

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Motions Hearing – June 16, 2008

Date of Decision – September 22, 2008

IN THE MATTER OF sections 91, 92, and 95 of the
Environmental Protection and Enhancement Act, R.S.A. 2000, c.
E-12;

-and-

IN THE MATTER OF an appeal filed by Lee and Marilyn
Fenske with respect to *Environmental Protection and
Enhancement Act* Approval No. 20754-01-00 issued to Beaver
Regional Waste Management Services Commission by the
Director, Central Region, Environmental Management, Alberta
Environment.

Cite as: Preliminary Motions: *Fenske v. Director, Central Region, Environmental
Management, Alberta Environment*, re: *Beaver Regional Waste Management
Services Commission* (22 September 2008), Appeal No. 07-128-ID1 (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair,
Dr. Alan J. Kennedy, Board Member, and
Mr. Jim Barlishen, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Lee and Ms. Marilynn Fenske, represented
by Ms. Karin Buss, Ackroyd LLP.

Director: Mr. Neil Holland, Director, Central Region,
Environmental Management, Alberta
Environment, represented by Ms. Shannon
Keehn, Alberta Justice.

Approval Holder: Beaver Regional Waste Management Services
Commission, represented by Ms. Cherrise
Killick-Dzenick, Reynolds Mirth Richards &
Farmer LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to Beaver Regional Waste Management Services Commission (BRWMSC) authorizing the construction, operation, and reclamation of the Beaver Regional Class II landfill near Ryley, Alberta, where more than 10,000 tonnes per year of waste is disposed. The Approval is a renewal of an approval issued in 1998.

The Environmental Appeals Board received a Notice of Appeal from Mr. Lee and Ms. Marilyn Fenske, adjacent landowners to the landfill. BRWMSC advised it did not see any merit in pursuing mediation and requested the appeal proceed to a hearing with issues being identified for the hearing.

The Board set a schedule to receive submissions on the following:

1. Issue Estoppel: whether the issues contained in the Notice of Appeal have been adequately dealt with in the Board's previous decisions;
2. Jurisdiction: whether there are grounds for appeal that are not within the Director's or the Board's jurisdiction, and therefore, should not be part of the appeal;
3. whether there are land use issues that are within the jurisdiction of Beaver County (the Municipality), and not within the jurisdiction of the Board; and
4. the issues to be dealt with at a hearing, should one be held.

The Board found that issue estoppel did not apply to all of the issues raised because the Approval allowed for an expansion of the operational site, changes to the amount of waste in each cell, and the construction of special waste cells. Specifically, the Board found issue estoppel did not apply to the effects on surface water, wells located and unidentified on the expanded part of the site, the special waste cells, and the operation of the landfill as it relates to litter, noise, odour, operating hours, and aesthetics. Therefore, the Board will hear these issues at the hearing. The Board found issue estoppel did apply to groundwater issues, the liner, and the leachate. These issues will not be considered at the hearing.

The Board decided that the issues related to adequacy of consultation and the refusal of the Director to refer the application for an environmental impact assessment were not within the Board's jurisdiction, and therefore, cannot be issues at the hearing.

Further, the Board also concluded the land use issues related to location of the landfill and the buffer zones are not within the Board's jurisdiction. However, the Board found that issues such as noise, operating hours, odour, litter, and aesthetics are within the concurrent jurisdiction of the Board and the Municipality as those issues have an environmental aspect as well as a land use aspect. Therefore, the Board has jurisdiction to hear these issues and will hear these issues at the hearing of this appeal.

The Board found the issue of a post-closure leachate plume and the possibility of an explosion from landfill gas were too remote and speculative to be valid issues in respect to an appeal of this Approval. These issues will not be considered.

The Board determined a hearing will be held and the issues to be heard at the hearing will be:

1. the appropriateness and adequacy of the conditions in the Approval with respect to the abandoned wells
 - a. that have been identified, and
 - b. that have not been identified, which may yet be encountered during constructionin the area where the expansion of the landfill is approved;
2. the effects of the expansion of the landfill on the surface water regime in the area including, but not limited to, Bible Creek;
3. the appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of special cells; and
4. the operation of the landfill as it relates to litter, odour, noise, operating hours, and aesthetics.

These will be the only issues heard at the hearing of this appeal, scheduled for December 17 and 18, 2008.

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I. BACKGROUND

[1] On September 1, 2007, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 20754-01-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to the Beaver Regional Waste Management Services Commission (the “Approval Holder” or “BRWMS”) authorizing the Beaver Regional Class II landfill (the “Landfill”) near Ryley, Alberta, in Beaver County (“County”) where more than 10,000 tonnes per year of waste is disposed.¹

[2] On October 4, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Lee and Ms. Marilyn Fenske (the “Appellants”) appealing the Approval. The Board has addressed appeals from these Appellants regarding previous approvals issued respecting this Landfill.

[3] On October 5, 2007, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) 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 record (the “Record”) relating to this appeal and that the Parties provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

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

[5] On November 1, 2007, the Board received a copy of the Record from the Director and on November 8, 2007, the Board forwarded a copy to the Appellants and Approval Holder. On November 14, 2007, the Board notified the Director that the November 1, 2007 Record did

¹ The Approval replaces a previous approval issued to the Beaver Regional Waste Management Services Commission in 1998 (the “1998 Approval”) and subsequent amendments (the “2005 Amendment”). The 1998 Approval had an expiry date of 2008, requiring the Approval Holder to apply for a new approval.

not contain Statements of Concern in relation to the Approval. On November 22, 2007, the Board received an addendum to the November 1, 2007 Record from the Director including the Director's Record related to the Statements of Concern filed. The addendum was forwarded to the Appellants and Approval Holder on November 29, 2007.

[6] On October 30, 2007, the Board received a letter from the Approval Holder advising that it saw no merit in pursuing mediation and requested that the issues for a hearing be identified and that the matter proceed directly to a hearing. The Board provided the Parties with a copy of the letter.

[7] In the Board's letter of November 14, 2007, it advised the Parties that, since the Approval Holder saw no merit or benefit in pursuing mediation and it requested a submission schedule be set to determine the issues for a hearing, the Board would proceed to schedule a hearing and set a written submission process to determine the issues. The Board requested that any further preliminary motions be provided to the Board by November 21, 2007.

[8] On November 19, 2007, the Approval Holder requested the Appellants "...provide, in advance, details of expert evidence upon which they will rely in the appeal, including names of experts and copies of reports, testing and findings. As well, if the Appellants have obtained any previous testing which will be relied upon by the Appellants, we request that that be provided to the [Approval Holder] in advance."

[9] The Approval Holder further requested clarification on what issues in the appeal are properly before the Board "...taking into consideration that there has been no change in groundwater, surface water, containment and discharge." In addition, the Approval Holder sought determination of "...which issues are land use issues that are within the jurisdiction of the County, and which will not be dealt with by the Board." The Board advised the Parties on November 21, 2007, that the request by the Approval Holder to the Appellants to provide detailed evidence in advance was, in essence, a request for a staggered submission process for the hearing to which the Board had agreed.

[10] On November 21, 2007, the Appellants advised they would be submitting an application for advanced interim costs.

[11] The Director, in his letter of November 21, 2007, requested the Board address in the preliminary issues the matter of: issue estoppel because a number of issues had been adequately dealt with in the Board's previous decisions regarding the Landfill; those issues under appeal that are not within the Director's or the Board's jurisdiction; and a request that the Board consider conducting the preliminary motions and hearing in writing. The Appellants advised the Board on November 27, 2007, they objected to a written hearing, if that was the Director's intent, and advocated for an opportunity to provide *viva voce* evidence.

[12] The Board advised the Parties on November 29, 2007, that it wished to receive written submissions on the following preliminary motions:

1. Issue Estoppel: whether the issues contained in the Notice of Appeal have been adequately dealt with in the Board's previous decisions;
2. Jurisdiction: whether there are grounds for appeal that are not within the Director's or the Board's jurisdiction, and therefore, should not be part of the appeal;
3. whether there are land use issues that are within the jurisdiction of the County, and not within the jurisdiction of the Board; and
4. the issues to be dealt with at a hearing, should one be held.

The Board stated that it would not conduct the hearing of this appeal via written submissions; however, it would request written submissions from the Parties in a staggered manner in preparation for the hearing, should one be held.²

[13] The Appellants' initial submission was received on December 21, 2007, response submissions were received on January 14, 2008 from the Approval Holder and the Director, and the rebuttal submission was received from the Appellants on February 7, 2008.

[14] On May 9, 2008, the Board notified the Parties that it required additional information regarding the issues to be heard at the hearing, should one be held, and it wanted to hear arguments on the issues at an oral preliminary motions hearing. The Board explained it

² In the Board's view, the principles of natural justice require that, with respect to a substantive hearing, if one of the parties requests an oral hearing, they are generally entitled to it.

understood the arguments with respect to issue estoppel and jurisdiction and it only wanted additional submissions on what issues should be heard if the appeal proceeds to a hearing.

[15] The preliminary motions hearing was held June 16, 2008.

