corporations and registered societies such as the CCWC are recognized in law as a legal entity. They have a right to file an appeal and to participate in the appeal process, including a hearing, providing the Board has jurisdiction to hear the appeal. A corporation can have interests that could be affected by the Director's decision, such as an economic interest, but it would still have to demonstrate to the Board that it is directly affected by the Director's decision, in this case, the Amending Approval. The same would be true of the CCWC. It has a right to file an appeal and participate as a legal entity, but it still has to show it is directly affected by the Director's decision.

[155] As identified, one of the key factors in determining whether a person is directly affected is the proximity between the activity being appealed and the alleged impact on the person filing the appeal. In the Board's March 25, 2004 letter to the Participants, the Board explained it wanted the Appellant to include in the evidence provided, information relating to the proximity between the Appellant's use of the area and the project. In the Board's view, this is a significant factor to consider in this case, but it is not the determinative factor given the project is located adjacent to Crown owned lands.

[156] The Appellant did raise an important point. The development and project are on private land surrounded by public lands. As a result, there are no landowners adjacent to the project that would qualify as being directly affected. However, the Board does not only look at

proximity to a site to determine the directly affected status of an appellant; it looks at other factors, including economic interests⁸⁴ or regular use of the area.⁸⁵

[157] In his submission, the Director argued that by geographical distance alone, those members who lived in the cities of Calgary, Edmonton, or Lethbridge would not be directly impacted. Although the Board considers where a person lives in relation to the proposed project, it is not the determinative factor. In the Board's previous decision of *Gadd*,⁸⁶ the appellant did not live in close proximity to the proposed project, but he had an economic interest that had the potential for being affected by the project. On that basis, the appellant was granted standing.

[158] An updated membership list was provided by the CCWC. Before the Board can accept the CCWC as directly affected, the CCWC has to prove to the Board that a substantial number of its *individual* members are directly affected. Some of the members clearly live outside of the area that could be directly affected. A number of the addresses were from Medicine Hat, Lethbridge, Calgary, and Edmonton. There were also addresses from British Columbia, Manitoba, and the United States. There were approximately 300 members listed, with only 63 addresses within the Municipal District of Pincher Creek or Pincher Creek. The Appellant explained some of its members may own property in the Municipal District even though their mailing addresses were listed in other communities. Thirty-eight members provided letters and affidavits, which is well below number required for the Board to even consider the group. This is without considering the directly affected status of the individuals. Even if the Board accepted all the affidavits submitted, there still was insufficient evidence to show how more than half of the members are individually directly affected. If the Board accepted all of those living in Pincher Creek or the Municipal District of Pincher Creek as filing valid Notices of Appeal, it is still less than 50 percent of the CCWC membership. As stated in *Jericho*, it "...is not enough for a group to show that more than half of its membership supports the filing of an

⁸⁴ *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 03-151 and 03-152-R (A.E.A.B.).

⁸⁵ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.).

⁸⁶ *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 03-151 and 03-152-R (A.E.A.B.) ("*Gadd*").

appeal; the group has to be able to show that more than half of its membership is *directly affected* by the Director's decision.”⁸⁷

[159] The CCWC argued it is similar to LWEPA, a group of citizens formed to pursue the regulatory process. The key mandate of the CCWC is to establish the Castle-Crown wilderness area. As a result of those endeavours, the CCWC has been required to participate in municipal and environmental processes. Although the CCWC tried to distinguish itself from the SAEG, it is much more like SAEG – a group of persons from a wide, diverse area interested in issues from a large geographic area.

[160] The Appellant argued it was not a general environmental group fighting every cause, and the Board accepts it may not be as general an organization as some groups such as the Western Canadian Wilderness Coalition or the Sierra Club. However, the CCWC was not formed to promote the protection of only the area that could be affected by the development. Instead, its mandate is to promote the conservation of the area around Castle Mountain, which includes a wide area.

[161] The Appellant referred to its role as steward of the Ecological Reserve and its purpose to develop the Castle Wilderness area. These are very worthy endeavors and are to be commended, but insufficient to find the CCWC directly affected.

[162] This conclusion is consistent with the *Blodgett*⁸⁸ case, where the Board held:

“The evidence that has been presented to the Board with respect to the importance of the Big Lake area to Ms. Blodgett has been powerful. In over 800 appeals, it may very well be that Ms. Blodgett has been the most eloquent and moving in presenting a case that she is personally and emotionally directly affected by the decision of the Director. The Board has no doubts whatsoever about her commitment and the importance to her of protecting the environment generally and in protecting Big Lake in particular. The Board commends her for this work. The Board also has no doubt that Ms. Blodgett regularly and consistently uses Big Lake area and that the natural environment in general and the Big Lake area in particular is the inspiration for Ms. Blodgett's artistic endeavours. We wish more Albertans had her love and commitment to the environment.

