ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 22, 2009

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by the Cold Lake Fibromyalgia Support Group, Inez Stone, the Ethel Lake Interveners, Sally Ulfsten, Rachel Stone, David Stone, George Elchuk, Andy Leroux, Mary Leroux, and Marinda Stander, with respect to Amending Approval No. 73534-00-06 issued to Imperial Oil Resources Limited, Amending Approval Nos. 68492-00-10 and 68023-00-04 issued to EnCana Corporation, Amending Approval No. 11115-03-02 issued to Canadian Natural Resources Limited, Amending Approval No. 147753-00-02 issued to Husky Oil Operations Limited, and Amending Approval No. 78161-00-01 issued to Blackrock Ventures Inc. (now Shell Canada Ltd.) under the *Environmental Protection and Enhancement Act*, by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Cold Lake Fibromyalgia Support Group et al.* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Limited,*

and Blackrock Ventures Inc. (now Shell Canada Ltd.) (22 January 2009), Appeal Nos. 07-004-021, 028-033, 040-075, 100-105, 112-117-ID1 (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair,
Dr. Dan Johnson, Board Member, and
Mr. Gordon Thompson, Board Member.

SUBMISSIONS BY:

Appellants: Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, the Ethel Lake Interveners, Ms. Sally Ulfsten, Ms. Rachel Stone, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Leroux, and Ms. Marinda Stander.

Director: Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. Darin Stepaniuk, Alberta Justice.

Approval Holders: Imperial Oil Resources Limited, represented by Mr. Peter Miller; EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.), represented by Mr. Shawn Munro and Ms. Deirdre Sheehan, Bennett Jones LLP.

EXECUTIVE SUMMARY

Alberta Environment issued amending approvals to Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.) for the construction, operation, and reclamation of enhanced recovery in-situ oil sands or heavy oil processing facilities and oil production sites near Cold Lake, Alberta. The Amending Approvals are required to allow for a regional air monitoring plan being implemented by the Lakeland Industry and Community Association (LICA).

The Board received Notices of Appeal from the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, the Ethel Lake Interveners, Ms. Sally Ulfsten, Ms. Rachel Stone, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Leroux, and Ms. Marinda Stander. A mediation meeting was held, but no resolution was reached. The Board proceeded to address a number of preliminary motions that were raised with respect to these appeals, including a request for a stay, mediation confidentiality, whether the appeals were frivolous or vexatious, if valid statements of concern were filed, if the appellants were directly affected, the issues to heard at the hearing, whether the hearing should be adjourned until the monitoring plan is approved, and whether it should be a written or oral hearing.

The stay was not granted because the Appellants did not demonstrate there would be irreparable harm in the time it would take for the appeals to be considered. The Board determined the appeals were not frivolous or vexatious, because the appeals raised an important issue – the effectiveness of a regional air monitoring program.

The interpretation of the Participants' Agreement to Mediate, signed by all participants at the beginning of the mediation meeting, requires that all discussions made during a mediation meeting are confidential, unless all participants agree to release the information. Confidentiality does not apply to the Director's Record, the Board's file, or information in the public domain.

The appeals of the Ethel Lake Interveners, Ms. Rachel Stone, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Anne Leroux, and Ms. Marinda Stander were dismissed for

failing to file a Statement of Concern. The appeals of Ms. Inez Stone and Ms. Sally Ulfsten will be heard because they live in the air shed that will be monitored under the Amending Approvals. The appeals filed by the Cold Lake Fibromyalgia Support Group were dismissed because no information was provided to demonstrate how the group itself would be directly affected by the Director's decisions. Although the Board did not find the submissions provided the information required to find the appeals of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners validly before the Board, the Board recognized the broad environmental issues these groups represent. Therefore, the Board allowed Ms. Stone to present the concerns of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners as part of her submissions.

The issues to be heard at the hearing of these appeals will be:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?

2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?

3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?

4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

The appeals will be put into abeyance pending the Approval Holders' and LICA's completion of the review of the LICA air shed zone, including the RWDI Report prepared by Rowan Williams Davis & Irwin Inc. (RWDI) and the Director's decision regarding the monitoring program.

Amending Approval No. 11115-03-02 was arguably moot because Amending Approval No. 11115-03-04 rescinds all previous amending approvals. However, the conditions in Amending Approval No. 11115-03-02 were incorporated into Amending Approval No. 11115-03-04. Therefore, the Board will hear arguments on conditions 4.1.20 to 4.1.31, inclusive, of Amending Approval No. 11115-03-04 issued to CNRL, because these conditions correspond to the conditions set out in Amending Approval No. 11115-03-02.

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I. BACKGROUND

[1] On April 30, 2007, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued the following Amending Approvals under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"):

- Amending Approval No. 73534-00-06 issued to Imperial Oil Resources Limited ("Imperial Oil") authorizing the construction, operation, and reclamation of the Cold Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.

- Amending Approval No. 68492-00-10 issued to EnCana Corporation ("EnCana") authorizing the construction, operation, and reclamation of the Foster Creek enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.

- Amending Approval No. 68023-00-04 issued to EnCana authorizing the construction, operation, and reclamation of the Foster Creek enhanced recovery in situ heavy oil plant near Cold Lake, Alberta.

- Amending Approval No. 11115-03-02 issued to Canadian Natural Resources Limited ("CNRL") authorizing the construction, operation, and reclamation of the Primrose and Wolf Lake enhanced recovery in-situ oil sands and heavy oil processing plant and oil production site near Cold Lake, Alberta.

- Amending Approval No. 147753-00-02 issued to Husky Oil Operations Limited ("Husky Oil") authorizing the construction, operation, and reclamation of the Tucker enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.

- Amending Approval No. 78161-00-01 issued to Blackrock Ventures Inc. (now Shell Canada Ltd.) ("Shell") authorizing the construction, operation, and reclamation of the Hilda Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Hilda Lake, Alberta.[1]

[2] The Amending Approvals incorporated the Lakeland Industry and Community Association Air Quality Monitoring Program network ("LICA") to monitor air quality in the area.

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[1] The various amending approvals will be referred to collectively as the "Amending Approvals," and Imperial Oil, EnCana, CNRL, Husky Oil, and Shell will be referred to collectively as the "Approval Holders."

[3] Between May 29, 2007, and June 8, 2007, the Environmental Appeals Board (the "Board") received Notices of Appeal from Ms. Gail Wolfe on behalf of herself and the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, Ms. Sally Ulfsten, Ms. Inez Stone on behalf of the Cold Lake Fibromyalgia Support Group, Ms. Ruth Sywak, Ms. Rachel Stone, Ms. Inez Stone on behalf of the Ethel Lake Interveners, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Leroux, Mr. David Yoshida, Mr. David Lee, Mr. Jens Harwerth, Ms. Cathy Urlacher, Ms. Marinda Stander, Ms. Barbara Johnson, and Ms. Inez Stone on behalf of herself and Ethel Lake Interveners.[2]

[4] The Board acknowledged receipt of the appeals and notified the Appellants, the Approval Holders, and the Director (collectively, the "Participants") of the appeals. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to the Amending Approvals, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received by the Board on July 9, 2007, and copies were provided to the Appellants and Approval Holders on July 12, 2007.

[5] On July 17, 2007, Ms. Stone notified the Board that she would be representing the CLFSG, because Ms. Wolfe was unable to continue representing the CLFSG membership.

EnCana, CNRL, Husky Oil, and Shell provided joint submissions and will be referred to as the "Operators."

[2] Ms. Wolfe, Ms. Sywak, Ms. Urlacher, Mr. Yoshida, Mr. Lee, Mr. Harweth, and Ms. Johnson withdrew their appeals. See: *Wolfe et al.* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (07 August 2007), Appeal Nos. 07-004 – 021, 028 – 033, 040 – 075, 100 – 105 & 112 – 117-D (A.E.A.B.); *Yoshida* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (25 February 2008) Appeal Nos. 07-076–081-DOP (A.E.A.B.); *Lee* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (29 October 2007), Appeal Nos. 07-082–087-DOP (A.E.A.B.); *Harwerth* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (16 June 2008), Appeal Nos. 07-088-093-DOP (A.E.A.B.); *Johnson* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (25 April 2008), Appeal Nos. 07-106–111-DOP (A.E.A.B.).

The remaining people and groups who filed Notices of Appeal, including the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, Ms. Sally Ulfsten, Ms. Rachel Stone, the Ethel Lake Interveners, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Leroux, and Ms. Marinda Stander, will be referred to collectively as

[6] On July 23, 2007, the Board notified LICA of the appeals and the Board provided a copy of the Board's file to LICA.

[7] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board[3] asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[8] On July 2, 2007, the Appellants requested a Stay. The Board asked the Appellants to provide responses to the Stay questions.[4] The Appellants provided their submission on July 30, 2007. After discussions with the Participants, the Appellants notified the Board on October 2, 2007, that they wished to go to a mediation meeting and that the review of the Stay could be concluded at a later date.

[9] On November 27, 2007, the Board confirmed that a mediation meeting would be held on February 5, 2008.

[10] On January 18, 2008, The Board wrote to the Participants, asking whether the mediation meeting should be postponed until after the release of the network review report prepared by RWDI. The Participants responded, agreeing to postpone the mediation meeting. The Board was provided with a copy of the network review report entitled, *Review of the LICA Ambient Air Quality Monitoring Network* (the "RWDI Report") on March 4, 2008. The Board confirmed with LICA that all of the Participants received a copy of the RWDI Report.

[11] The mediation meeting was held on April 11, 2008, in Cold Lake, Alberta. All of the Participants signed the Participants' Agreement to Mediate that laid out the confidentiality

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the "Appellants."

[3] In 2008, the Alberta Energy and Utilities Board was divided into the Alberta Utilities Commission and the Energy Resources Conservation Board ("ERCB").

[4] The Appellants were asked to respond to the following questions:

"1. What are the serious concerns of the [Appellants] that should be heard by the Board?