[16] On July 24, 2008, the Board notified the Parties that the issues that will be heard at the hearing are:

1. the appropriateness and adequacy of the conditions in the Approval with respect to the abandoned wells
 - a. that have been identified, and
 - b. that have not been identified, which may yet be encountered during constructionin the area where the expansion of the Landfill is approved;
2. the effects of the expansion of the Landfill on the surface water regime in the area, including but not limited to Bible Creek;
3. the appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of special cells; and
4. the operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics.

These are the only issues the Board will hear.

[17] The following are the Board's reasons for setting these issues.

II. Submissions

A. Appellants' Initial Submission

[18] The Appellants explained their homestead is located in the SW 14-50-17-W4M, and their home is within a half a mile, directly kitty-corner to the active landfill and is one of the closest residences to the active portion of the Landfill. They stated they have experienced environmental, social, and economic impacts from the Landfill.

[19] The Appellants argued cumulative effects of the development should have been considered, but the application did not contain any cumulative effects assessment beyond the Landfill itself. The Appellants argued the proposed framework for managing cumulative effects

in Alberta requires cumulative effects of developments to be considered as part of regular business. The Appellants submitted the Hearing issues should include whether the Director was wrong in not exercising his discretion to require an environmental impact assessment (“EIA”) which would review the entire development plans, including plans to import garbage from outside the province, to relocate a seasonal tributary of Bible Creek, to dedicate a cell for special wastes, and to develop a landfill gas treatment facility. The Appellants argued the scale of the project and the economic, social, and environmental consequences warrant a review of whether the Director should have ordered an EIA of the complete development plan for the Landfill, including all related facilities.

[20] The Appellants noted an interim report included in the application conceded the details of the specific hydrophysical aspects were not considered because the aspects were still under assessment. The Appellants submitted the sufficiency of the hydrophysical and hydrochemical investigations into the expansion area warranted further investigation.

[21] The Appellants argued there was no assessment of how the scale of development could cumulatively impact the groundwater and surface water regimes. The Appellants argued the scale of the development could fundamentally change local groundwater and surface water regimes, but the effects were never considered.

[22] The Appellants explained that in the Board’s previous decision, *Fenske and Janus v. Director, Central Region, Regional Services, Alberta Environment re: Beaver Regional Waste Management Services Commission* (19 May 2006) Appeal Nos. 05-044 & 05-047-R (“*Fenske*”), the Board recommended the Approval Holder prepare five reports to ensure there were no outstanding technical, environmental, or health concerns.³ The Appellant argued the sufficiency of the Reports and the Director’s consideration of the Reports is warranted in any hearing of the matter.

[23] The Appellants stated that one report the Board recommended to be prepared required the Approval Holder to conduct a thorough assessment of the status of all wells

³ The reports were to provide information regarding the effects of chloride in leachate on anaerobic digestion, the effect of hydrocarbons on high-density polyethylene liners, the potential hydrogeologic connection between the landfill site and the Appellants’ property, and analysis of the water from the Appellants’ dugout, and a listing of all the wells drilled on the landfill site. (collectively, the “Reports”).

previously and currently drilled on the Landfill site. The Appellants stated the sufficiency of this report and the Director's consideration of this report should be considered by the Board. The Appellants recommended the Board also consider the environmental effects on the watershed downstream of the Landfill as a result of surface water runoff from the Landfill.

[24] The Appellants argued the impacts created by the increased scale of the project, such as odours, pests, and visual impacts, were not properly considered by the Director. The Appellants submitted the failure of the Approval to require the construction of a treed berm to mitigate odours and visual impacts needs to be addressed at the Hearing. The Appellants argued the visual impacts resulting from the removal of the upper limit for the elevations of the cells also warrants consideration.

[25] The Appellants raised the issue of impacts resulting from the leachate plume created after closure of the cells. The Appellants argued the Director erred in not requiring the Approval Holder to use a composite liner in the cells.

[26] The Appellants believed the possibility of an explosion or degradation of air or soil quality from landfill gas warranted consideration of an industrial risk assessment given the close proximity of residences. The Appellants stated the sufficiency of the protocols used to test soils with hydrocarbons and the risk of these soils combusting also warranted further assessment and risk analysis.

[27] The Appellants raised the issue of the lack of conditions in the Approval regarding the development of special waste cells, including the entombment of bovine spongiform encephalopathy ("BSE") carcasses, and the potential impacts on the Appellants' cattle operations.

[28] The Appellants noted the Approval did not require the Operations Plan to include an emergency response plan and an environmental contingency and response plan, and this should be addressed.

[29] The Appellants argued an EIA was warranted in this case to consider the cumulative impacts of the development given the size of the disturbance and the setting; the need for the project; risks to the watershed given the relocation of the Bible Creek tributary; impact of

the leachate plume from the site; possible effects on groundwater and surface water regimes; health, safety, and economic risks posed by the creation of special waste cells; the sufficiency of the emergency response plan and the environmental contingency plan and the Approval Holder's ability to implement them; cumulative impacts with respect to the Village of Ryley; potential health impacts to residents; protection of residents in the event of property loss or damage; risks and impacts of the potential Landfill gas treatment facility; cumulative impacts of industrial development in the region; compatibility of development with land use and development in the region and the cumulative impacts on residential developments; and the adequacy of the public consultation.

[30] With respect to issue estoppel, the Appellants stated there has been previous consideration of issues related to the Landfill before the Board and the Courts, but the current application involves substantial amendments to the previous approvals that were never addressed. The Appellants noted the changes in the Approval from the previous approval operating at the time of the application, including: consistency with the provisions of Alberta Environment's draft Guidelines for Landfills in Alberta; expanded footprint to include all of the NE and SE of 10-50-17-W4M and ancillary uses in the NW 10-50-17-W4M; maximum cell depth to be based on underlying geological formations and soil requirements for operations and closure rather than fixed maximum depth; maximum height referenced to sideslopes and geometry instead of fixed maximum height; provision for development of dedicated landfill cells for special wastes to accommodate special needs such as bulk disposal of animal carcasses; and elimination of the maximum allowable chloride concentration limit for leachate circulation.

[31] The Appellants stated that as a result of these changes, many issues associated with the Approval had not been previously addressed. The Appellants argued the Landfill as approved has a dramatically increased footprint, changes in operations, and increased cumulative impacts on groundwater and surface water, greater nuisance and visual effects, changes in leachate management, and greater impacts on human health. The Appellants stated the direct and cumulative impacts stemming from the operation on the southeast quarter section and the rest of the northeast quarter section of 10-50-17-W4M were never addressed previously.

[32] The Appellants argued the Landfill approved "...is so different in scope and scale that previous Board and judicial reviews could not have comprehended its impacts and interactions with the surrounding environment, properties, and watershed."⁴ They stated that, at the very least, the Board should address the relocation of the tributary to Bible Creek, the provision for the construction of special waste cells, the removal of the upper elevation limits for the cells, and the removal of chloride concentration limits for recirculated leachate.

[33] The Appellants argued the 2006 hearing of the issues cannot be described as final because the Board recommended the preparation of five additional reports to assist the Director when he reviewed the renewal application for the Approval. The Appellants argued issues arising from the Reports recommended by the Board in *Fenske* should be considered for a hearing, including the issue about abandoned wells.

[34] The Appellants argued the issues related to groundwater and surface water, leachate management, and human health and safety are within the jurisdiction of the Board. The Appellants referred to section 2(g) of EPEA⁵ and submitted this places issues related to consultation within the Board's jurisdiction. The Appellants argued sections 2(b) and (c)⁶ and sections 41 through 45 of EPEA⁷ puts the Director's decision not to conduct an EIA within the Board's jurisdiction.

⁴ Appellant's submission, dated December 21, 2007, at paragraph 32.

⁵ Section 2(g) of EPEA states:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing ... the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment...."

⁶ Sections 2(b) and (c) of EPEA provide:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ...

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations."

⁷ Sections 41 through 45 of EPEA state:

"41 Where any Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration under the environmental assessment process, that Director

may refer the proponent or the proposed activity to the Director who is designated for the purposes of sections 43 to 56 so that the proposed activity may be dealt with under section 44.

42 In sections 43 to 56, 'Director' means the Director who is designated for the purposes of those sections.

43 Where the Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration under the environmental assessment process, the Director may by notice in writing to the proponent advise the proponent that the proposed activity must be dealt with under section 44.

44(1) Where a proponent or a proposed activity is referred to the Director under section 41, where the Director gives a notice under section 43 or where a proponent on the proponent's own initiative consults with the Director in respect of the application of this Division to a proposed activity, the Director shall,

(a) if the proposed activity is a mandatory activity, direct the proponent by order in writing to prepare and submit an environmental impact assessment report in accordance with this Division, or

(b) if the proposed activity is not a mandatory activity,

(i) make a decision that the potential environmental impacts of the proposed activity warrant further consideration under the environmental assessment process and require that further assessment of the proposed activity be undertaken, or

(ii) make a decision that further assessment of the proposed activity is not required and, if it is an activity for which an approval or registration is required, advise the proponent that it may apply for the approval or registration.

(2) The Director may require a proponent to submit a disclosure document in the form and containing the information required by the Director to assist the Director in making a decision under subsection (1)(b).

(3) In making a decision under subsection (1)(b), the Director shall consider the following:

(a) the location, size and nature of the proposed activity;

(b) the complexity of the proposed activity and the technology to be employed in it;

(c) any concerns in respect of the proposed activity that have been expressed by the public of which the Director is aware;

(d) the presence of other similar activities in the same general area;

(e) any other criteria established in the regulations;

(f) any other factors the Director considers to be relevant.