⁸⁷ *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment re: St Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.) at paragraph 119.

⁸⁸ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (28 December 2001), Appeal No. 01-074-D (A.E.A.B.).

However, at law, the Board does not accept that, in this case, this is sufficient for her to be directly affected by the Director's decision to issue this Approval within the meaning of section 115(1)(a)(i) of the *Water Act*.”⁸⁹

[163] The initial problem encountered in this appeal was that the Notice of Appeal was filed on behalf of the organization instead of the individual members despite advice by the Board to the contrary. The Board recommended to the Appellant that each member who has a direct interest in the project and its potential affect on the area and their use of the area should file individual appeals. The Board has continually stated in its past decisions regarding groups and organizations that appeal, that they must be able to demonstrate how *individual members* are directly affected. The Board does not discourage groups from appearing before it, but the legislators have specifically stated that only those persons who are directly affected by the proposed project can be heard by the Board. One of the questions asked in the standard Notice of Appeal form asks appellants if someone will be representing them through the appeal process, and if the individual filer wants an organization to represent them, that can be stated on the Notice of Appeal. This would allow the organization to represent the individual member's interests in the appeal process. The organization can also file a Notice of Appeal, but it should be in addition to the individual members' appeals. Although some organizations might argue that filing one appeal on behalf of all the members of the organization may be more efficient, it does not satisfy the Board's directly affected test as established over the past 12 years and which was based on the requirements of the legislation under which the Board operates. The Board also expects appellants accept the responsibilities associated with filing an appeal. There is work involved after an appeal is filed and to be involved in the process. Section 2(f) of EPEA⁹⁰ states persons have a responsibility to bring environmental issues to the forefront, and part of this responsibility includes preparing and submitting the required documentation and evidence.

[164] The Board requested the members of the CCWC provide affidavits, not only to assist the Participants and the Board to prepare for the Preliminary Meeting, but also to assess how individual members are directly affected. The Board stated in its March 25, 2004 letter that

⁸⁹ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (28 December 2001), Appeal No. 01-074-D (A.E.A.B.) at paragraphs 48 and 49.

“All individuals who swear affidavits should be available to attend the preliminary meeting for cross-examination on their affidavits.” By being available for cross-examination and questioning by the Board, the weight placed on the affidavit may increase, and it also demonstrates to the Board that the person who filed the affidavit is serious in pursuing and participating in the appeal process.

[165] In closing comments, counsel for the Appellant suggested the Board’s process of looking at individual members of a group and the percentage that would be directly affected was capricious. According to the Appellant, this places larger organizations at a disadvantage. The Board recognizes the possibility that this may place larger organizations at a disadvantage, but the Board believes that this is consistent with the legislation that governs it. That is also why the Board has repeatedly stressed the importance of individuals filing individual Statements of Concern and Notices of Appeal. It is also feasible that with a larger membership, the opportunity is there to find an individual who is directly affected and to ensure that person files his or her own Statement of Concern and Notice of Appeal. Most of the affidavits provided by the individual members of the CCWC referred to using the area for recreational purposes. The Board requested that certain members of the CCWC appear at the Preliminary Meeting to allow the Board an additional opportunity to hear how the Amending Approval affects the CCWC members, as individuals. The Appellant members who were asked to appear indicated in their affidavits that they lived or owned property in the nearest community, or they undertook specific endeavors in the area adjacent to the project. The individual members of CCWC who owned property in Beaver Mines informed the Board that Beaver Mines, the nearest community to the Castle Mountain Resorts was 27 kilometres away. Considering the distance between Beaver Mines and wastewater lagoon, they failed to demonstrate how the Amending Approval would directly affect them. Some of the members indicated they undertook scientific research within the Ecological Reserve. These were interests in the area beyond the general interest of the other members of the CCWC. However, they failed to demonstrate a plausible nexus between their activities and how the Amending Approval would directly affect them or their specific activities.

⁹⁰ Section 2(f) of EPEA provides: “The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

[166] When Mr. Gordon Petersen, a photographer, was asked how much of his personal income comes from taking photographs in the area, he stated none of his income comes from using that area of the Ecological Reserve. Although Mr. John Hancock mentioned an interest in the area for researching spiders, the Board was only able to use his affidavit as a source for information. The Board appreciates that he was unable to attend at the Preliminary Meeting, but the Board is also restricted to basing its decision on the evidence in front of it, and with limited information and no ability to cross-examine the evidence, the Board could not find how the Amending Approval would affect his research. It was unclear how the Director's decision to issue the Amending Approval would affect his research considering the lagoon would still be in the same location and be able to hold the same amount of wastewater if the Amending Approval was not issued.