2. Would the Appellants suffer irreparable harm if the Stay is refused?

3. Would the Appellants suffer greater harm if the Stay was refused pending a decision of the Board, than Imperial Oil Resources Limited, Encana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited and Shell Canada Ltd. would suffer from the granting of a Stay?; and

terms of the mediation meeting and the ground rules. Even though productive discussions ensued, the Participants were unable to come to a satisfactory resolution.

[12] On April 16, 2008, the Board requested the Participants provide any preliminary motions they wanted to raise. On May 27, 2008, the Board provided a schedule to receive submissions on the following preliminary motions:

1. The Stay request;
2. That the Board formally rule on the question of whether "facts and evidence" presented at a Mediation may be characterized as "communications made to or through the Mediator," and if so, whether such characterization contradicts Rule 2 under "Confidentiality" of the Ground Rules for Mediation Meetings;
3. Whether the appeals are vexatious and without merit, and if they are, that they be dismissed;
4. Whether the Appellants are directly affected, and if not, that their appeals be dismissed;
5. Whether the Appellants submitted Statements of Concern with Alberta Environment, prior to filing Notices of Appeal with the Environmental Appeals Board, and if not that their appeals be dismissed;
6. Whether the Board should adjourn its proceedings until 2009, until the Director has considered the Approval Holders' and LICA's response to the RWDI Report;
7. Whether a Hearing, should one be held, be conducted orally or in writing;
8. The issues to be considered at a Hearing of the appeals, should one be held;
9. In addition to addressing the effect of these preliminary motions, the Board asked the participants to address CNRL Amending Approvals No. 11115-03-02, 11115-03-03, and 11115-03-04, which were issued on April 30, 2007, May 29, 2007 and September 6, 2008, and were not appealed.

[13] The Board received the Appellants' submission on June 12, 2008, the Operators, Imperial Oil, and the Director provided their response submissions on June 26, 2008, and the Appellants' rebuttal submission was provided on July 25, 2008.

[14] On September 16, 2008, the Board notified the Participants that the Stay application was denied and that reasons would be provided later.

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

[15] On October 16, 2008, the Board notified the Participants that Ms. Inez Stone and Ms. Sally Ulfsten would have standing at the Hearing, and although the appeals of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners were dismissed, the Board would hear the broader concerns of these groups as raised in Ms. Inez Stone's appeal. The Board stated the issues that would be heard at the Hearing are:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?
2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?
3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?
4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

[16] In the same October 16, 2008 letter, the Board notified the Participants that the appeals would be held in abeyance pending the completion of the review of the LICA air shed monitoring program, including the RWDI Report. The Board noted the Approval Holders were required to submit plans to address items raised in the review to the Director by December 31, 2008. The Board asked for available dates for a hearing between March 16, 2009 and April 30, 2009. A hearing has been scheduled for April 27 and 28, 2009, in Cold Lake, Alberta.

II. Stay Request

A. Appellants' Submission

[17] The Appellants were concerned with the impacts and loss of data that has occurred since they agreed not to proceed with the Stay application in 2007. The Appellants argued that not granting the Stay would mean harm may occur to the residents of the air shed due to unmonitored exceedances.

[18] The Appellants stated they are only asking for previous monitoring requirements, a cost that was budgeted for and incurred by the Approval Holders prior to the issuance of the Amending Approvals. The Appellants argued that if the Approval Holders sold monitoring equipment after the July 2, 2007 Stay application, it was a risk they took on themselves.

[19] The Appellants asked that pre-Amending Approvals monitoring requirements be re-instated and that the Director conduct inspections to verify that all operations are in compliance. The Appellants also requested that monitoring data be provided to them.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[20] The Operators conceded that, to the extent that the Notices of Appeal raised issues related to the adequacy of the LICA monitoring program to monitor emissions from the facilities governed by the Amending Approvals, a serious issue was raised by the Appellants.

[21] The Operators stated that irreparable harm could only occur if the Appellants are adversely affected to the extent that the harm could not be remedied in the event of a successful appeal. The Operators also stated the Appellants must show there is a real risk that harm will occur and it cannot be mere speculation.

[22] The Operators argued the Appellants' statement that harm may occur to the residents of the air shed due to unmonitored air quality exceedances is mere speculation. The Operators stated the Appellants provided no evidence or connection between the LICA monitoring program and harm to human health.

[23] The Operators stated air quality monitoring and data collection are still required under the Amending Approvals. The Operators explained the Amending Approvals simply change the air quality monitoring parameters, such as type or location of monitors, and require the Operators to coordinate their monitoring through LICA. The Operators explained the collection of air quality data is ongoing and is not eliminated by the Amending Approvals. The Operators argued a change in the monitoring program does not result in irreparable harm.

[24] The Operators stated the Amending Approvals relate to existing facilities only and do not result in new facilities or changes to the facilities, and therefore, there will not be any

irrevocable changes to the environment. The Operators submitted that the Appellants failed to demonstrate irreparable harm will occur if the Stay is not granted and, therefore, the Stay application must be dismissed.

[25] The Operators argued the Appellants also failed to meet the balance of convenience test because there was no evidence the Appellants would be harmed if a Stay was not granted.

[26] The Operators argued they would face harm if the Stay was granted because they have already ceased operating some monitoring stations or not made arrangements to rent continuous monitors that would be required under the original approvals. The Operators stated they are moving to fully implement the Amending Approvals and would suffer harm in the form of increased operational costs and expenses if the Stay was granted. They explained they would be required to move and alter their air shed monitors and monitoring operations to comply with the original approvals, and if the appeals are unsuccessful, they would have to reinstate the requirements of the Amending Approvals. The Operators argued the status quo should be preserved.

[27] The Operators submitted that the public interest is sometimes viewed in terms of the interest that the decision-maker under appeal is designated to protect. The Operators submitted that the public interest favours permitting the statutory exercise and process followed by the Director in issuing the Amending Approvals to stand. The Operators argued that if the decision of the Director is stayed, the interest of the public in the integrity of the approval process under EPEA is undermined.

[28] The Operators requested the Board to determine expeditiously if the Stay is granted and the monitoring conditions of the original approval be reinstated, because the Operators will require as much notice as possible to secure monitoring equipment to complete the monitoring conditions of the original approvals for the 2008 year.

C. Imperial Oil's Submission

[29] Imperial Oil submitted the Stay request should be denied. Imperial Oil argued the Appellants misunderstand the purpose and intent of the monitoring devices that are the subject of the Amending Approvals. Imperial Oil stated the release of air contaminants is regulated through its original approval, which has not been changed by its Amending Approval. Imperial Oil explained air contaminants are monitored on a continuous basis by instrumentation that is separate from the monitoring devices described in the Amending Approvals. Imperial Oil stated its reporting of measurable releases confirms a very good compliance history and no risk to the public.

[30] Imperial Oil stated the Amending Approvals create a more comprehensive regional monitoring capability that will provide better air quality data for the region. Imperial Oil argued a Stay would result in a continuation of a less effective data collection system.

[31] Imperial Oil requested the Board rule on the motion immediately, because without the full implementation of the entire air shed monitoring network, there is no way to continuously monitor air quality in all areas of the air shed.

D. Director's Submission

[32] The Director took no position on the Stay request.

E. Appellants' Rebuttal Submission

[33] The Appellants argued the Stay must be granted to provide timely and effective monitoring of the Approval Holders' facilities in view of public safety. The Appellants argued re-instating pre-Amending Approvals' monitoring requirements would prevent potential harm to the residents and the environment in the air shed.

[34] The Appellants disagreed with Imperial Oil's allegation that the Appellants misunderstand the purpose and intent of the monitoring. The Appellants argued Imperial Oil was relying on the current, inefficient LICA monitoring program to support its assertions that there are no ambient air quality exceedances, whereas the more rigorously collected data in the past indicate otherwise.

[35] In response to Imperial Oil's statement that it has a very good compliance history and caused no risks to the public, the Appellants stated the data included in the 2003 and 2006 Jacques Whitford reports and the 2008 RWDI Report show otherwise. The Appellants stated the most disturbing thing about the exceedance and release data is when no cause is found or determined.

[36] The Appellants argued the RWDI Report contradicts Imperial Oil's assertion regarding better air quality data, indicating LICA's monitoring program will not catch exceedances, properly monitor ambient air quality, or ensure compliance monitoring in the region.

[37] The Appellants explained that if the Amending Approvals are implemented, there would only be three continuous monitoring stations in the region, down from 13 continuous monitoring stations and in direct contrast to Imperial Oil's assertions of an improved monitoring network. The Appellants expressed concern on the number of static monitors to be removed from the Approval Holders' sites, including 54 from Imperial Oil, 8 from Shell, 40 from CNRL, 10 from EnCana, and 4 from Husky, because these monitors provide data on the acidification of their farmland and surface water bodies. The Appellants stated static monitors picked up exceedances in the past. The Appellants noted passive monitoring at the plant sites will also be cut.

[38] The Appellants argued there is a serious issue to be tried. They stated they have not speculated the irreparable harm since the RWDI Report provides evidence of a connection between the ineffectiveness of the LICA monitoring program and harm to human health. The Appellants noted the RWDI Report indicates the current monitoring system is inadequate regarding the Alberta Ambient Air Quality Guidelines, compliance, and parameters monitored relating to health. The Appellants argued the Stay must be enforced and pre-Amending Approvals monitoring put in place to prevent harm to the residents of the air shed and for public safety.

[39] The Appellants stated the addition of CNRL's Primrose Lake Expansion Project resulted in an irrevocable change to the environment along with increased emissions. The Appellants argued that ignoring a subsequent amending approval in this case would not take into

account the intent of EPEA, and that is why the Appellants pointed out the change to the Shell plant and facilities and want them included as issues in these appeals.

[40] The Appellants argued they established irreparable harm, irrevocable change to the environment, increased emissions, and irreplaceable data loss, and therefore, their request for a Stay should be granted.

[41] The Appellants argued there is evidence in the RWDI Report that the LICA monitoring network is inadequate, indicating the greater harm would be suffered by the residents of the air shed if the Stay was not granted. They argued the harm would be to the natural resource, the air, and their use of that natural resource.

[42] The Appellants stated the Approval Holders took the risk upon themselves to move to fully implement the monitoring under the Amending Approvals in spite of the Stay request and appeals.