(4) The Director shall notify the proponent

(a) in writing of a decision made under subsection (1)(b)(i), and

(b) orally or in writing of a decision made under subsection (1)(b)(ii).

(5) The proponent shall provide notice of a decision of the Director under subsection (1)(b)(i) in accordance with the regulations.

B. Approval Holder

[35] The Approval Holder stated the 1998 Approval was appealed by Ms. Fenske, and the Approval Holder and Director were parties to the hearing of the appeal at which the issues addressed were litter waste spillage, noise, odour, surface and ground water quality, health and quality of life, buffer zone, berms, soil management, decommissioning of the monitoring wells, and closure of the Landfill. The Approval Holder stated the Appellants appealed the 2005 Amendment, and the Director and Approval Holder were parties to the hearing of the appeal. The Approval Holder stated the issues heard in the 2005 Amendment appeal included leachate removal, recirculation of leachate, trucking leachate, shallow groundwater effects, effects on

(6) Any person who is directly affected by a proposed activity that is the subject of a decision of the Director under subsection (1)(b)(i) may, within 30 days after the last notice under subsection (5) or within any longer period allowed by the Director in the notice, submit a written statement of concern to the Director setting out the person's concerns with respect to the proposed activity.

45(1) Where the Director decides under section 44(1)(b)(i) that further assessment of a proposed activity is required, the Director shall, in accordance with the regulations,

(a) prepare a screening report regarding the need for the preparation of an environmental impact assessment report, and

(b) decide whether preparation of an environmental impact assessment report is required.

(2) The Director shall make the screening report available in accordance with the regulations.

(3) Where the Director decides under subsection (1) that preparation of an environmental impact assessment report is not required, the Director

(a) shall advise the proponent of that fact,

(b) if the activity is one for which an approval or registration is required, shall advise the proponent that it may apply for the approval or registration, and

(c) may refer any information on the potential environmental impacts of the proposed activity to the Director responsible for issuing the approval or registration.

(4) Where the Director decides under subsection (1) that preparation of an environmental impact assessment report is required, the Director shall by order in writing direct the proponent to prepare and submit the report in accordance with this Division.

(5) The Director shall provide notice of the Director's decision regarding preparation of an environmental impact assessment report under subsection (1)(b) in accordance with the regulations."

surface water and deeper aquifers, and odour. The Approval Holder stated the berm and screening were raised by the Appellants but were not considered by the Board.

[36] The Approval Holder explained the Ministerial Order issued regarding the 2005 Amendment appeal required the Approval Holder submit written reports addressing certain issues, including: "...effects of varying concentrations of chloride in leachate will have on anaerobic digestion of landfill waste; effects of various types, fractions and concentrations of hydrocarbons from the produced sand will have on high-density polyethylene liners; potential hydrogeological connections between the landfill site and Marilyn[n] and Lee Fenske's property; review of the results from water analysis of the water from the dugout on Fenske's property; list of wells drilled on the landfill site."⁸ The Approval Holder stated the Reports were provided to Alberta Environment and the Appellants on August 31, 2006, and Alberta Environment acknowledged the Reports met the requirements of the Ministerial Order.

[37] The Approval Holder explained it holds three separate licences under the *Water Act*, R.S.A. 2000, c. W-3, for the detention and storage of on-site and off-site storm water runoff, the diversion for irrigation and dust control, or the seasonal release into the tributary of Bible Creek. The Approval Holder stated these licences are still valid and are not the subject of this appeal. The Approval Holder stated the development permit issued by the County deals with land use issues and is not the subject of this appeal.

[38] The Approval Holder explained the Board's recommendations and the Ministerial Order issued with respect to the 2005 Amendment were issued after the renewal application was submitted, so they are not referenced in the application. The Approval Holder stated all aspects of the application complied with Alberta Environment's 2004 Standards for Landfills in Alberta and the 2005 Draft Guidelines for Landfills in Alberta.

[39] The Approval Holder argued certain issues in the Notice of Appeal were previously determined by the Board, including surface water, domestic water, groundwater, nuisances, and leachate management, while other issues, such as business practices of the Approval Holder and land use issues, are outside the Board's jurisdiction.

⁸ Approval Holder's submission, dated January 14, 2008, at paragraph 12.

[40] The Approval Holder argued the same issues were raised before the Board regarding the 1998 Approval and 2005 Amendment, and the Board's recommendations and corresponding Ministerial Order were final. The Approval Holder stated it was a party to the previous appeals as was the Director, and further, Ms. Fenske was an appellant to the 1998 Approval and both Appellants appealed the 2005 Amendment. The Approval Holder argued the issues raised in this appeal are fundamentally the same as the issues raised in the previous appeals.

[41] The Approval Holder argued that, to allow the appeal to proceed in its entirety, would be an abuse of process. The Approval Holder submitted that some of the issues raised in this appeal were raised and addressed in the previous appeals, and as the present appeal meets the criteria for the Board to find issue estoppel applies, the appeal should be dismissed.

[42] The Approval Holder argued the Appellants raised a number of issues in the previous appeals, including chloride concentration limits for leachate recirculation, location and status of wells drilled at the Landfill site, the need for an EIA, screening and berming, nuisance controls, surface and groundwater issues including hydrophysical and hydrochemical investigations, and an emergency response plan.

[43] The Approval Holder stated the elimination of chloride levels was addressed in the 2005 Amendment appeal, and no new issues have been raised in the current application because the same provision for the elimination of chloride concentration limits from leachate recirculation is being advanced for the entire area. Therefore, according to the Approval Holder, the issue does not change from the issues discussed and decided in the previous appeal.

[44] The Approval Holder argued the need for an EIA was considered in the first appeal and the Board recommended detailed plans which would have covered or been included in an EIA, but the Minister did not accept the recommendation and did not order an EIA. The Approval Holder argued the issue of an EIA is subject to issue estoppel. The Approval Holder noted that it has never been a requirement that it conduct an EIA on the Landfill and, to its knowledge, it has never been a requirement for a Class II landfill in Alberta.

[45] In response to the Appellants' statement regarding "details of a specific hydrophysical aspect," the Approval Holder stated it was taken out of context and should be considered in the context of the full geological characterization of the southeast quarter of 10-50-17-W4M. The Approval Holder stated its consultant, Mr. Charles E. Moell, recognized the failure of the monitoring wells to stabilize, which normally takes a few weeks or months until the groundwater reaches equilibrium, and as the wells were in existence for about four months at the time Mr. Moell prepared his report, he was able to make a reasonable forecast of potential recovery rates and draw corresponding hydrogeological conclusions. The Approval Holder argued it "...is a tribute to the nature of the underlying geology of the site and its exceptionally low permeability. It should not be considered a defect or weakness in the hydrogeological assessment."⁹

[46] The Approval Holder argued the issues of groundwater and surface water were dealt with in the 1998 and 2005 appeals, and in the second decision, the Board determined the Appellants should not be affected by surface water runoff leaving the Landfill and flowing into the Appellants' water sources.

[47] The Approval Holder explained the Reports provided to the Director and the Appellants after the Board's decision in the second appeal were accepted by the Director, and neither the Director nor the Appellants raised issues with the Reports. The Approval Holder argued the issues addressed in the Reports should not be opened again.

[48] The Approval Holder stated the Landfill has been developed and abandoned wells have been identified and excavated out. The Approval Holder argued the issue of wells previously and currently drilled on the Landfill site has been addressed and considered and should not be reopened in this appeal.

[49] The Approval Holder argued that, given the scale of operation including the size and configuration of the actual working face, the procedures for handling and covering waste, and the daily tonnages, are unrelated to the size and scale of the footprint of the Landfill, and the

⁹ Approval Holder's submission, dated January 14, 2008, at paragraph 31.

issues regarding nuisance control remain essentially unchanged and were dealt with in the 1998 appeal.

[50] In response to the Appellants' concern regarding the need for an emergency response plan and an environmental contingency and response plan, the Approval Holder stated it has developed the plans as required in the 1998 Approval, and therefore, the plans are not a new issue before the Board.

[51] The Approval Holder argued the issues of berming and screening have been dealt with by the Board. The Approval Holder stated the Ministerial Order did not require a berm to be built, and the Board recognized that aesthetics were not issues in the appeal of the 1998 Approval. The Approval Holder submitted that screening and berming are development control issues and not within the Board's jurisdiction.

[52] The Approval Holder stated the Board cannot review other approvals or licences issued to the BRWMSC, and therefore the Board cannot review issues involving licences under the *Water Act*. The Approval Holder noted that, pursuant to the *Municipal Government Act*, R.S.A. 2000, c. M-26, land use issues are within the jurisdiction of the municipality and decisions made by the municipal planning authority are not reviewable by the Board.

[53] The Approval Holder stated the Board cannot determine issues dealing with business decisions, financial decisions not tied to environmental issues, and internal guidelines of the BRWMSC on how it will ensure the terms and conditions of its Approval are followed. The Approval Holder argued the economic issues raised by the Appellants are not tied to environmental issues and, therefore, are not within the Board's jurisdiction.