[167] Mr. Andrew Hurley explained the University of Lethbridge had a field station in the proximity of the site, but he was unable to explain the involvement of the University of Lethbridge other than it owned the field station and that he used it when conducting field research. He also explained to the Board that he has already abandoned the observation sites nearest to the sewage lagoon, because the research sites had been compromised by the activity already in the area and the data collected from these sites are not useful. If he still used the sites in closest proximity to the project and he had filed his own Notice of Appeal, he would have had a stronger basis on which to be found directly affected. However, the issuance of the Amending Approval did not cause Mr. Hurley to vacate the research sites closest to the wastewater lagoon, and therefore this evidence does not support finding Mr. Hurley directly affected by the Director's decision.

[168] The Appellant argued it is "...capriciously arbitrary to assert that personal interests denoting a direct effect could not be shared by the community at large."⁹¹ The Board knows that a community at large can share the same interests or be affected in the same manner. In fact, this was the Board's reasoning for finding the community group in *Hazeldean* to be directly affected. Each individual in the surrounding community would be affected by the project in a similar manner. If each and every resident adjacent to the project had filed an

⁹¹ Appellant's submission, dated September 29, 2005, at paragraph 67.

individual appeal, most, if not all, would have been found to be directly affected. The community group consisted of individuals living in the area of the project; it did not include those with an interest in the environmental effects but who lived many miles from the project site. The same cannot be said of the CCWC. The CCWC is composed of individuals who have a common interest – the protection of the Castle area. However, when each individual is looked at, there are many, if not most, who would not be found to be directly affected, that is having a personal interest that is affected by the decision whether it be economic, traditional land use, health, or some other interest beyond that of the ordinary Alberta citizen. Each person within the CCWC cannot show how they would be directly affected by the Amending Approval. They can still continue their use of the Ecological Reserve, because the sewage lagoon, although close to the Ecological Reserve, will not be taking up any more area than what was allowed in the Approval. If the CCWC had encouraged each of its members to file individual Notices of Appeal, there was a greater opportunity to find someone within the group that had an interest in the area that was more than a general desire to protect the Castle area.

[169] Even if the Board had found the Appellant directly affected, the Board would only have been able to hear arguments on issues directly related to the Amending Approval. In the Approval, condition 3.1.1(a) stated:

“The approval holder shall submit a written request to the Director and receive an amendment to this approval or an authorization, prior to proceeding with any of the following:

- i. extensions to the wastewater collection system component of the wastewater treatment facility to a maximum of 88 housing units....”

This condition was amended by the Amending Approval to provide: “3.1.1 (a) any extension to the wastewater collection system.”

[170] The Appellant tried to argue that because of the Amending Approval, there would be increased development that would increase environmental concerns. It is not fair to an approval holder if the Board allowed appellants to continually expand on the “If this, then that” speculations. This approach would allow the interconnectedness of issues to never end, and uncertainty would prevail in every approval issued.

[171] The Appellant's true concern appears to be the number of housing units that can now be built at the Castle Mountain Resort. Although it is interested in the environmental impacts of the development, it considers the removal of the 88 housing unit limit in the Approval as the Director accepting the expansion of the development. The size of the development was not an issue before the Director. What the Director had to determine was whether the sewage lagoon could adequately handle the anticipated wastewater amounts, and to determine what conditions should be included to minimize the effect of the sewage lagoon on the environment.

[172] The matter of the size of the development at the Castle Mountain Resort is not before the Board. Developments such as this are a matter for the development board and the Municipal District of Pincher Creek. Appellants cannot use the Board's process in an attempt to circumvent the proper protocol for pursuing such concerns. The number of housing units that can be erected at a site is not a decision for the Director and, therefore, is not an issue for the Board to consider.

[173] Although the Appellant stated it was told by officials from Alberta Environment that the CCWC should be able to get standing for the water allocation and wastewater issues, it does not mean the CCWC would automatically get standing before this Board. The directly affected test for the Director is different than that for this Board. The Director is generally more inclusive when assessing directly affected, and in this case, the Director did take additional steps to include the CCWC in the decision making process. The decision of Alberta Environment or the Director does not bind the Board. The Board's determination of standing is more restrictive.

[174] The same can be said about the July 24, 2002 letter from the Deputy Minister of Environment. The Appellant raised the issue of the letter from the Deputy Minister dated July 24, 2002, in which he stated there would be a full environmental assessment if any changes were made to the project. The Board interprets this to mean a full environmental assessment would be required if the footprint of the project was actually changing as a result of the amendment. The Director clearly explained the footprint is not changing as a result of the Amending Approval; the size of the lagoon, the volume allowed, and the disposal methods are not changing. Even if an environmental assessment was completed on the lagoon as a result of the amendment, the

Board questions whether there would be any environmental effects different from those assessed for the Approval.