[43] The Appellants argued the public interest is best served by granting the Stay. They submitted that the purpose of EPEA would then be followed and the apparent bias towards industry would be avoided.

[44] The Appellants asked that the pre-Amending Approvals monitoring requirements be re-instated and that inspections be conducted to verify that all operations are in compliance. The Appellants also requested the monitoring data be provided to them.

[45] The Appellants asked for a timely solution because they have been subjected to increases in release events, and should the Stay be granted, their anxiety would be eased.

F. Discussion

[46] The Board is empowered to grant a Stay pursuant to section 97 of the EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted…."

[47] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[5] and *Stelter*,[6] is based on the Supreme Court of Canada case of *RJR MacDonald.*[7] The steps in the test, as stated in *RJR MacDonald,* are:

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[8]

[48] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[9]

[49] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[10] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one

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5 *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* re: *Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

6 *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

7 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 ("*Metropolitan Stores"*) and *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 41.

8 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 43.

9 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 50.

10 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110.

party could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*,[11] the Alberta Court of Appeal defined irreparable harm by stating:

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be denial of justice."[12]

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.[13] The damage that may be suffered by third parties may also be taken into consideration.[14]

[50] The third step in the test is the balance of convenience: "…which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[15] The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The Courts have considered factors such as the cumulative effect of granting a Stay,[16] third parties who may suffer damage,[17] or if the reputation and goodwill of a party will be affected.[18]

[51] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized the public interest is a special factor in constitutional cases.[19]

[52] The environmental mandate of this Board requires the public interest be considered in appeals before the Board, and therefore the public interest will be considered in the

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11 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

12 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

13 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

14 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

15 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

16 *MacMillan Bloedel* v. *Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

17 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

18 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

19 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 90.

balance of convenience.[20] The Board has, therefore, included the public interest as a separate step in the Stay test. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[21] The effect on the public may sway the balance for one party over the other.[22]

[53] As indicated in *RJR MacDonald,* the first step in determining if a Stay should be granted requires the Appellant to demonstrate that there is a serious issue to be tried and the claim is not frivolous or vexatious.

[54] The Appellants raised the issue of the effectiveness of the monitoring as required under the Amending Approvals. The Appellants live in the air shed and have an interest in ensuring the emissions are properly monitored. Although Imperial Oil argued the Appellants misunderstand the intent of the Amending Approvals, the Board does not agree. The Appellants raised an important issue concerning the protection of their air shed and the air they breathe. The Board considers this an important issue and the appeals are not frivolous or vexatious. Therefore, the first step has been met.

[55] In assessing irreparable harm, the Supreme Court of Canada states that it must be determined "…whether the refusal to grant relief could so adversely affect the applicant's own

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[20] The Court in *RJR MacDonald,* at paragraph 64, stated: "The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

[21] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 66.

[22] The Court in *RJR MacDonald,* at paragraph 68, stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[23]

[56] To determine if the harm is irreparable, the Board looks at whether the Appellant could not be compensated for any damages that may result from the refusal to grant a Stay. The onus is on the Appellants to demonstrate they will suffer irreparable harm if the Stay is not granted.

[57] The harm noted by the Appellants is essentially the loss of data from pre-existing monitoring stations. The Approval Holders explained that monitoring is continuing, including emissions from the facilities. The Board acknowledges that the data collected under the Amending Approvals are different from the data collected previously. However, the Board does not consider the loss of this data irreparable harm during the time it will take to hear the appeals.

[58] The Board recognizes that lost data is irretrievable. If the existing monitoring equipment was the only source for data collection, the Board may be of a different view. However, in this case, monitoring will continue and data will be collected and available.

[59] The Appellants also expressed concern about the potential of having a release from one of the facilities in the time it will take to consider the appeals. This concern is speculative, and the Board cannot allow a Stay based on a harm that is purely speculative. Each of the Approval Holders is required to continue monitoring emissions from their own facilities as required in the original approvals. If a release occurs, there will still be monitoring data available. Monitoring will not prevent a release if it occurs, only measure the extent and type of release.

[60] The Appellants have failed to demonstrate they will suffer irreparable harm from the change in monitoring allowed under the Amending Approvals during the time it will take to hear the appeals. Therefore, the Board will not grant a Stay on the basis of irreparable harm.

[61] For the balance of convenience, the Board must look at which party would suffer the greatest harm if the Stay was granted. In this case, the Appellants would lose data, which is also a loss to the Approval Holders. If the data are not gathered, it cannot be replicated. Because

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[23] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 58.

both the Appellants and the Approval Holders would not have the data, it cannot be said that one side would suffer a greater harm. The Board recognizes the Appellants are more concerned about the loss of the monitoring stations, but they have not demonstrated to the Board that the harm would be greater to them. The Appellants also raised the matter of protecting their health and the possibility of releases. As stated before, emission releases would not be controlled by the amount of monitoring, and the possibility of a release occurring during the time it takes to consider these appeals is speculative.

[62] The Approval Holders noted the expense of acquiring the monitoring equipment. Although the Board is not granting the Stay, there is the possibility that, once the Board hears all of the evidence at the hearing, the Board will recommend that the Amending Approvals be reversed and monitoring be returned to the original level. Removing existing monitoring equipment at this stage of the appeal process is a risk that the Approval Holders have to determine is worth taking.

[63] In this case, neither the Appellants nor the Approval Holders will suffer the *greater harm*; therefore, it is not a determinative factor in deciding the Stay request.

[64] However, the Supreme Court stated in *American Cyanamid* that, when all things are equal, the *status quo* should be preserved. As the Appellants have failed to prove, at this point of the proceedings, that they will actually be harmed if the Stay is refused, the Board accepts the position of maintaining the *status quo*, and therefore, on this basis, the application for a Stay is denied.

[65] On the question of the public interest, the Supreme Court in *RJR MacDonald* stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the

> impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[66] Further, in determining the public interest, the Supreme Court directs us to look to the "…authority that is charged with the duty of promoting or protecting the public interest…."

[67] It is the public interest that is important in this appeal. Appeals were received from a number of individuals who live in the air shed affected by the decision of the Director appealed. The Appellants are concerned about the air quality in the area where they live, and they want to ensure the best possible measures are taken to protect the air shed, the environment, and ultimately, their health. At this stage of the process, however, it is difficult to determine, based on the information provided in the submissions, whether the changes to the monitoring conditions is a benefit or a detriment to the protection of the air shed. Because there is this uncertainty, it is generally accepted the status quo will prevail. It is generally accepted that the public official making the decision was acting in the public interest. The Director decided to amend the monitoring requirements for the Approval Holders to make it a regionally based monitoring system. Therefore, the Amending Approvals are the status quo, and therefore, the Stay is also denied on this basis.

[68] Although the Appellants demonstrated they have a serious issue to be considered, they did not meet the onus of demonstrating they would suffer irreparable harm or would suffer the greater harm if the Stay was denied. In this case, the public interest supports the status quo remains in effect. Therefore, the Board denies the Stay request.

III. Mediation Confidentiality

A. Appellants' Submission

[69] The Appellants stated facts and evidence are such no matter where and how they are presented.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[70] The Operators took no position on this motion.

C. Imperial Oil's Submission

[71] Imperial Oil argued the Board ruled that facts and evidence cited by Imperial Oil in support of its motion would not be allowed in the formal hearing process.[24] Imperial Oil stated the Board's ruling was based on clause 4 of the *Participants' Agreement to Mediate* (the "Agreement").[25] Imperial Oil submitted that facts and evidence that were discussed in the mediation meeting "at large" is not communication made to or through the mediator and should not be disallowed.

[72] Imperial Oil referred to point 6 under "Communication Among Participants" in the Agreement, and stated the qualifier described in clause 4 of the Agreement is intended to apply to the type of conversation described in point 6, that is the communication made directly to the mediator in private caucus and the participant requests that it be conveyed to the other participants.[26]

[73] Imperial Oil stated it is clear that offers, tentative agreements, or other proposals are not admissible in a Board hearing, but issues of fact and evidence are admissible because they are expressly exempted from the confidentiality provision.

[74] Imperial Oil argued it is illogical and erroneous to interpret one provision of the Agreement in such a way that nullifies another when a logical interpretation is available.

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[24] Imperial Oil is referring to the Board's letter of May 12, 2008, in which the Board expressed concern that some of the contents in Imperial Oil's May 5, 2008 letter were subject to to the *Participants' Agreement to Mediate*.

[25] Clause 4 of the *Participants' Agreement to Mediate* states:

> "4. All communications made to or through the Mediator and EAB staff who attend the mediation shall be confidential and without prejudice to the position of a Participant in any further proceedings. This means that communications exchanged during this mediation can only be raised in subsequent Environmental Appeals Board proceedings or court proceedings with the written consent of all Participants. Confidentiality does not apply to the documents, records, materials or other correspondence provided to the EAB with respect to the main part of the appeal even if they are used in the context of the mediation. Participants are not permitted to record the mediation meeting…."

[26] Point 6 under "Communication Among Participants" states:

> "In the event that a Participant is unable to speak about a concern directly to other Participants, he or she can speak with the Mediator in a private caucus during the mediation. Upon request, all information or views shared during conversations with the Mediator will be kept confidential."

Imperial Oil stated it is the principle of interpretation that a meaning must be found that gives effect to every provision of an agreement or statutory instrument.

[75] Imperial Oil stated that all of the facts and evidence it cited related to or relied on the RWDI Report, for which confidentiality was excluded. Imperial Oil noted the Appellants did not take issue with that position, and therefore, the Board should decide that all facts and evidence presented at the mediation meeting will be admissible at the Hearing.

D. Director's Submission

[76] The Director disagreed with Imperial Oil's position that it should be able to rely on certain comments made at the mediation meeting in arguing other preliminary motions. The Director stated clause 4 and the ground rules on confidentiality in the Agreement protect the confidentiality of all communication during mediation with the narrow exception of facts and evidence.[27] The Director explained facts and evidence are those items that exist independent of the mediation such as the Director's Record or statements made in public forums.