[54] The Approval Holder stated the Appellants listed a number of issues outside the jurisdiction of the Board, including the following issues raised in the context of an alleged error of the Director not to require an EIA: visual concerns regarding screening and berming; property values, property damage and liability; source of waste accepted; draft documentation of the Minister of the Environment; proliferation of industrial development; land use compatibility; and business practices of the BRWMSC.

[55] The Approval Holder argued the contracts for accepting material to the Landfill are within business practices of the BRWMSC and do not fall within the scope of the appeal.

[56] The Approval Holder acknowledged it imposed significant changes to the footprint, height, and depth of the Landfill. It explained the footprint has been expanded to include the entire southeast quarter of 10-50-17-W4M. The Approval Holder explained the depth has been altered to allow individual cells to extend to the optimum depth to provide for cover, capping, and excavation material, and for the base to extend into the lower Bearpaw geologic formation that has very low permeability instead of working to an arbitrary fixed elevation. The Approval Holder stated the height has been increased to optimize available air space while maintaining structural stability and an efficient landform. The Approval Holder explained that an amendment to the development permit would be necessary to increase the height of the Landfill, and because it is a development issue within the jurisdiction of the municipality, it is not a proper issue before the Board.

[57] The Approval Holder stated the aesthetic issues raised by the Appellants are development control issues and only within the jurisdiction of the municipal land use bylaw. The Approval Holder explained it tried to plant trees around the Landfill in the past but conditions are not conducive for sufficient growth of the trees to provide any effective screening of Landfill activities.

[58] The Approval Holder argued the issues related to the proliferation of industrial development and land use capability are within the jurisdiction of municipal land planning.

[59] The Approval Holder argued the Appellants raised issues in their submission that were not raised in their Notice of Appeal including: hypothetical leachate plume; liner design or alternatives; combustion and safety of hydrocarbon soils; Alberta Environment discussion document, Towards Environmental Sustainability¹⁰; treatment of landfill gas; BSE carcasses; special waste cells; emergency response plan; adequacy of public consultation; need for the project; economic issues; Village of Ryley issues; health concerns; liability for damages; property values; proliferation of industrial development; and land use capability.

¹⁰ See: Appellants' submission, dated December 21, 2007, Appendix A: Alberta Environment, Towards Environmental Sustainability (2007).

[60] The Approval Holder noted the discussion paper, Towards Environmental Sustainability, was not in effect at the time of Director's consideration of the Approval Holder's application. The Approval Holder stated the discussion paper had not been passed at the time of the application, and the Approval Holder could not be expected to meet unknown standards.

[61] The Approval Holder stated the application recognizes the alternative of a composite liner, but it has never been a requirement for the Approval Holder to operate, and the conditions at the Landfill do not warrant a composite liner.

[62] The Approval Holder explained it has met the consultation requirements under EPEA, and it has been consulting with the community for 15 years. The Approval Holder stated that the Town of Ryley has never sent a concern to the BRWMS, and therefore, it cannot be an issue for the Board to consider. The Approval Holder further stated that proliferation of industrial activity and land use compatibility are land development issues and within the jurisdiction of the municipality.

[63] The Approval Holder argued the issue of risk from soil combustion was not raised in the Notice of Appeal and is purely hypothetical so it should not be considered by the Board. The Approval Holder explained that if the material has a flashpoint below 61°C, it cannot be accepted at the Landfill.

[64] The Approval Holder argued the detention and subsequent discharge of surface water runoff is governed by the *Water Act* and EPEA. The Approval Holder stated the Approval sets out new discharge parameter limits for offsite release of stormwater that simulate the water quality if the Landfill had not been developed and that are well within the limits set in the Alberta Surface Water Quality Guidelines. The Approval Holder stated the parameters and limits have changed from the previous approval because those limits were arbitrarily set at extremely stringent levels with no basis or framework.

[65] The Approval Holder stated what may be a proper issue is the outcome of the watershed downstream of the Landfill, provided it does not reference effects on the Appellants' property or other issues previously decided by the Board.

[66] The Approval Holder requested the appeals be dismissed. It stated the 1998 Approval contained conditions not common to other Class II landfills in Alberta. The Approval Holder stated it met the 2005 draft Guidelines for Landfills in Alberta, and the conditions in its Approval should not be more stringent than what is required of other similar landfills. The Approval Holder argued that, if the Appellants did not deal with an issue in their submission even though it was raised in their Notice of Appeal, the Board should not consider that issue.

C. Director

[67] The Director submitted that most of the issues raised by the Appellants should be excluded because they were not included in the Notice of Appeal, outside the Board's jurisdiction, subject to issue estoppel, or speculative and premature. The Director submitted the only issue that may be appropriate for a hearing is the impact of the Landfill on the Bible Creek and Beaverhill Lake watersheds.

[68] The Director explained the Approval is a renewal of the 1998 Approval. The Director stated the Appellants appealed the 1998 Approval, and the Minister set out additional conditions to the 1998 Approval. The Director explained these additional conditions pertained to land conservation, landfill gas management, soil management, closure and post closure, hydrogeological assessment, and monitoring, and the conditions were satisfied through the subsequent Reports provided to the Director.

[69] The Director explained an amendment was issued in 2005 allowing the recirculation of leachate containing more than 3,000 mg/L of chlorides in the Stage 1 cell. The Director stated the 2005 Amendment was appealed to the Board by the Appellants, and the Minister accepted the Board's recommendations requiring the Approval Holder to submit the Reports to Alberta Environment dealing with chloride in the leachate, effects of hydrocarbons on liners, and determining ground and surface water connections between the Landfill and the Appellants' property. The Director stated the Reports were submitted to his satisfaction.

[70] The Director stated that, to be an issue, it must have been raised in the Notice of Appeal, within the Board's jurisdiction, and it must be a new issue that had not been determined in a prior proceeding.

[71] The Director argued it is unfair to all the Parties if the Appellants are allowed to add issues in their submissions that did not fall squarely within the parameters of the Notice of Appeal. The Director submitted that the issues of human health and safety, including air/soil quality degradation, landfill gas, risk of explosion, sufficiency of testing protocols, special waste cells, the lack of an emergency response plan and environmental contingency plan, and the adequacy of the consultation should not be addressed at the Hearing because they were not matters included in the Notice of Appeal.

[72] The Director argued the Board does not have the jurisdiction to consider whether an EIA should have been completed, because decisions of the Director under Part 2, Division 1 of EPEA are not appealable to the Board. The Director stated the Appellants' request to direct the Director to require the Approval Holder to submit its complete development plans and applications for all related facilities so that an EIA can be undertaken, should be denied.

[73] The Director submitted the issues of visual impact and nuisance, including screening berms and shelter belts, are land use issues and outside the Board's jurisdiction.

[74] The Director explained issue estoppel operates to prevent a party from raising an issue in a current proceeding when the issue had already been decided in an earlier proceeding. The Director noted the three requirements in determining issue estoppel are whether the parties to the proceeding were the same persons as the parties to the proceedings in which the estoppel is raised, that the judicial decision which created the estoppel was final, and the same question had been determined. The Director stated the Appellants are the same Appellants that were involved in the two previous appeals, and therefore, the first requirement had been met. The Director stated the second requirement has also been satisfied because the decisions of tribunals are considered final.

[75] The Director submitted that, in relation to whether the same question had been decided, the following issues had been considered and decided by the Board in past appeals regarding the Landfill: surface and groundwater issues, including the sufficiency of the hydrophysical and hydrochemical investigations, and the lack of assessment how the Landfill development could impact groundwater and surface water; effects of varying concentrations of chloride in leachate on anaerobic digestion of landfill waste; effects of various types, fractions,

and concentrations of hydrocarbons from the produced sand on high density polyethylene (“HDPE”) liners; and nuisance and visual impacts. The Director referred to the Reports provided by the Approval Holder in response to the Ministerial Order issued for the 2005 Amendment to support his argument that the first three issues listed were dealt with by the Board. The Director argued all of these issues should be excluded from the current appeal.

[76] The Director stated the overall purpose of issue estoppel is to ensure judicial finality, thereby preventing parties from re-litigating an issue already decided in an earlier proceeding. The Director argued the underlying fundamental circumstances regarding the Landfill have not changed. He stated there has never been and still there is no evidence of any hydrogeologic or hydrochemical connections between the Landfill property and the Appellants’ property as indicated in the Reports. The Director stated the existence and nature of the ground and surface water have not changed.

[77] The Director argued that none of the issues related to hydrophysical and hydrochemical information and the potential impacts on surface or ground water are new issues. The Director stated the effects of chloride on anaerobic digestion of landfill waste and the effect of hydrocarbons on HDPE liners have been asked and considered in the 2005 Amendment hearing and were thoroughly answered in the Reports ordered by the Minister. The Director further stated the issues of nuisance and visual impacts have not changed between the earlier appeals and the Approval. According to the Director, all of these issues should be excluded from the current appeal.

[78] The Director referred to the Appellants’ statement that “...the environmental outcomes of the water shed [*sic*] downstream of the landfill as a result of surface water run-off from the landfill...” is an issue. The Director stated that, if the Appellants are referring to possible impacts of surface runoff from the Landfill on the Appellants’ dugout, then issue estoppel should apply; however, if they were questioning the impacts of the Landfill on the larger watersheds of Bible Creek and Beaverhill Lake, then that would be an issue that has not yet been determined by the Board.