[175] The CCWC was provided the opportunity to be involved in the review of the application. The Director sought the Appellant's input throughout the process. At no time was it stated there would be an automatic right to appeal and be granted standing. The Board's discretion in determining directly affected for appeal purposes cannot be fettered by Alberta Environment employees or the Deputy Minister, and at no time does it appear they attempted to fetter the Board's discretion. The Board will assess each appellant and the circumstances surrounding the appeal on a case by case basis, and it is the Board that will make the determination of who has standing before it.

[176] The Appellant referred to decisions by the NRCB and AEUB regarding standing. The Appellant recognized rulings on standing by these other boards do not bind this Board. The NRCB and the AEUB have a very broad public interest element in their decision making process, and as a result, they give those with an interest in the matter the opportunity to present their evidence. The mandate of this Board was narrowed by the legislators by requiring only those who are directly affected by the decision the right to have their appeal heard by the Board. This is one of the major differences that results in this Board having a different, narrower test for standing.

[177] The Appellant must show there is a direct affect, and the effect must be a result of the decision made by the Director. In this case, the ecological footprint is not changing as a result of the Amending Approval. The Appellant expressed concern there will be a greater potential for overflows from the sewage lagoon. It is still the Approval Holder's responsibility to adhere to the conditions of the Approval and the Amending Approval. If it fails to contain the water as required, the Director can take action under the *Water Act*, R.S.A. 2000, c. W-3, and EPEA to ensure the Approval Holder complies. This can include issuing environmental protection orders or enforcement orders to ensure the Approval Holder takes the necessary steps to protect the environment and correct any noncompliance.

[178] The Board recognizes the effort taken by the Director to include the CCWC in the process. The Director in this case attempted to contact the Appellant for feedback on the

Amending Approval prior to issuing it. It was unfortunate the Director was unable to reach the representative for the CCWC, but the Board appreciates the reason why the Director issued the Amending Approval when he did. Although he was unsuccessful in reaching the spokesperson for the CCWC before the Amending Approval was issued, he did try to get their input. The Appellant was involved in the process. It submitted a Statement of Concern, which the Director did consider, even though the Director found the CCWC was not directly affected. The Director took proactive steps to protect the interests of the Appellant. He included additional conditions to make a stronger approval than what would have been allowed under the Code of Practice. He was eminently aware of the sensitivity of the area and the conflicting land use issues in the area. The Director decided to issue the Amending Approval with stringent conditions instead of relying on the conditions under the Code of Practice. The Appellant should appreciate the efforts of the Director to involve it in the process and his effort to protect the area and minimize any potential risks.

[179] The Board asked the Appellant to have its individual members file individual Notices of Appeal. If an individual member had filed his or her own Notice of Appeal, and the Board then found that person directly affected, a hearing would have been held to hear arguments on the merit of the case, and the CCWC could have participated as representative of the person, or possibly as an intervenor. What was missing in this case was the person impact under the directly affected test. As stated, the Board recognizes that filing individual Notices of Appeal is more time consuming, not only for the appellant but also the other participants and the Board, but it provides the appellant with the greatest opportunity to have someone found directly affected.

[180] The Appellant in this case, the CCWC, did not provide evidence to demonstrate that over half of its members are directly affected by the issuance of the Amending Approval. The CCWC's role as steward of the Ecological Reserve is insufficient to find the Appellant directly affected in its own right. Even if the Board accepted the Notice of Appeal as an appeal filed on behalf of each individual member of the CCWC, the Board must still dismiss the appeal, because based on the information provided in the affidavits and at the Preliminary Meeting, the members are not directly affected by the Director's decision to issue the Amending Approval.

IV. ISSUES

[181] Under section 95 of EPEA, the Board can determine the issues that will be heard at a hearing, and once determined, the Board will not consider any other matters. Sections 95(2), (3), and (4) of EPEA provide:

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of an appeal....
- (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
- (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

[182] As the Board has dismissed the appeals, no hearing will be required and, therefore, no issues have to be determined.

V. COSTS

[183] At the Preliminary Meeting, the Appellant and the Approval Holder reserved their right to ask for costs. Should the Appellant or the Approval Holder wish to proceed with their costs applications, they are to provide their applications to the Board within two weeks of the date of this Decision. The Board will then provide the Participants with an opportunity to respond to any such applications before making its decision on costs.

VI. CONCLUSION

[184] Based on the evidence provided and the above reasons, the Board finds the CCWC as an organization and its individual members are not directly affected by the Amending Approval.

[185] Therefore, the Board dismisses the Notice of Appeal filed on behalf of the Castle-Crown Wilderness Committee.

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

“original signed by”

Dr. Steve E. Hruddy
Chair

“original signed by”

Mr. Al Schulz
Board Member

“original signed by”

Dr. Alan J. Kennedy
Board Member