[77] The Director submitted that the comments Imperial Oil seeks to rely on are protected from disclosure by the confidentiality provisions of the Agreement, because the comments are not fact or evidence within the meaning of the Agreement.

[78] The Director argued that Imperial Oil's interpretation of the Agreement would reduce the confidentiality protection afforded to participants at mediation to settlement offers, tentative agreements, and discussions with the mediator in private caucus. The Director submitted this position was incorrect and does not reflect the meaning of the provisions of the Agreement read in context. The Director added, "Imperial Oil's position would significantly

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[27] The ground rules on confidentiality in the *Participants' Agreement to Mediate* provide:

"In order to enhance the free flow of appropriate information, to allow for discussion of past differences, and to encourage the generation of options for solution; the EAB also abides by the following confidentiality constraints:…

2. If the mediation does not result in a resolution of the appeal, comments, statements, and dialogue beyond the issues of fact and evidence that will be the subject of a formal EAB hearing, are not admissible in the formal EAB proceedings."

undermine confidentiality and without prejudice privilege as a cornerstone for productive mediation discussions designed to settle disputes."[28]

E. Appellants' Rebuttal Submission

[79] The Appellants agreed with the Director's submission.

F. Discussion

[80] The purpose of a mediation meeting is to allow the participants to openly discuss their concerns and to offer possible solutions in an environment that encourages open exchange of ideas and concerns. To be able to have this open exchange of ideas and concerns, mediations are confidential. What is said and discussed during that time is not to be discussed outside of the mediation without consent of all participants involved. To ensure all participants understand this, all participants are provided with information on the mediation process and they are required to sign the Agreement at the start of the mediation meeting. The rules of confidentiality are discussed in this Agreement and are reviewed by the mediator at the start of the mediation meeting. The Agreement clearly states the Board's mediations are confidential proceedings and clauses 1 and 2 under Confidentiality states that "…any offers, tentative agreements, or other proposals…" and "…comments, statements and dialogue…" are not admissible in a Board hearing. The only exception provided for are the facts and evidence.

[81] Imperial Oil is trying to interpret the Agreement so that confidentiality only applies to those conversations held with the mediator and tentative agreements. Accepting this interpretation would undermine the intent of the Agreement. Mediation is intended to allow participants to have to an open dialogue and present concerns and potential solutions in an atmosphere where no matter how unusual the suggestion may be, it will not be judged or shared elsewhere. It is often the open, free discussions that are allowed to happen that lead to solutions.

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[28] Director's submission, dated June 26, 2008, at paragraph 11.

[82] In this case, a resolution was not achieved, but the discussions that took place between the Participants are still subject to the confidentiality principles of mediation. With respect, the Board cannot agree with the arguments presented by Imperial Oil. To accept Imperial Oil's interpretation would destroy the usefulness of mediation as a means to settle appeals and would not be in the best interest of any of the Participants.

[83] Facts and evidence can be presented at the hearing. Facts and evidence include the Director's Record, the Board's record, and any documents in the public domain, such as the RWDI Report. What cannot be presented at the hearing are discussions, offers, or alternatives that were discussed at the mediation, whether these were made in caucus or in the mediation meeting with all of the Participants present.

IV. Merit of Appeals

A. Appellants' Submission

[84] The Appellants argued their appeals were not vexatious or without merit because they did not believe the Director's decision met the intent of EPEA. The Appellants stated they were not trying to change policy but were trying to enhance its use.

[85] The Appellants argued the Minister must, under section 11 of EPEA,[29] address health concerns through environmental protection policies. The Appellants noted section 14(1) of EPEA[30] requires the Minister to develop ambient environmental quality objectives in qualitative or quantitative terms for all or part of Alberta, including the Appellants' air shed. The Appellants explained their air shed is 15,200 square kilometers with numerous plants, wells, and

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[29] Section 11 of EPEA states:

"The Minister shall, in recognition of the integral relationship between human health and the environment, co-operate with and assist the Minister of Health and Wellness in promoting human health through environmental protection."

[30] Section 14(1) of EPEA provides:

"In order to further the protection and wise use of the environment, the Minister shall, after having complied with any applicable regulations regarding public input or, in the absence of regulations, after having engaged in any public consultation that the Minister considers appropriate, develop ambient environmental quality objectives in qualitative or quantitative terms for all or part of

projects being quickly approved while continuous ambient air monitoring has decreased from 13 stations to 3 when the Director's decisions come into effect. The Appellants argued that had regional monitoring been added to existing monitoring, then the plan would be more credible.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[86] The Operators took no position on this motion.

C. Imperial Oil's Submission

[87] Imperial Oil submitted that the basis for the Appellants' appeals lies in the recommendations contained in the RWDI Report. Imperial Oil argued the only deficiencies in the current proposed monitoring program which the Appellants identified were raised in the RWDI Report. Imperial Oil stated the air shed monitoring network will be improved when the RWDI Report recommendations are implemented, and the Approval Holders, LICA, and the Director are committed to considering the recommendations and developing and implementing a plan that addresses the issues raised in the RWDI Report. Imperial Oil stated this is required in its Amending Approval, and the Appellants are not asking for anything more to be done than what is already required to be done.

[88] Imperial Oil stated the Appellants raised a number of concerns with the broader LICA mandate and objectives that are unrelated to Imperial Oil's Amending Approval. Imperial Oil explained it does not operate any cold flow tanks under the operating approval.[31] Imperial Oil argued the Appellants are attempting to use the appeal process to regulate third party emissions from unregulated facilities, an inappropriate and vexatious use of the appeal process.

[89] Imperial Oil stated the Appellants' issues relate to the concept and the government's policy respecting the community based monitoring program. Imperial Oil argued the Appellants want the Board to recommend broader monitoring parameters and criteria that would meet broader community objectives but that are unrelated to Imperial Oil's operations.

Alberta."

[31] The Board notes the Appellants raised the matter of cold flow tanks, but these facilities are not covered by the Amending Approvals.

Imperial Oil noted the Appellants had concerns about the effectiveness of LICA's implementation of the program. Imperial Oil submitted these concerns are unrelated to Imperial Oil's operating approval and appealing the Amending Approval is an inappropriate and vexatious use of the appeal process.

[90] Imperial Oil stated the Appellants raised issues that are broader than the Amending Approvals and are beyond the Board's jurisdiction. Imperial Oil argued the appeals are focused on the activities of the "many industry emitters" whose activities are not regulated in the way Imperial Oil's plants are regulated under the initial approval. Imperial Oil stated the Board has no jurisdiction to deal with those concerns in these appeals.

[91] Imperial Oil argued that many of the concerns raised by the Appellants fall within the federal government's jurisdiction and beyond the Board's jurisdiction. Imperial Oil stated the Appellants questioned the adequacy of the LICA regional air shed monitoring network to deal with the broad issues and the federal clean air monitoring initiative.

[92] Imperial Oil explained its Amending Approval does not create a delegation of the Director's responsibility or authority. Imperial Oil stated it must submit monthly reports to the Director, apply to the Director for any amendments to the monitoring requirements, implement the recommendations of the RWDI Report that are authorized by the Director, and implement plans as authorized by the Director.

[93] Imperial Oil noted Ms. Ulfsten stated in her Notice of Appeal that, "Supporting my understanding of how Industry (oil sands) control the politicians and how politicians do not allow the Department to enforce AEPEA." Imperial Oil suggested this demonstrates Ms. Ulfsten's appeal is vexatious and without merit because it "…lacks sufficient grounds for action and seeking only to annoy [the] defendant."[32] Imperial Oil argued the same justification for finding Ms. Stone's appeal vexatious and without merit, because Ms. Stone stated in her Notice of Appeal that "The public service duties of Alberta Environment have been compromised to partisan political agendas." Imperial Oil argued the Appellants offered no evidentiary basis for

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[32] Imperial Oil's submission, dated June 25, 2008, at page 6, quoting the Oxford Dictionary.

the statements and that the statements are untrue, and if they were true, they are irrelevant to Imperial Oil's operating approval.

[94] Imperial Oil argued Ms. Stone misinterpreted the effect of the Amending Approvals when she stated her health would be affected with more releases of air pollution and toxins and increased volatile organic compounds ("VOCs"). Imperial Oil explained its Amending Approval does not alter the emissions that are permitted to be released by its facilities. Imperial Oil stated the reports referred to by Ms. Stone deal with potential, province-wide emissions which may result from potential activity that may take place throughout the province in the future, and not Imperial Oil's Cold Lake operations. According to Imperial Oil, the appeals are without merit and should be dismissed.

[95] Imperial Oil argued the remedy sought by Ms. Ulfsten is identical to the conditions contained in its Amending Approval. Imperial Oil stated its Amending Approval requires it to conduct an independent, third party review of the proposed monitoring network, which was done through its participation in the RWDI review. Imperial Oil explained the RWDI Report recommended the Approval Holders consider a number of improvements to the proposed monitoring network, and the Approval Holders must implement the recommendations and plans authorized by the Director.

[96] Imperial Oil explained the LICA community based monitoring network is a consensus-based, collaborative initiative developed by all stakeholders and developed to meet the requirements of EPEA. Imperial Oil stated numerous public meetings were conducted, and the Appellants attended some of the meetings. Imperial Oil stated there was wide-spread community support for the LICA program resulting from the consultation program, but the Appellants asked for further opportunities to input their ideas. Imperial Oil stated it has proposed, through the LICA network, further extensive public consultation over the next eight months. Imperial Oil submitted the concerns of the Appellants will be fully addressed by the proposed consultation process if they choose to participate in it. Imperial Oil argued it would not serve the public interest if the Board establishes a parallel consulting process focused on the select agendas of the Appellants while ignoring the community-based, consensus approach.

[97] Imperial Oil explained its Amending Approval does not alter the current compliance monitoring requirements, and the monitoring required in its Amending Approval is in addition to all other, point source, compliance monitoring requirements in the initial approval.