[79] In response to the Appellants’ concerns over a post-closure leachate plume, the Director stated there is no knowledge that a leachate plume exists or that one will occur after

closure of the Landfill. The Director argued if the issue was included in the hearing, it would be speculative and premature as no evidence relating to it exists.

[80] The Director submitted that the Appellants' reference to cumulative effects in the context of an EIA is not within the Board's jurisdiction. The Director stated he is aware of the the issue of cumulative effects, but this is a renewal Approval of an existing activity and the potential impacts remain largely unchanged from the previous approvals and amendments. The Director noted the document referred to by the Appellants regarding cumulative impacts was published October 2, 2007, more than one month after the Approval was issued, and therefore, it could not have been considered by the Director. The Director stated the document sets out a proposed approach to addressing cumulative effects, but the final framework will not be in effect until public comments are received and new legislation is in place. The Director argued consideration of cumulative effects using the proposed framework is premature and speculative.

[81] The Director reiterated that the only issue that may exist is the impact of the activity on the larger watersheds downstream of the Landfill, but it is unclear from the Appellants' submission if this is an issue they want to have heard.

D. Appellants' Rebuttal Submission

[82] In their rebuttal submission, the Appellants stated the Director and Approval Holder conceded that the impact of the Landfill on the Bible Creek and Beaverhill Lake watersheds may be appropriate for the hearing.

[83] The Appellants argued the Director did not address the fact that the Landfill project is different in scope and scale so that the previous Board decisions and judicial reviews could not have comprehended the impacts to the surrounding environment, properties, and watersheds. The Appellants noted the Landfill will be expanded to the remainder of the NE ¼ of 10-50-17-W4M and all of the SE ¼ of 10-50-17-W4M.

[84] With respect to surface and ground water issues, the Appellants stated the Director referred to the 2005 Amendment appeal decision, the report that stemmed from that decision detailing the hydrogeological connections between the Landfill and the Appellants'

property, and the hydrophysical report found within the application to show surface and ground water issues had been dealt with. The Appellants argued the Board assessed surface and ground water issues but was limited to the smaller size of the Landfill being considered at the time and therefore, did not address the impact of the expanded Landfill. The Appellants acknowledged the hydrophysical report included in the application addressed the hydrophysical properties of the SE ¼ of 10-50-17-W4M, but it did not specifically address the impacts from developing the entire Landfill, including the remainder of the NE ¼ of 10-50-17-W4M, on surface and ground water regimes. The Appellants submitted that the surface and ground water impacts of the Landfill have not been assessed in their totality and finality including the impacts that could arise once the entire east half of the section is developed. The Appellants submitted the assessment has been accomplished piece-by-piece. The Appellants argued that issues involving total surface and ground water impacts have not been addressed given the expanded size and scope of the Landfill, and therefore, the issue of surface and ground water impacts is not issue estopped.

[85] The Appellants noted the Approval Holder's reference to the changes in parameters for off-site release of surface water, and they argued the change and resulting impacts are relevant to the release of water that may reach the Appellants' property and into their domestic water supply. The Appellants stated that any analysis of the watershed downstream of the Landfill must include the Appellants' property because it is part of the watershed and Bible Creek flows through a portion of their lands. The Appellants explained current runoff, when released from the west side of the Approval Holder's property, makes its way onto the Appellants' property. The Appellants submitted that the totality of ground and surface water impacts should be considered by the Board.

[86] The Appellants argued the Reports completed after the 2005 Amendment hearing and as required in the Ministerial Order should not be estopped as suggested by the Director and Approval Holder. The Appellants stated the Reports were intended to assist the Director when reviewing the Approval Holder's application, and therefore, the adequacy of the Reports and the consideration given to them by the Director should be considered in this appeal. The Appellants referred to the report on the abandoned wells in which it states the status of 53 wells is unknown. The Appellants submitted the adequacy of such a report should be addressed at the hearing given

the potential impacts that abandoned wells could have on leachate migration. The Appellants acknowledged the Reports were ordered in part as a response to concerns raised during prior hearings. The Appellants argued that the sufficiency of the Reports and the consideration given to them by the Director is relevant to the appeal process and could not be estopped. The Appellants submitted, "... the Reports do not represent a final disposition of the issues, but rather were meant to be a relevant aid to this Approval process."¹¹ The Appellants argued the Reports should be dealt with at a hearing and to do otherwise would limit the intended purposes of the Reports and create an unjust result.

[87] The Appellants submitted that nuisance issues, including odours, pests, and visual impacts, and their impact on the Appellants have not been considered within the context of the approved Landfill because of the larger footprint, the intensity of the operations, and the removal of the maximum height restrictions.

[88] The Appellants acknowledged the decision to conduct an EIA is made by a specifically designated Director. The Appellants argued the Director who issued the Approval has an obligation to consider the environmental impacts and he has the ability to refer the proposed activity for a possible EIA to the appropriate Director. The Appellants submitted the Director erred in not referring the application for an EIA and that decision relates directly to the assessment process undertaken by the Director in deciding to issue the Approval. The Appellants stated the purpose of the environmental assessment process includes consideration of economic and planning issues. They argued "...the consideration of economic issues represents a fundamental principle of the EPEA which should guide all processes pursuant to this legislation – including the issuance of the Approval in question."¹² The Appellants argued the defining line between what is an economic issue and what is an environmental issue is not always clear, and because they are inseparably interconnected, there must be consideration of these issues. The Appellants submitted that economic issues, including property values, must be considered as issues in certain situations.

¹¹ Appellants' submission, dated February 7, 2008, at paragraph 24.

¹² Appellants' submission, dated February 7, 2008, at paragraph 34.

[89] The Appellants argued the business practice of the Approval Holder of importing inter-jurisdictional waste will affect the environmental impacts that will occur and, potentially, the total tonnage brought into the Landfill will increase and fill up the Landfill to capacity more quickly. The Appellants noted the projected yearly waste intake for years 5 to 10 is listed as unlimited. The Appellants argued the increased daily tonnage could lead to additional odour and pest problems.

[90] The Appellants argued the need for an EIA is a valid issue as well as consideration of economic and planning issues such as damage to property values, the source of waste accepted, and the proliferation of industrial development.

[91] In response to the Approval Holder's argument that the recommendation for an EIA was previously dealt with by the Board and on judicial review, the Appellants argued the project is now substantially different, including an expanded footprint, changes to the height and depths of the cells, the special waste cells provision, and changes to the maximum allowable chloride concentration in the leachate. Therefore, according to the Appellants, issue estoppel should not apply to the question of whether an EIA is required given the potential impacts of the Landfill.

[92] The Appellants argued that visual impact and nuisance are issues properly before the Board. The Appellants argued the environmental effects created by the Landfill, including accumulated wastes, odours, and pests, and appropriate mitigations, are within the jurisdiction of the Board. The Appellants acknowledged municipalities have jurisdiction over regulations which affect the location and development of certain mitigations such as screening and berming, but the Appellants argued this should not bar the Director or the Board to request such mitigations be incorporated into the Approval Holder's application and Approval if there is a benefit from an environmental perspective or if it mitigates an environmental impact.

[93] In response to the Approval Holder's statement that the height of the cells is a municipal issue, the Appellants submitted that, even though an amendment to the municipal development permit may be necessary, there are nuisance impacts to the Appellants from the changes in elevation that need to be addressed at a hearing. The Appellants stated the Director addressed the issue of landfill elevation in previous approvals, and the decision to remove

restrictions regarding those elevations and the impacts on the Appellants should be addressed in a hearing.

[94] In response to the arguments made by the Director and Approval Holder that a number of issues should not be included because they were not raised in the Notice of Appeal, the Appellants explained the Notice of Appeal was broadly written and included by reference questions from the Appellants' Statement of Concern and the responses provided to those questions by Entarra Consulting Services Ltd. ("Entarra").

[95] The Appellants argued they listed "safety, use and enjoyment" in their Notice of Appeal and this encompasses risk of explosion, air and soil degradation, landfill gas, testing hydrocarbons protocols, special waste cells, and lack of emergency response plan and environmental contingency plan. The Appellants stated they have legitimate concerns that their lives and lands could be impacted from the effects of the Landfill.

[96] The Appellants stated the emergency response plan and environmental contingency plan were not considered by the Director prior to issuing the Approval because they were not part of the application. Therefore, according to the Appellants, the sufficiency of these plans is an issue that should be considered.

[97] The Appellants stated they specifically mentioned concerns regarding post-closure leachate in the addendum to their Notice of Appeal and in their Statement of Concern, and it was discussed in the response letter from Entarra. The Appellants stated the need for the project, property values, proliferation of development, and land use compatibility were also raised in the letter from Entarra. The Appellants explained the letter from Entarra was incorporated in their Notice of Appeal through specific reference.

[98] The Appellants stated they raised their concerns about consultation in the response letter from Entarra. The Appellants argued public consultation has been inadequate given the intensified use of the Landfill. The Appellants explained there was one public meeting in 2000. The Appellants feel their previous and legitimate concerns have been ignored, and there is no appropriate mechanism in place to deal with them.

[99] The Appellants stated they specifically requested an EIA in the addendum to their Notice of Appeal, and therefore, there should be no barriers to considering it an issue for the Hearing.