[98] Imperial Oil argued the Appellants filed the appeals to ask the Board to direct the Director to undertake activities that are unrelated to Imperial Oil's Amending Approval. Imperial Oil argued the appeals are based on a series of misunderstandings that are easily clarified through a review of its Amending Approval itself and further documentary evidence. Imperial Oil argued the Appellants are asking the Director to do nothing more than what he has already directed Imperial Oil to do through its Amending Approval. Imperial Oil argued the appeals are without merit and not in the public interest. Imperial Oil stated the public interest would be best served by allowing the Approval Holders, LICA, and the Director to complete the work they have set out to accomplish.

D. Director's Submission

[99] The Director took no position on this issue.

E. Appellants' Rebuttal Submission

[100] The Appellants stated Imperial Oil misunderstood the Appellants' position and they disagreed with the comments that the Appellants are not asking for anything more to be done than what is already required to be done.

[101] The Appellants stated that, in 2005, Imperial Oil publicly committed to monitoring VOCs from cold flow tanks. The Appellants stated a member of LICA committed privately in 2006 to monitoring VOCs and polycyclic aromatic hydrocarbons ("PAHs") and to establish a baseline of VOCs and PAHs levels. The Appellants stated there has been no further monitoring of these compounds as promised.

[102] The Appellants stated their broader concerns apply to Imperial Oil operations because it was a joint application for the Amending Approvals and Imperial Oil appointed LICA as its agent.

[103] The Appellants argued the Board has jurisdiction to deal with the Amending Approvals of the Approval Holders located on the Cold Lake Air Weapons Range, including CNRL Primrose North, South, and East and EnCana Foster Creek pilot plant and commercial plant. The Appellants noted the Director and the Operators pointed out in their submissions that air emission enforcement is the responsibility of Alberta Environment.

[104] The Appellants stated Ms. Stone based her appeal on the many facts and evidence provided to the Participants to these appeals. The Appellants argued Imperial Oil also took Ms. Ulfsten's comments out of context to support Imperial Oil's misleading contention. The Appellants disagreed that the appeals are vexatious given the definition in the *Pocket Dictionary of Canadian Law*.[33]

[105] The Appellants argued the Amending Approvals alter the way emissions are monitored at five Imperial Oil plants and facilities, four CNRL plants and facilities, one Husky facility, two EnCana facilities, and one Shell facility. The Appellants argued Imperial Oil willingly participated in a joint application and now appears to want to be considered a "… separate entity to avoid owning up to potential, province-wide emission increases, and their proper monitoring."[34]

[106] The Appellants did not agree that the Amending Approvals already contain the remedies for the Appellants' issues. The Appellants stated the Amending Approvals do not contain a specific date for the plans, only that the plans must be implemented as authorized by the Director. The Appellants explained they want a timely response and date set for the hearing because they breathe the air all the time. The Appellants stated they have seen continuous monitoring decline from 13 to 3 monitoring stations, the removal of static monitors, and a sharp

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[33] See: Appellants' submission, dated July 25, 2008, at page 10. The Appellants quote the definition of vexatious as follows:

> "An action may be vexatious if it is obvious that it cannot succeed …. Or if no reasonable person can possibly expect to gain relief in it…."

[34] Appellants' submission, dated July 25, 2008, at page 11.

decline in the parameters tested in the air shed. The Appellants argued the regressive change in air monitoring must stop and be acknowledged in keeping with public interest transparency. The Appellants noted there have been three reports completed regarding the proper design of a monitoring program and several reports regarding cold flow tank vapours.

[107] In response to Imperial Oil's reference to LICA being a community-based monitoring network based on consensus and collaboration, the Appellants stated that many of the stakeholders are unfamiliar with EPEA.

[108] The Appellants took issue with Imperial Oil's comment regarding the "select agendas of the Appellants." The Appellants submitted that further public consultation over the next eight months sets up a parallel process when the Director should be using his staff's expertise to continue the monitoring programs that follow the requirements of EPEA.

[109] The Appellants stated the current requirements in the Amending Approvals replace the original static stations and/or continuous air monitoring requirements, and the RWDI Report showed there is a deficiency in monitoring exceedances and compliance.

[110] The Appellants submitted that they did not misunderstand the joint application for the Amending Approvals. The Appellants argued the public interest would be best served by having 13 continuous monitoring stations providing data, not three for the 15,200 square kilometer area with its multiple tanks, plants, pipelines, and facilities. The Appellants stated their appeals hold merit and are not vexatious.

F. Discussion

[111] Imperial Oil was arguing the appeals are without merit and therefore, should be dismissed. The Appellants raised the issue of whether the monitoring requirements set out in the Amending Approvals are adequate to protect the air shed in which the Appellants live. The Board recognizes the RWDI Report reviewed the monitoring plan and recommended changes, and the Approval Holders are to provide the Director with a modified monitoring plan by December 31, 2008. The Director gives the final approval to the monitoring plan. The process

is not yet complete, so, at this time, it is not known exactly how the monitoring program will be changed and if the monitoring program will be sufficient to satisfy the Appellants' concerns.

[112] The Appellants had a limited time in which to file their Notices of Appeal. They could not wait until the final decision of the Director regarding the monitoring plan became available. If they waited until that time, their appeals would have been time-barred.

[113] All of the Appellants live in the air shed where the LICA monitoring plan will be in effect. At this point of time, the Board does not have all of the evidence so it cannot determine whether it should recommend the Amending Approvals should be confirmed, reversed, or varied. However, the issue raised by the Appellants, regional air monitoring and its effectiveness, is an important issue. It is not vexatious or without merit.

[114] Although the Appellants raised matters in their submissions that may not be applicable in these appeals, such as the operation of other facilities not covered by the Amending Approvals, that does not mean that the Appellants' prime concern, the adequacy of the air monitoring program, should not be heard. The Board will define the issues that will be heard based on the submissions provided by the Participants and the Notices of Appeal.

[115] With respect, the Board does not agree with Imperial Oil's assessment of the appeals. Imperial Oil's motion to dismiss the appeals on the grounds that the appeals are vexatious or without merit, is denied.

V. Statements of Concern

A. Appellants' Submission

[116] The Appellants stated the Director accepted as Statements of Concern the letters filed by Ms. Sally Ulfsten, Ms. Gail Wolf on behalf of the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, and the Ethel Lake Interveners. The Appellants stated the signatories to these Statements of Concern made up the Notice of Appeal filers, and therefore, membership lists are not required to note who filed a Notice of Appeal from each group. The Appellants stated that providing membership lists would increase the number of appellants.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[117] The Operators noted that Mr. George Elchuk, Mr. David Stone, Ms. Mary Anne Leroux, Mr. Andy Leroux, and Ms. Marinder Stander were relying on the Statement of Concern filed Ms. Inez Stone. The Operators noted Ms. Stone had inserted "Ethel Lake Interveners" into her address and under her signature line in her Statement of Concern.

[118] The Operators stated Ms. Stone's Statement of Concern indicates that she is expressing her concerns as opposed to the concerns of the group. The Operators noted the Statement of Concern refers to "my" concerns and identifies land owned by Ms. Stone. The Operators stated the Statement of Concern does not indicate the membership of the Ethel Lake Interveners, the concerns of the group, or how individual members may be directly affected. The Operators stated that nowhere in the Statement of Concern is there a statement that it was filed on behalf of the Ethel Lake Interveners. The Operators noted that only Ms. Stone signed the Statement of Concern. The Operators submitted that the Statement of Concern was filed by Ms. Stone as an individual and not on behalf of a group. The Operators stated the Statement of Concern did not clearly state that it was intended to be filed on behalf of the individual members of the group or explain how the members are directly affected.

[119] The Operators submitted that the Statement of Concern filed by Ms. Stone cannot be relied upon by other individuals, and therefore, the appeals of Mr. Elchuk, Mr. Stone, Ms. Leroux, Mr. Leroux, Ms. Stander, and Ms. Johnson should be dismissed as they did not file Statements of Concern. The Operators argued Ms. Stone's Statement of Concern was an individual Statement of Concern, and just as a group Statement of Concern cannot be relied on by an individual to file a Notice of Appeal, an individual's Statement of Concern cannot be relied on later by members of a purported group.

[120] The Operators submitted that the appeal filed by Ms. Stone as the Ethel Lake Intervener representative should be dismissed, because the group itself also relied on the individual Statement of Concern filed by Ms. Stone.

[121] The Operators argued the Statement of Concern filed by the Cold Lake Fibromyalgia Support Group does not contain sufficient information to qualify as a Statement of

Concern on behalf of the Cold Lake Fibromyalgia Support Group. The Operators noted the Statement of Concern did not identify other members of the Cold Lake Fibromyalgia Support Group or how members of the group may be directly affected by the applications.

[122] The Operators noted that Ms. Wolfe withdrew her appeal and appointed Ms. Inez Stone to represent the Cold Lake Fibromyalgia Support Group. The Operators argued that Ms. Wolfe cannot unilaterally substitute Ms. Stone as being a member of and appellant for the Cold Lake Fibromyalgia Support Group. The Operators asked the Board to find Ms. Stone is not an appellant with respect to the appeal of the Cold Lake Fibromyalgia Support Group. The Operators submitted that the appeal of Ms. Rachel Stone should be dismissed, and there is no existing appeal on behalf of the Cold Lake Fibromyalgia Support Group for whom Ms. Inez Stone could act as representative. In addition, the Operators argued the appeal of the Cold Lake Fibromyalgia Support Group should be dismissed because the Appellants failed to establish how the group is directly affected by the Amending Approvals.

[123] The Operators stated Ms. Rachel Stone filed a Notice of Appeal by relying on the Statement of Concern filed by Ms. Gail Wolfe on behalf of the Cold Lake Fibromyalgia Support Group. The Operators submitted that Ms. Rachel Stone did not file a Statement of Concern that would permit her to bring an appeal under section 91(1)(a) of EPEA,[35] and therefore, her appeal should be dismissed.

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[35] Section 91(1)(a) of EPEA provides:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (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)…."

C. Imperial Oil's Submission

[124] Imperial Oil agreed with the Operators' submission.

D. Director's Submission

[125] The Director stated the validity of the appeals depends on whether a previously submitted Statement of Concern was submitted.

[126] The Director submitted that Ms. Rachel Stone, Mr. George Elchuk, Ms. Mary Anne Leroux, Mr. David Stone, Mr. Andy Leroux, and Ms. Marinda Stander do not have valid appeals in their personal capacity because they did not previously submit Statements of Concern.