[100] The Appellants respectfully disagreed with the Approval Holder's argument that the issues concerning the special waste cells, leachate plume, and the relocation of a tributary to Bible Creek are premature. The Appellants argued the special waste cells could impact the Appellants' cattle operations as well as their own health. The Appellants stated the creation of the cells would require additional analysis and consultation, but that is not reflected in the Approval that only requires the Director be notified 14 days prior to construction of the cells and that the plans be stamped and signed by a professional registered with the Association of Professional Engineers, Geologists, and Geophysicists of Alberta ("APEGGA").

[101] The Appellants argued the lasting environmental effects need to be addressed, including the potential for a leachate plume developing and migrating to the groundwater if leachate is not recirculated post-closure.

[102] The Appellants explained active landfilling of the southeast of 10-50-17-W4M requires the relocation of the tributary of Bible Creek, and therefore the impacts of the relocation need to be addressed at this stage.

[103] The Appellants argued the cumulative impacts related to surface and ground water issues, nuisance, and human health and safety have not been properly considered given the intensified activities of the Approval Holder and the activities of other current industrial participants, and they need to be addressed. The Appellants argued the intensified operations result in significant changes from the previous approvals and amendments. The Appellants acknowledged the policy paper entitled "Towards Environmental Sustainability: Proposed Regulatory Framework for Managing Cumulative Effects" does not have legislative authority, but they argued it demonstrates the importance of cumulative effects assessments being done at an early stage. The Appellants stated that if the policy develops further, information concerning cumulative effects of significant approvals like this Approval will need to be properly gathered and evaluated.

[104] The Appellants submitted the following summary of the issues they considered are properly before the Board:

1. the sufficiency of hydrophysical and hydrochemical investigations into the proposed expansion area;
2. an assessment of the how the scale of the development could cumulatively impact ground and surface water regimes, including impacts to the Appellants' property;
3. the sufficiency of the Reports submitted pursuant to the Board's previous decision and the Director's consideration and response to the Reports;
4. the sufficiency of the report regarding abandoned wells, the Director's consideration of that report, and the potential impacts created by abandoned wells;
5. the environmental outcome of the watershed downstream of the landfill as a result of surface runoff from the Landfill, including impacts to the Appellants' property, drainage of waters onto the Appellants' property, and the changes in the parameters and limits of surface water that can be released;
6. the impacts of the increased intensity of the project as to odours, pests, and visual impacts;
7. the increased visual impact of the larger Landfill and the removal of an upper limit elevation for the cells, and the failure to require a treed berm to mitigate odours and visual impacts;
8. the impacts of leachate created post-closure and the potential of leachate migrating and forming a plume;
9. the lack of a composite liner;
10. the possibility of explosion or degradation of soil or air quality from landfill gas warrants the consideration of an industrial risk assessment;
11. the sufficiency of the protocols to test soils containing hydrocarbons, the risk of such soil combusting warrant further assessment and risk analysis;
12. the lack of conditions relating to the development of the special waste cells and the potential impacts of these cells on the Appellants;
13. the failure of the Approval to consider the emergency response plan and an environmental contingency and response plan;
14. the inadequacy of the consultation, given the scale of the project;
15. the Director erred in not referring the matter to the appropriate Director for an EIA, given the potential environmental impacts of the project and the need to assess environmental and economic considerations; and
16. whether the terms and conditions in the Approval adequately deal with the direct, indirect, and cumulative impacts of the project on the environment and health and

safety of nearby residents, including impacts on surface and ground water and nuisance issues.

[105] In summary, the Appellants argued issue estoppel should not significantly limit the issues because of the intensified operations of the Landfill and the increase in size of active landfilling. The Appellants argued the Board has the jurisdiction to consider environmental effects, including nuisance impacts, stemming from the approved activities and the mitigation measures. The Appellants submitted that the Board can consider the Notice of Appeal in its entirety when determining issues and can rely on clarification provided by the Parties in the submission process. The Appellants argued the Director should have referred the matter to the EIA Director prior to issuing the Approval. The Appellants stressed the need for consideration of cumulative impacts related to surface and ground water issues, nuisance, and human health and safety prior to the issuance of the Approval. The Appellants submitted that the impacts and risks of provisional activities, such as special waste cells and the relocation of a tributary to Bible Creek, need to be considered by the Board at this time.

III. ASSESSING THE ISSUES

A. Issues to Consider

[106] The Director and Approval Holder argued that issues not clearly defined in the Notice of Appeal should not be considered by the Board. Although the Board would prefer that appellants clearly explain what their issues are, it is often the case, particularly with unrepresented appellants, that the issues are not stated as clearly as they could be. The Appellants expressed concern with the entire Approval, and they attached their Statement of Concern to their Notice of Appeal. The Board believes this is adequate, in this case, to consider all of the issues raised by the Appellants to determine if they are validly before the Board, including by reference those included in their Statement of Concern.

[107] The Board must deal with the issues specified by the Appellants and determine whether the Board has jurisdiction to hear the matter, if the issues must be excluded because they are solely within the municipality's control, or for those issues within the Board's jurisdiction, whether they must be excluded because issue estoppel applies. In their rebuttal submission, the

Appellants listed 16 issues they considered were properly before the Board. These issues are summarized in paragraph 103 above. Even though their Notice of Appeal, attached Statement of Concern and their submissions raised additional matters of concern, the Appellants agreed some have been addressed by the Director or the Approval Holder and some are not within the Board's jurisdiction. Therefore, in assessing which issues are properly before the Board, the Board will only look at the 16 issues listed in the Appellant's rebuttal submission. Because the issues identified overlap to varying degrees, the Board will assess the following matters:

1. assessment of effects of the expansion on the hydrology in the area, including the hydrophysical and hydrochemical characteristics and the surface and ground water regimes;
2. the sufficiency of the Reports;
3. abandoned wells onsite;
4. odours, pests, and visual impacts resulting from increased footprint and increased elevation;
5. leachate migration and potential post-closure plume;
6. composite liner;
7. explosion or degradation of soil or air quality from Landfill gas and the protocol to test soils containing hydrocarbons;
8. special waste cells;
9. emergency response plan and environmental contingency and response plan;
10. consultation; and
11. EIA referral.

[108] The Board assessed each of the issues to determine which are in the Board's jurisdiction, if any are premature, and the remainder were assessed under the test for issue estoppel.

B. Jurisdiction

[109] The Board is developed under statute, specifically section 91 of EPEA, defines the jurisdiction of the Board.¹³ The Board has jurisdiction to hear appeals of certain decisions

¹³ Section 91 of EPEA provides:

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- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
- (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3);
- (b) where the Director refuses
- (i) to issue an approval, or
 - (ii) to make an amendment, addition or deletion in respect of an approval pursuant to an application under section 70(1)(a),
- the applicant may submit a notice of appeal;
- (c) where the Director cancels or suspends an approval under section 70(3)(b) or (4), the approval holder may submit a notice of appeal;
- (d) where the Director cancels a certificate of qualification under section 83(1)(b), the holder of the certificate of qualification may submit a notice of appeal;
- (e) where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed may submit a notice of appeal;
- (f) where an inspector issues an environmental protection order regarding conservation and reclamation under section 140 or 141, the person to whom the order is directed may submit a notice of appeal;
- (g) where the Director issues an environmental protection order under section 129,
- (i) the person to whom the order is directed, and
 - (ii) any person who is directly affected by the designation of the contaminated site
- may submit a notice of appeal;
- (h) where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g), the person to whom the order is directed may submit a notice of appeal;
- (i) where an inspector issues a reclamation certificate under section 138, or the Director or an inspector amends a reclamation certificate under section 139, the operator and any person who receives a copy of the certificate or amendment under section 145 may submit a notice of appeal;
- (j) where the Director or an inspector cancels a reclamation certificate, the operator may submit a notice of appeal;
- (k) where the Director or an inspector refuses to accept an application for a reclamation certificate or an inspector refuses to issue a reclamation certificate, the operator may submit a notice of appeal;
- (l) where the Director or an inspector issues, amends or cancels a remediation certificate under section 117, any person who receives notice of the issuance, amendment or cancellation as provided for in the regulations may submit a notice of appeal;
- (l.1) where the Director or an inspector refuses to accept an application for a remediation certificate or refuses to issue a remediation certificate under section 117, any person who receives notice of the refusal as provided for in the regulations may submit a notice of appeal;

made by the Director. If the particular decision is not listed in section 91 of EPEA, the Board cannot hear an appeal in relation to that decision. In this case, the Appellants raised certain matters that are not in the Board's jurisdiction.

[110] The Appellants argued the Board has jurisdiction to determine if the Director erred in not referring the Approval Holder's application to the EIA Director. The Board acknowledges the Director has the discretionary ability to refer the matter for an EIA.¹⁴ However, it is clear from section 91 that the Director's ultimate decision of whether it should be forwarded for an EIA is not appealable. Nowhere under section 91 of EPEA is the Board given the jurisdiction to consider the Director's decision regarding EIAs. Therefore, the Board cannot consider the issue of the Director's decision not to refer the application to the EIA Director. If the Appellants had concerns with the Director's decision, their recourse would have been to file a judicial review in the courts.