[127] The Director took no position on the validity of the appeals based on directly affected or the filing of Statements of Concern. The Director explained Ms. Gail Wolfe submitted a letter to the Director on behalf of the Cold Lake Fibromyalgia Support Group responding to the notices of application, and the Director acknowledged the letter as an official Statement of Concern. The Director stated Ms. Inez Stone submitted a letter to the Director responding to the notices of application and the letter was addressed and signed as "Inez Stone Ethel Lake Interveners." The Director stated the letter was acknowledged as an official Statement of Concern. The Director explained Ms. Sally Ulfsten submitted a letter to the Director that was acknowledged as an official Statement of Concern.

[128] The Director explained copies of the letters were sent to LICA and copied to the Approval Holders. The Director stated the cover letter included the statement: "Should you disagree with our decision to declare these as statements of concern, you may wish to file a letter of protest with us to ensure that you could raise the issue with the EAB should the project go to appeal."[36] The Director did not receive any letters of protest.

E. Appellants' Rebuttal Submission

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[36] Director's submission, dated June 26, 2008, at paragraph 15.

[129] The Appellants noted the Director acknowledged Ms. Ulfsten's Statement of Concern.

[130] The Appellants argued the Approval Holders and LICA were given the opportunity to protest the Statements of Concern, but the Director did not receive any letters of protest. Therefore, according to the Appellants, the Approval Holders and LICA already agreed to the Appellants obtaining standing regarding the Statements of Concern filed. The Appellants argued the Approval Holders and LICA had two years to express concerns with the Ethel Lake Interveners and the Cold Lake Fibromyalgia Support Group being ad hoc committees or the individuals belonging to those groups.

[131] In response to the Director's submission that many of the Appellants did not file Statements of Concern in a personal capacity, the Appellants stated the Statements of Concern were filed on behalf of the groups they belong to and the individual leaders named.

[132] The Appellants acknowledged that, even though the Director accepts someone as directly affected, it does not bind the Board.

[133] The Appellants explained that Statements of Concern were filed by Ms. Gail Wolfe, the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, the Ethel Lake Interveners, and Ms. Ulfsten, and the Director gave these three individuals and two community groups directly affected status when he accepted their Statements of Concern. The Appellants stated that all of the individuals and members of the groups reside in the LICA air shed. The Appellants stated they were not aware of any "right to challenge evidence" raised by the Director regarding the Statements of Concern, and, therefore, the Statements of Concern are valid.

[134] The Appellants explained Ms. Wolfe, who had filed the Notice of Appeal on behalf of the Cold Lake Fibromyalgia Group, signed over the appeal to Ms. Stone because of personal circumstances.

[135] The Appellants questioned whether there was an inequity in the process because they have to prove standing twice, because they had been granted standing to participate in the mediation meeting.

[136] The Appellants submitted the Statements of Concern were filed with the Director, and therefore standing of all of the Appellants and groups should remain.

F. Discussion

[137] The Appellants argued that, because they were given the opportunity to participate in the mediation meeting, they were granted standing and should not have to prove it again for a hearing. The Board will often allow mediation meetings to take place without determining some of the preliminary matters first, such as standing, providing all participants agree. The intent of mediation is to have the participants work co-operatively and collaboratively to come to a resolution of the issues. If a participant raises preliminary matters in an attempt to dismiss the appeals, it can inhibit the mediation process.

[138] At the time of the mediation meeting, the Board had not made any determination on the matter of standing. The Board has found that, if the appeals are resolved through mediation, the participants would not be required to prepare submissions on preliminary matters.

[139] The filing of a Statement of Concern serves two purposes. First, it provides the Director with information regarding the concerns of those affected by the proposed project. Second, in most circumstances, filing a Statement of Concern is a prerequisite to filing a valid Notice of Appeal.[37] In this case, the Director received Statements of Concern from Ms. Wolfe on behalf of the Cold Lake Fibromyalgia Support Group, Ms. Inez Stone, and Ms. Sally Ulfsten.

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[37] Section 91(1)(a) states:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (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

[140] In their submissions, the Approval Holders did not present any arguments regarding the Statement of Concern filed by Ms. Ulfsten. She filed her Statement of Concern in response to the notice of application within the specified time frame. The Director accepted it as an official Statement of Concern and none of the Approval Holders indicated to the Director that they had concerns with the Statement of Concern being accepted by the Director. The Board accepts that Ms. Ulfsten filed a valid Statement of Concern.

[141] There is some uncertainty regarding the Statement of Concern filed by Ms. Inez Stone. She signed it "Inez Stone Ethel Lake Interveners." It is unclear whether the Statement of Concern was filed solely for herself as a member of the Ethel Lake Interveners, on behalf of the Ethel Lake Interveners, or both. In the Appellants' submission, it was argued the Statement of Concern was filed by Ms. Stone on behalf of herself as an individual and on behalf of the group.

[142] The other Participants did not present arguments regarding the Statement of Concern being filed by Ms. Stone on behalf of herself. The Director accepted the Statement of Concern as an official Statement of Concern. In reading the Statement of Concern, Ms. Stone clearly states that it was "…my statement of concern." She also refers to "my quarter section" and "my concerns," all indicating the Statement of Concern was prepared from her perspective as an individual. The Statement of Concern was filed within the timeframes specified by the Director. Therefore, the Board accepts that Ms. Inez Stone filed a valid Statement of Concern on behalf of herself and the requirement of section 91(1)(a) of EPEA is met.

[143] The Statement of Concern filed by Ms. Stone did not refer to the Ethel Lake Interveners in the text, only in the address line and signature line. Although the text refers to "we," it is not clear whether this means the group, her family, or other members in the community. It appears the Statement of Concern was not filed on behalf of the Ethel Lake Interveners, but only filed on behalf of Ms. Inez Stone, a member of the Ethel Lake Interveners. Therefore, the Board must dismiss the appeal of the Ethel Lake Interveners.

> (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)…."

[144] The Statement of Concern filed by Ms. Wolfe clearly was filed on behalf of the Cold Lake Fibromyalgia Support Group. The Director accepted the Statement of Concern, and none of the Approval Holders objected to this decision. Therefore, the Board accepts that one of the conditions of section 91(1)(a) of EPEA has been met in that the Cold Lake Fibromyalgia Support Group filed a valid Statement of Concern.

[145] The Approval Holders argued that, because Ms. Wolfe withdrew her appeal, the appeals of the Cold Lake Fibromyalgia Support Group must also be dismissed. The Board does not agree with this argument. Ms. Wolfe was the representative for the group, much like counsel represents the Approval Holders. When she withdrew her appeal, she asked that Ms. Inez Stone represent the group. This would be similar to having other legal counsel step in to represent the client. The Board accepts that Ms. Inez Stone is the representative for the Cold Lake Fibromyalgia Support Group.

[146] The remaining Appellants did not file individual Statements of Concern. In their submissions and Notices of Appeal, the remaining Appellants stated they were associated with the Ethel Lake Interveners or the Cold Lake Fibromyalgia Support Group. They argued that, even though they did not file individual Statements of Concern, they could use the Statements of Concern filed by the groups they were associated with. The Board does not agree. There is no indication in the Statements of Concern of who is included in the membership. If this type of information had been provided or if they each signed the Statement of Concern submitted, then there would be a stronger basis on which to find the remaining Appellants had filed a Statement of Concern. Because this information was lacking and no individual Statements of Concern were filed with the Director, the appeals of Ms. Rachel Stone, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Anne Leroux, and Ms. Marinda Stander are dismissed.

[147] Therefore, only the appeals of Ms. Inez Stone, Ms. Sally Ulfsten, and the Cold Lake Fibromyalgia Support Group submitted valid Statements of Concern.

VI. Directly Affected

A. Appellants' Submission

[148] The Appellants explained that all of them live in the LICA air shed and are within a 50 mile radius of all of the Approval Holders' facilities included in the Amending Approvals. They argued they were all directly affected because of their proximity to the facilities and because they need clean air to breathe and remain healthy.

[149] The Appellants explained Mr. David, Ms. Inez, and Ms. Rachel Stone live about three miles from the Shell/Orion/Hilda pilot, 12 miles from Husky Tucker, four miles from the closest Imperial Oil well pad, about seven miles from the Maskwa Plant, 18 miles from CNRL Burnt Lake, 24 miles from Wolf Lake, and 36 miles from EnCana Foster Creek. The Appellants stated the Harwerth residence is closer to the plant operations and will be about 300 meters from Shell's phase 2 well pads and as close to Imperial Oil's operations. The Appellants explained the prevailing northwest winds blow emissions to Ethel Lake, Cold Lake, Ardmore, Beaver River, and LaCory where Ms. Stander, Ms. Ulfsten, Mr. Elchuk, and Mr. and Ms. Leroux reside, well within the 50 mile radius.

[150] Mr. Elchuk explained he is half a mile from cold flow tanks and there are plans to drill 300 wells within his township. Ms. Ulfsten stated she lives 100 metres from two CNRL cold flow tanks.

[151] The Appellants argued the Approval Holders' only interests are in following corporate compliance requirements and profit for the shareholders. The Appellants submitted that the Approval Holders should not operate or cause to operate the LICA monitoring program because to do so would be a conflict of interest. The Appellants stated that, under section 11 of EPEA, the Minister's responsibility is to promote human health through environmental protection.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[152] The Operators submitted that only a person known to law, such as a natural or corporate person, is entitled to bring an appeal under EPEA. The Operators argued that the Ethel Lake Interveners and the Cold Lake Fibromyalgia Support Group are not legally recognized entities and, therefore, are not entitled to bring appeals because they are not persons who are directly affected. The Operators explained they conducted Alberta and federal corporate searches and did not find any registration of corporations or societies under these names, and because they are not known legal entities, they are not entitled to bring these appeals.