[111] The matter of consultation is not listed in section 91 of EPEA as an appealable issue. Although the Director will review an application to determine if adjacent landowners were included in the process, there is no legislated requirement for consultation by project proponents unless an EIA is required. However, from a project proponent's perspective, it is prudent to receive feedback from adjacent persons to ensure concerns have been met or mitigated.

[112] Another matter raised by the Appellants was the adequacy of the soil testing protocol for soils with hydrocarbons. The protocol for sampling and testing soil containing

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- (m) where the Director designates an area as a contaminated site under section 125, any person who is directly affected by the designation may submit a notice of appeal;
 - (n) where the Director requires a person to pay an administrative penalty under section 237, the person to whom the notice is directed may submit a notice of appeal;
 - (o) where the Director refuses a request for confidentiality under section 35(5)(b), the person to whom the notice is directed under section 35(6) may submit a notice of appeal;
 - (p) persons authorized under Part 9 of the *Water Act*, in accordance with Part 9 of the *Water Act*."

¹⁴ See: Section 41 of EPEA:

"Where any Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration under the environmental assessment process, that Director may refer the proponent or the proposed activity to the Director who is designated for the purposes of sections 43 to 56 so that the proposed activity may be dealt with under section 44."

hydrocarbons is standard for all landfill sites across the province and is basically the same for all contaminated soil. Therefore, unless some specific shortcoming of the protocol is identified, the Board does not see this as an issue that can be addressed by the Board.

[113] It is often the case that other boards or entities have jurisdiction to hear matters related to the proposed project. For example, under the *Municipal Government Act*, municipalities have the authority to determine land use in an area and how the area will develop. These types of decisions are not within this Board's mandate and cannot be considered a valid issue before the Board. Although the Board listed jurisdiction and land use as separate questions to ensure the Parties assessed all the issues critically to determine if they were valid issues, in this decision, the Board will combine the questions, because if the matter pertains to land use, the Board does not have jurisdiction.

[114] The issue of proliferation of industrial activities in the area is a regional planning matter and is not part of the Approval under appeal. Land use issues are within municipal jurisdiction, and if the Appellants are concerned with what is happening in their area, they should continue participating in local planning hearings and continue being involved in the planning process for the County. The Board appreciates the Appellants' concern for cumulative effects of increased industrial growth in the area, but this Board cannot control the rate of growth or the area designated for industry because these are planning issues within a municipality.

[115] Land use issues, including zoning, siting, and set back distances of projects, are within the local municipality's exclusive jurisdiction. The Landfill site was accepted by the municipality as suitable for a landfill. Unfortunately for the Appellants, the site is adjacent to their property and now they are faced with the issues related to landfill sites, but these municipal issues are not matters this Board has any jurisdiction over.

[116] Some issues, such as noise, buffers, and working hours can be controlled by the municipality or it can be included as a condition in an approval issued by the Director. These are matters of concurrent jurisdiction. Although the Director will often leave these issues to the municipality, the Director has the authority under EPEA to regulate noise levels and, related to noise effects, hours of operation. Therefore, the issues where there is concurrent jurisdiction will be assessed to determine if issue estoppel applies.

C. Prematurity

[117] The Approval Holder and Director argued the issue of the leachate plume is speculative. The issue of the leachate plume is closely related to the issue of the geology of the site and groundwater. Because both of these matters have been dealt with previously before the Board in *Fenske*, these issues are estopped from being heard again. Based on the findings in the previous hearings that the site is adequate for the construction of the facility based on geological characteristics and the location of the groundwater aquifer, the Board accepts that, at this point of the operations, the matter of a leachate plume post-closure is speculative. The site geological conditions have previously been found to be such that any leachate not collected during the period after the facility is closed will migrate too slowly to be considered a leachate plume. Therefore, the Board cannot consider the issue of a potential post-closure leachate plume in this appeal because it is too speculative.

[118] The Appellants raised the matter of the possibility of an explosion or degradation of soil or air quality from landfill gas. The possibility of an explosion is highly speculative. There is no indication that an explosion is likely to occur on the site. Likewise, there is nothing about the new Approval which makes the possibility of degradation of soil or air quality from landfill gas anything but speculation. Therefore, the Board will not accept this as an issue at the Hearing.

[119] The speculative nature of these issues is distinguished from the matters of the effects on Bible Creek and its tributary and the construction of special waste cells because these are allowed under the Approval and the Approval Holder has to decide only if and when to proceed. There is nothing speculative on these matters because the Approval allows them to proceed if certain conditions are complied with. Therefore, the Board will assess these issues to determine if issue estoppel applies.

D. Issue Estoppel

[120] Issue estoppel is a judicial concept that is used to prevent parties from re-litigating the same issues. The Board uses a three-part test to determine if issue estoppel applies to the specific circumstances. The three steps are:

“... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decisions ... were the same persons as the parties to the proceedings in which the estoppel is raised...”¹⁵

[121] In determining which issues identified by the Appellants are not issue estopped, the Board considered each of the remaining issues in the three steps process, with particular emphasis on the first step. For the third part of the test, whether it is the same Parties in the proceedings, there is no doubt the Approval Holder and the Director participated in the previous hearings. The same is true with the Appellants.¹⁶ Therefore, the Board accepts that the third part of the test has been met.

[122] With respect to the issue of whether the decisions were final, in both previous hearings the Board provided the Minister with recommendations for varying the 1998 Approval and the 2005 Amendment. The Minister issued ministerial orders in both instances, the first order accepted only some of the Board’s recommendations but the Minister accepted all of the Board’s recommendations in the second order. The first ministerial order was judicially reviewed on the grounds that the Minister is required to provide reasons if the Board’s recommendations are not accepted. The Court of Appeal ultimately determined the Minister did not have to provide reasons and the Minister’s decision was not changed.¹⁷ A ministerial order is intended to be final, except for the right to a judicial review. Therefore, the second part of the test has been met.

[123] This Approval is a renewal of the 1998 Approval and associated amendments. If all of the terms and conditions were the same, it could be argued all of the issues were heard previously. However, one of the purposes of having expiry dates on approvals is to ensure best available technology is incorporated into the approvals where required and to recognize that conditions change over time. This Approval changes the actual project by, among other things,

¹⁵ *Carl Zeiss Stiftung v. Rayner and Keller Ltd. (No.2)* [1967] 1 A.C. 853 at page 935 quoted with approval by Mr. Justice Dickson in *Angle v. Canada (Minister of National Revenue)* [1975] 2 S.C.R. 248.

¹⁶ See: *Mizera et al. v. Director, Northeast Boreal and Parkland Regions #2, Alberta Environmental Protection*, re: (13 July 1999), Appeal Nos. 98-231-98-233-R (A.E.A.B.), and *Fenske and Janus v. Director, Central Region, Regional Services, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (19 May 2006), Appeal Nos. 05-044 and 05-047-R (A.E.A.B.).

¹⁷ See: *Fenske v. Alberta (Minister of Environment)* (2002), 46 C.E.L.R. (N.S.) 155 (Alta C.A.) and *Fenske v. Alberta (Minister of Environment)* (2001), 36 C.E.L.R. (N.S.) 67 (Alta. Q.B.).

increasing the size of its footprint and allowing the development of special waste cells. Therefore, it cannot be said all of the environmental impacts will be exactly the same as those discussed in the previous hearings. Although the Approval Holder argued that issue estoppel should apply to almost all of the issues raised, in the report provided by EBA Engineering Consultants and submitted with the BRWMS's Approval application, it clearly stated there are "...significant changes and/or enhancements that the Commission is seeking in the renewed Approval..."¹⁸ The changes listed included: an expanded footprint; the elimination of chloride and hydrocarbon limits for the acceptance of soils containing hydrocarbons; revision of the requirements and frequency for placement cover; revision of the surface water discharge requirements to the Bible Creek tributary; adjustment of the capping and reclamation requirements; adjustment of the prescribed maximum cell depth; removal of specified maximum height of the landfill; provision for the development of special waste cells; revision of the maximum chloride concentration limit for leachate recirculation; and the provision for the use of a geocomposite leachate collection system as a pre-approved alternative to granular material and/or tire shred.

[124] As soon as the terms and conditions in the Approval are changed from pre-existing terms and conditions, it is difficult to see how issue estoppel can apply to all of the issues raised. If those conditions did not exist at the time of the previous hearings, the Board could not have considered them and they cannot be subject to issue estoppel. Therefore, can be considered as a possible issue before the Board.

[125] The Board must look at the issues identified by the Appellants and, taking into consideration the arguments from all of the Parties regarding each issue, determine whether the environmental impacts will be the same, and therefore heard previously, or whether the matter is a new issue not previously heard or if there is a possible different environmental effect.

1. Hydrology

¹⁸ See: Director's Record, Tab 18, EBA Engineering Consultants Ltd., *Beaver Regional Landfill Approval Renewal Application* (November 2005) at page 6.

[126] The hydrophysical and hydrochemical aspects of the site have been discussed in the previous hearings. What the Board must assess is whether the changes to the facility allowed under the Approval will affect the hydrophysical and hydrochemical aspects of the site. The hydrophysical and hydrochemical aspects of the groundwater regime will not change as a result of the Approval. The location of the groundwater and its characteristics has not been altered by the Approval. Therefore, issue estoppel applies to the hydrophysical and hydrochemical aspects of the site as it relates to groundwater.

[127] The Approval Holder admits the footprint of the project will increase as more cells are developed with no cap as to the height and because a tributary to Bible Creek will have to be altered to accommodate additional cells. Based on these changes, the surface water regime on the site may be affected sufficiently by the proposed changes to require the Board to hear evidence and arguments on the hydrophysical and hydrochemical aspects of the proposed expansion area as it relates to surface water. The surface flow may be affected by the increased height of the cells and the additional cells constructed on the site. The Board will hear evidence on how the expansion of the project allowed under the Approval will impact surface water regimes, including any impacts to the Appellants' property. One of the changes allowed for in the Approval is the ability to realign the tributary to Bible Creek when required. Although an approval under the *Water Act* will be required prior to changes being made to the tributary, the Approval Holder raised the issue of relocating the drainage ditch as part of the expansion. The Board understands that Bible Creek flows through the Appellants' property.

[128] The issue the Board will hear is: What are the effects of the expansion of the Landfill on the surface water regime in the area including, but not limited to, Bible Creek? The Board reminds the Parties that the effects the Board will assess are limited to the expansion of the project.

2. Sufficiency of the Reports

[129] The Board recommended and the Minister ordered the Approval Holder complete five Reports in response to the issues raised in the appeal of the 2006 Amendment. It was clear in the Board's recommendations that the Reports be prepared to provide additional information

to the Director when making his decision regarding this Approval. None of the Reports existed at the time of the 2005 Amendment, so it was impossible for the Board to hear issues related to the findings in the Reports and it is unclear how the Approval Holder and the Director can argue the Reports are subject to issue estoppel.

[130] The Director reviewed the Reports as part of the application process, but the Board has not reviewed any of them from a substantive viewpoint. Because the Reports are part of the application and the Director's Record, the information in the Reports, as it relates to the issues the Board has defined, can be addressed in arguments at the Hearing.

3. Abandoned Wells

[131] The issue of the abandoned wells was raised in the 2006 Hearing. The Appellants were concerned the wells had not been located, and there was the potential for leachate to enter the groundwater through improperly sealed wells. The Board recommended, and the Minister ordered, to have the Approval Holder conduct further research to locate the abandoned wells on the site and discuss its findings in one of the Reports. The Approval Holder completed the report with the conclusion that 51 wells were not located, and it was not clear what steps were being taken regarding the wells identified in the report. The identification of these wells occurred after the 2006 Hearing, and therefore issue estoppel cannot apply. The gaps in information regarding these abandoned but not located wells concerns the Board, so the Board considers it appropriate to include a discussion of these wells and the possible effect on the environment as an appropriate issue for the hearing.

[132] Therefore, one of the issues the Board will hear at the Hearing is: Are the conditions in the Approval with respect to the abandoned wells that have been identified, and that have not been identified, which may yet be encountered during construction in the area where the expansion of the Landfill is approved, appropriate and adequate?

4. Odours, Pests, and Visual Impacts

[133] The Approval Holder and Director argued the matters of odour, pests, and visual impacts were either heard before in the previous hearings or are municipal matters. Although

these matters may have been dealt with in the previous hearings, it was considered with respect to the project as defined under the previous approval. This Approval allows the waste cells to be deeper and with no limit to heights. This creates the possibility of increased odours and pests if the work face is changed, and the possibility of visual impacts to the Appellants' properties. These are issues of concurrent jurisdiction. Under section 98(2) of EPEA, the Board can confirm, reverse, or vary the decision made by the Director and make any decision that the Director could make.¹⁹ Therefore, although the Director may not have dealt with the issues, the Board can hear the matters.

[134] Therefore the Board will hear arguments on the operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics. The Board will hear arguments on these issues, but it is limited to the effects that result from the Landfill expansion authorized under the Approval.

5. Composite Liner

[135] The issue of the composite liner was discussed at the 2006 Hearing. The Board determined the liner as planned was sufficient to protect the groundwater and soils around the cells. One of the Reports completed after the last hearing required the Approval Holder to research the effect of chlorides on the liner. Based on the information provided in the application, including the Reports, the Director included a condition that requires the Approval Holder to construct the cells with a clay liner or composite liner.²⁰ Because the new cells will be constructed the same as existing cells, the Board has determined the issue and, therefore, is issue

¹⁹ Section 98(2) of EPEA provides:

“In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision.”

²⁰ Condition 3.1.3 of the Approval states:

“The Design Plan and Specifications in 3.1.2 for any Class II landfill Cell shall include at a minimum all of the following:

estopped. However, the Board will hear submissions on the issue of the liner as it relates to the special waste cells only. These are new cells built for a different purpose than the existing cells. These cells were not contemplated in previous decisions and there may be issues related to the special waste that may warrant a look at whether composite liners should be a requirement for the special waste cells.

6. Special Waste Cells

[136] The ability to construct the special waste cells is a condition that was included in this Approval that did not exist in the previous approvals issued to the Approval Holder. The Approval Holder and the Director argued the issue of the special cells is premature, but if the issues surrounding these cells are not addressed at this appeal, then the Appellants' rights to have the issue heard by the Board would be expired unless the Approval is amended by the Director to accommodate the special cells.

[137] The provision in the Approval allows for the Approval Holder to construct the special cells 14 days after providing the required documentation to the Director. The wording in the Approval indicates that the Approval does not have to be amended to allow for the special waste cells, thereby preventing the Appellants from being given their opportunity to present their concerns. This appeal is the only opportunity for them to present evidence related to their concerns about special waste cells, and to argue that it is speculative would be denying the Appellants the opportunity to participate in decisions affecting their environment, a right given to them through the purpose section of EPEA.²¹ The Board is aware that the details of the special

²¹ (a) a clay liner or composite liner that provides for containment of the waste constituents....”
Section 2 of EPEA provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

cells have not been finalized, but the construction of such cells to prevent potential impacts should be dealt with at the outset. Therefore, the Board will hear arguments on the appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of the special cells.

7. Emergency Response Plans

[138] The Appellants raised the matter of the emergency response plan and the environmental contingency and response plan. The Board understands these plans have been provided to the Appellants by the Approval Holder. If there are concerns with these plans that relate to the specific issues identified by the Board, the Parties may present arguments to address these concerns.

8. Conclusion

[139] The Board had to determine whether any of the issues raised in the Appellants' Notice of Appeal were decided by the Board in previous decisions and recommendations when the first approval and subsequent amendments were appealed and to assess whether the issues raised were within the Board's jurisdiction. Although in some circumstances this may be straight forward, in this case the Board was faced with a renewal of a previous approval with

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- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
 - (e) the need for Government leadership in areas of environmental research, technology and protection standards;
 - (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
 - (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
 - (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
 - (i) the responsibility of polluters to pay for the costs of their actions;
 - (j) the important role of comprehensive and responsive action in administering this Act.”

major changes incorporated into the terms and conditions and the actual operation of the Landfill.

[140] The Board determined issue estoppel applies to the groundwater issues and issues with respect to the composite liner. However, issue estoppel did not apply to the surface water regime, the abandoned wells in the area of the Landfill expansion, the special waste cells, litter, odour, noise, hours of operation, and aesthetics.

IV. ISSUES FOR A HEARING

[141] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing. Section 95 provides:

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....
- (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.”

[142] Based on the above analyses, the Board has determined the following issues will be heard at the substantive hearing:

1. the appropriateness and adequacy of the conditions in the Approval with respect to the abandoned wells
 - a. that have been identified, and
 - b. that have not been identified, which may yet be encountered during constructionin the area where the expansion of the Landfill is approved;
2. the effects of the expansion of the landfill on the surface water regime in the area including, but not limited to, Bible Creek;
3. the appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of special cells; and
4. the operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics.

[143] Pursuant to section 95(4) of EPEA, the Parties will be allowed to make representations on these issues only.²² If matters beyond these defined issues are argued, the Board will not consider the arguments in its deliberations.

V. DECISION

[144] The Board reviewed the issues raised and the arguments presented by the Parties. Some of the issues, such as effects on groundwater and the composite liner were issue estopped. Other issues, such as other industry being established in the area, were land use issues and were not properly before the Board. The issues of a post-closure leachate plume and explosion from landfill gases were found to be too speculative to be a valid issue in this appeal, and the issue of requiring an EIA was not within the Board's jurisdiction.

[145] Because the proposed project allowed for under the Approval is varied from the previous Landfill, the Board found a number of issues were validly before it. The issues to be heard at the hearing will be:

1. the appropriateness and adequacy of the conditions in the Approval with respect to the abandoned wells
 - a. that have been identified, and
 - b. that have not been identified, which may yet be encountered during constructionin the area where the expansion of the Landfill is approved;
2. the effects of the expansion of the Landfill on the surface water regime in the area including, but not limited to, Bible Creek;
3. the appropriateness and adequacy of the conditions of the Approval with respect to the development and operation of special cells; and
4. the operation of the Landfill as it relates to litter, odour, noise, operating hours, and aesthetics.

²² Section 95(4) of EPEA provides:

“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.”

[146] The Hearing is scheduled for December 17 and 18, 2008.

Dated on September 22, 2008, at Edmonton, Alberta.

Dr. Steve E. Hruday, FRSC, PEng
Chair

Mr. Jim Barlishen
Board Member

Dr. Alan J. Kennedy
Board Member