[153] The Operators argued the Appellants provided little information in the Notices of Appeal as to how the individual Appellants will be directly affected by the Amending Approvals. The Operators stated the Notices of Appeal list general concerns related to clean air and health or concerns related Alberta Environment policy. The Operators argued that, to be directly affected, the effect needs to be more than an effect on the public at large and the interest being affected must be something more than the generalized interest that all Albertans have in protecting the environment. The Operators submitted that such generalized concerns are not sufficient to support the Appellants' directly affected status.

[154] The Operators noted the Appellants stated that all of them live within a 50 mile radius of the Operators' plants, which supports their position that they are directly affected by the Director's decision regarding air emissions monitoring and thresholds. The Operators stressed that the Amending Approvals do not permit the construction of additional facilities, additional emissions from the existing facilities, or any changes to permitted emissions from existing facilities. The Operators explained that because the Amending Approvals only relate to monitoring the air shed and will not result in any changes to air emissions coming from the facilities governed by the Amending Approvals, the air shed monitoring will not change any thresholds for air emissions in the area. The Operators submitted that the Amending Approvals will not directly affect the Appellants.

[155] The Operators argued that, although proximity is one factor to consider whether an appellant is directly affected, it not sufficient to establish that one is directly affected.

[156] The Operators commented on the factual information provided by the Appellants. The Operators explained that only Shell's Hilda pilot facilities are governed by the Amending

Approvals and the other facilities listed by the Appellants are irrelevant for the purpose of determining whether the Appellants are directly affected. The Operators stated they are not aware of any cold flow tanks associated with the facilities governed by the Amending Approvals in the vicinity of Mr. Elchuk's residence, and therefore, the tanks are irrelevant to Mr. Elchuk's standing. The Operators submitted that any future operations are not relevant to these appeals because they are not subject to the Amending Approvals. The Operators explained the CNRL cold flow tanks are not associated with the facilities governed by the Amending Approvals and therefore are not relevant to establishing the directly affected standing of Ms. Ulfsten.

[157] The Operators submitted that the Appellants' appeals should be dismissed because they did not establish that they are directly affected by the Amending Approvals.

C. Imperial Oil's Submission

[158] Imperial Oil argued the effect Ms. Ulfsten alleged she would suffer does not satisfy the Board's test that the effect on her interest must be actual or imminent and not speculative. Imperial Oil further argued that Ms. Ulfsten's explanation of how she is directly affected does not show the effect is unique or that she will be affected to a greater degree than the public generally.

[159] In response to Ms. Stone's Notice of Appeal, Imperial Oil explained she misunderstands the Amending Approval because the Amending Approval does not allow more releases of air pollution and air toxins. Imperial Oil argued the appeal must be dismissed, because the direct affect alleged by Ms. Stone is not permitted by the Amending Approval and will not be experienced by the Appellant.

D. Director's Submission

[160] The Director took no position on the validity of the appeals based on the directly affected status of the Appellants.

E. Appellants' Rebuttal Submission

[161] The Appellants stated the Board accepts that a group represents persons and that forming groups makes for a more efficient process.

[162] The Appellants explained the Cold Lake Fibromyalgia Support Group began in 1998 by persons who attended a workshop put on by the arthritis society. The Appellants stated that all of the members live in the LICA air shed region, mostly in the Cold Lake/Ardmore area. The Appellants stated Ms. Gail Wolfe and Ms. Inez Stone have been members since the beginning and Ms. Rachel Stone joined five years ago. The Appellants argued release events may trigger illness in the Appellants and sensitive area residents, and therefore, there is a potential for harm for this group.

[163] The Appellants explained the Ethel Lake Interveners began in 2004 by persons concerned with drilling under Ethel Lake. They stated all of the members reside in the LICA air shed region on Ethel Lake, in Ardmore, or in the Municipal District of Bonnyville.

[164] The Appellants argued the case law presented by the Approval Holders does not deal specifically with the approval of an air shed or its management because little case law exists that deals with the formation and management of air sheds.

[165] The Appellants stated there appeared to be some confusion whether their directly affected interests are communal or personal. The Appellants stated their interests and concerns are both personal and communal as demonstrated by filing group and individual Statements of Concern and Notices of Appeal. The Appellants stated that three of the Appellants' lands share a boundary with Shell's leases.

[166] The Appellants stated they continue to experience incidents related to upset conditions from several facilities, and they questioned if these incidences are related to the Approval Holders moving to implement the Amending Approvals.

[167] In response to Imperial Oil's comments that Ms. Ulfsten must prove she is affected to a greater degree than the public generally, the Appellants noted Ms. Ulfsten lives approximately 100 metres from two CNRL cold flow tanks.

[168] The Appellants argued they are directly affected because of proximity and because there is a harm to a natural resource, the air, and their use of that natural resource. The

Appellants explained that some of the Appellants live off the produce from their farms, all of which are affected by the proximity to the emissions. The Appellants argued that those who use surface water for drinking, watering animals, and irrigation may suffer potential effects from emissions. The Appellants argued their crops and logging as well as fish, wildlife, and vegetation are potentially affected by acid deposition.

[169] The Appellants submitted they established, as residents of the sir shed, that they are directly affected by the Amending Approvals. They stated the regional air shed monitoring changes how thresholds are perceived, thereby directly affecting the Appellants regarding possible land and surface water body acidification and the potential for harm.

F. Discussion

[170] The Board has discussed the issue of directly affected in numerous decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

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

> "First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. …
>
> Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. …
>
> Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:
>
> > What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water,

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

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

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

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

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue

> causation because there can be no injury where a plant has never operated."[38]

[172] Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted…."[39]

[173] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.[40]

[174] The Court of Queen's Bench in *Court*[41] stated an appellant only needs to show there is a potential for an effect on that person's interests. This potential effect must still be within reason, plausible, and relevant to the Board's jurisdiction for the Board to consider it sufficient to grant standing. This is the same regardless of whether it is an individual person or corporate person.

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

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

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

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

[175] Ms. Ulfsten and Ms. Stone live in the air shed that will be monitored by the LICA monitoring program allowed for under the Amending Approvals. The Appellants filed appeals because they are concerned about their air shed and the surrounding environment. They want to ensure their air shed is protected by the issuance of the Amending Approvals. If there is a negative effect from the Director's decisions, then it is those people who live in proximity to the projects, in this case those who live in the air shed, who will be affected. The effect does not have to be unique in kind or magnitude.[42] However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.[43] Only those living in the air shed will be affected by the Director's decisions. If they had so chosen, every resident in the air shed could have filed an appeal, and each would be equally affected by the Director's decisions and would have an equal chance to be found to be directly affected.

[176] Ms. Ulfsten and Ms. Stone breathe the air in the air shed every day. They are directly affected by the Director's decisions to issue the Amending Approvals.

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

[178] There are two pivotal cases in which the issue of a group filing an appeal was addressed - *Hazeldean*[44] and *Graham*.[45] In the *Hazeldean* case, the Community League filed an

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

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

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

appeal in relation to a plywood manufacturing plant located immediately next to their community. Two other appeals were also received in the *Hazeldean* case, the first on behalf of an individual and an environmental association, and the second from an individual. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

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

> "The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.
>
> Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them."

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

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

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

[182] It has been the exception rather than the general rule to have a group deemed to be directly affected. One exception has been the Lake Wabamun Enhancement and Protection Association ("LWEPA"). In the Board decision, *Bailey*,[46] LWEPA was a group that was found to be directly affected. LWEPA provided a membership list to the Board, and the Board determined that LWEPA "…was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which the (*sic*) many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process."[47] In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

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

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

[183] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 91 of EPEA, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean* or *Bailey*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced that the individual members of the organization (effectively the "in *personam*" of the organization) are individually and personally impacted by the project.[48]

[184] In this case, the Cold Lake Fibromyalgia Support Group filed a Notice of Appeal. A group does not have to be a registered corporation or society to file a Notice of Appeal with the Board. When the Board receives a group appeal, it looks at the individual members of the group to assess if the members would be directly affected in their own right. That is why the Board asks for membership lists and recommends to those planning to file as a group to also file individual Notices of Appeal.

[185] The Cold Lake Fibromyalgia Support Group did not provide a membership list or provide any relevant information regarding the group. There is insufficient information on which to find the Cold Lake Fibromyalgia Support Group directly affected by the Director's decisions. Therefore, the Board must dismiss the appeals of the Cold Lake Fibromyalgia Support Group.

[186] However, the Board believes the intent of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners is to present a broader perspective of the impact of the Director's decisions. The monitoring program will affect an entire air shed. As a result, the Board will allow Ms. Inez Stone to include as part of her submissions, if she desires, the broader perspective as raised in her Notice of Appeal.

[187] The appeals that are validly before the Board are those filed by Ms. Inez Stone and Ms. Sally Ulfsten. The Board will allow Ms. Stone to present the broader concerns of the

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[48] "*In personam*: Against the person. Action seeking judgment against the person involving his personal rights and based on the jurisdiction of his person, as distinguished from his property." (*Black's Law Dictionary*, 6th ed.)

Ethel lake Interveners and the Cold Lake Fibromyalgia Support Group that were raised as part of Ms. Inez Stone's appeal.

VII. Adjourn Proceedings

A. Appellants' Submission

[188] The Appellants stated they want a plan that monitors and provides data that ensures the protection of human health and the environment. The Appellants advised they did not want an adjournment because they are exposed to the air in the air shed constantly and their apprehensions regarding safety and the environment must be addressed now. The Appellants noted the RWDI Report did not directly state where continuous monitoring stations should be placed in the air shed or what compounds must be monitored for and, therefore, the Approval Holders do not have a substantial design for implementation. The Appellants stated that it is premature to address design adequacy since the review mainly stated the monitoring in place now does not do a good enough job regarding exceedances and non-compliance, and the improvements need to be considered immediately in view of the RWDI Report.

[189] The Appellants argued the Amending Approvals should be rescinded until after the Director properly addresses the current inadequacy of monitoring while re-instating previous monitoring requirements with 13 continuous monitoring stations. The Appellants noted the first study completed addressing the LICA air shed noted continuous monitoring at point sources measuring VOCs, PAHs, heavy metals, green house gas emissions, and hydrogen sulphide was needed.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[190] The Operators noted that under the Amending Approvals, the Operators must, through the LICA Air Quality Monitoring Program, ensure that a network review of the LICA air shed zone is completed. The Operators explained the network review is intended to complete a third party review of the existing network, a statistical analysis for each monitoring station, and a list of recommendations and changes for the network. The Operators stated they, as well as

Imperial Oil, are in the process of preparing plans to be submitted to the Director by December 31, 2008, to address the items raised in the review. The Operators explained LICA is establishing a process to obtain public input with respect to the RWDI Report and the response plan. The Operators stated the Director then may consider and authorize implementation of the plans.

[191] The Operators submitted that it would be premature to address the adequacy of the design and monitoring of the LICA monitoring program in advance of considering any proposed changes in the plans and authorized by the Director. The Operators stated that many of the concerns raised by the Appellants may be addressed in the modified monitoring program, and the plans will provide the Board with further relevant information with respect to the monitoring program.

[192] The Operators submitted that if the hearing was delayed until the Director considers the plan in response to the network review, it would benefit the Board and would ensure the Board and the Appellants would have the additional information to assess the adequacy and design of the LICA monitoring program.

C. Imperial Oil's Submission

[193] Imperial Oil submitted the Board would not be in a position to judge the adequacy of the monitoring program until the program is fully developed and approved by the Director, which will not occur until 2009.

[194] Imperial Oil argued the Appellants do not understand that the regional monitoring network is designed to measure long term trends in air quality and not respond to particular incidents or point source emissions. Imperial Oil argued that community health issues are affected by multiple sources, including many outside of the region, and many of the Appellants' concerns relate directly to community activities, such as private automobiles.

[195] Imperial Oil stated the emission limits imposed in the approval are contained in a section that is not affected by the Amending Approval. Imperial Oil added that the approval

deals with point source emissions and ambient air quality, but the Amending Approval deals only with ambient air quality.

D. Director's Submission

[196] The Director supported the Board adjourning its proceedings until 2009. The Director explained adjourning the hearing to allow him to consider the RWDI Report would assist the Board in providing the Minister with the most thorough and complete record and recommendations that it can. The Director submitted that an adjournment would not significantly prejudice any of the Participants in terms of their ability to present their case.

E. Appellants' Rebuttal Submission

[197] The Appellants explained they are concerned with the present air monitoring at multiple facilities, public health, and the environment. The Appellants argued that delaying the hearing allows the Approval Holders to apply for further amendments, resulting in further prejudice to their appeals.

F. Discussion

[198] The Appellants are concerned with the effectiveness of the air shed monitoring program allowed under the Amending Approvals. Part of the process under the Amending Approvals requires the Approval Holders to develop a monitoring plan to address the concerns and recommendations included in the RWDI Report. These monitoring plans are then forwarded to the Director for his review and approval.

[199] At this point of time, none of the Participants know the exact details of what the monitoring program will involve. The Board has a responsibility to give the best possible recommendations to the Minister. To achieve this, the Board needs to have the most complete information. By adjourning the hearing until after the Director makes his decision, the Board and the Participants will have the benefit of having the complete monitoring program before them. The Appellants may find that some of their concerns will be addressed in the monitoring program.

[200] The monitoring program has to be provided to the Director by December 31, 2008. Although there is no time limit in which the Director has to make his decision, the Board does not anticipate the Director will take long to assess the monitoring plan. The Board will schedule the hearing so the matter will be heard as soon as possible.

[201] The Board does not believe any of the Participants will be prejudiced by waiting until all of the relevant information is available. Therefore, the Board will adjourn the hearing to allow the monitoring program to be finalized by the Director. The hearing has been set for April 27 and 28, 2009, in Cold Lake.

VIII. Oral or Written Hearing

A. Appellants' Submission

[202] The Appellants stated they wanted an oral hearing given the complexity and public concern regarding air emissions and their effect on human health and the environment. The Appellants stated that oral cross-examination would be the best way for their interests to be presented.

[203] The Appellants argued that if appellants with very limited resources are willing to commit time, energy, and heart to a public, democratic process, then the other parties should be willing to participate in an oral, public hearing.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[204] The Operators left this issue to the discretion of the Board.

C. Imperial Oil's Submission

[205] Imperial Oil stated the Board should base its decision on written submissions. Imperial Oil stated that none of the facts are in dispute, and there is no need for the Board to hear oral evidence. Imperial Oil stated that the misunderstandings stated by the Appellants could be easily addressed through documentary evidence and written argument.

[206] Imperial Oil argued the primary objective of the Appellants is political in that they want the "…government to vary, or abolish, its community-based air shed monitoring program, and to implement a more prescriptive program, directed by the Department, including third party operations (Blackrock and Shell) and ignoring the community and industry participation which characterizes the community-based approach."[49]

[207] Imperial Oil argued the Appellants are attempting to utilize the appeal process to affect a policy change in the Government's position, a position unrelated to Imperial Oil's operation. Imperial Oil submitted that considering these appeals would result in the Board exceeding its jurisdiction.

[208] Imperial Oil submitted that advancing unrelated political agendas is not a proper purpose of the appeal process, and it is beyond the jurisdiction of the Board to alter government policies or direct the Director to take action against other operations that are unrelated to the matters properly before the Board. Imperial Oil stated the Board could adequately discharge its function on the basis of written arguments alone.

[209] Imperial Oil submitted that the public interest has already been served because the Appellants were given a full day to voice their concerns to the Director at the mediation meeting. Imperial Oil stated all of their questions were answered by the Approval Holders and the Director. Imperial Oil noted the consent of the Appellants is not required and may not be set as a condition of approval for any future changes to the LICA network which the Director authorizes, because this would result in the fettering of the Director's discretion.

D. Director's Submission

[210] The Director supported having the hearing be conducted in writing. He stated that, given the nature of the issues in these appeals, a written hearing will allow the parties to present their cases fully and fairly.

E. Appellants' Rebuttal Submission

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[49] Imperial Oil's submission, dated June 2*, 2008, at page 11.

[211] The Appellants argued the Board needs to conduct an oral hearing to determine the details of the nature of the joint Amending Approvals and whether the Amending Approvals uphold the ideals of EPEA. The Appellants submitted that an oral hearing would allow them to present their case more fully and fairly than a written hearing.

F. Discussion

[212] Under section 94(2) of EPEA, the Board can hold a hearing either through written submissions only or hold an oral hearing.

[213] The Appellants in this case have requested an oral hearing. It is the Board's standard practice and consistent with the principles of natural justice that, when a party to an appeal requests an oral hearing, it will normally be granted. The Approval Holders and the Director have not provided any substantial reason why the hearing should be through written submissions only. Therefore, the Board will schedule an oral hearing. The issues will be set by the Board based on the submissions of the Participants. This will prevent the parties presenting arguments on issues that are not within the Board's jurisdiction.

IX. Issues

A. Appellants' Submission

[214] The Appellants submitted the following questions for review:

> "1. Do the Director's amendment approvals follow the requirements under the Alberta Environmental Protection and Enhancement Act ensuring ambient air quality guidelines, human health security and environmental safety from pollutants are met within the Air Shed?
> 2. Will the Alberta Environment, LICA and the Approval Holders explain to the Appellants how they will deal with the increase in release events that may cause harm to residents and satisfy concern about future risks to our health and the environment?
> 3. Shall all issues to do with air shed management, past, present and foreseeable future be discussed?

4. May we include all three LICA tendered studies regarding the air shed (Jacques Whitford 2003, Jacques Whitford 2006, RWDI Report 2008)?
5. Will the Energy Resources and Conservation Board and Conservation Board who presumably are tasked by Alberta Environment to enforce operator compliance of approvals be available at the hearing to answer questions?
6. If these 5 approval holders (who will cause to operate the LICA air shed monitoring) will be concentrating on regional monitoring as opposed to point source monitoring, what will the other 50 operators say concerning this?
7. Could LICA or Alberta Environment become embroiled in litigation over these (above) issues?
8. Why can't both point sources and regional monitoring occur simultaneously?
9. Is LICA able to offer the same level of protection, data gathering and expertise as the previous approvals offered?
10. Do the amending Approvals meet the Director's mandate under the Act, and is LICA up to the job?
11. More importantly, if the Approval Holder's who have an absolute interest in producing profit to their shareholder's 'shall operate or cause to be operated the LICA Air Quality Monitoring Program Network,' is there a conflict of interest and bias of interest?
12. Which promises made to the Cold Lake First Nations in correspondence of July 17, 2006 by Mr. Deresh representing LICA have been fulfilled and may we see this evidence?
13. How will the regional approach deal with the unlicenced, fugitive emissions contribution to regional air quality, health impacts, and environmental protection in the LICA air shed?
14. How will LICA handle liability and exceedance events and enforce the 'polluter pays' principle?
15. Will the Appellants be provided with the Alberta Environment audit of LICA that has been requested several months ago?
16. How will audits and reviews guarantee ongoing legitimacy of the data?
17. What type of accreditation and qualifications do LICA personal have to perform air shed monitoring?
18. Given that different polluters have different requirements how ill LICA monitor individual polluters?
19. Where does the Energy and Resources Conservation Board, the only inspectors who check compliance and ambient air quality requirements in this air shed for Alberta Environment fit in with LICA?

20. Will LICA obtain qualified plant inspectors to check non-compliances?
21. Does Mr. Miller represent Imperial Oil Resources or the Lakeland Industry and Community Association in this matter and is there bias or conflict?
22. What are the Government requirements for selective catalytic reduction and ultra-low-nitrogen-oxide burners to reduce emissions?"[50]

B. EnCana, CNRL, Husky Oil, and Shell Submission

[215] The Operators stated that the Board's jurisdiction over the Amending Approvals is the environmental effects that directly or indirectly result from the amendment, which in this case is the implementation of the LICA program. The Operators noted that, in many instances, the Appellants' issues were presented as broad, general statements that did not provide the specific information needed to delineate the issues, and some of the issues raised go beyond the environmental effects resulting from the LICA program.

[216] The Operators submitted that the overall health of the area residents is not a relevant issue for these appeals. The Operators explained the Amending Approvals do not authorize an increase in emissions, so any perceived or anticipated change in emissions is not an environmental effect resulting from the implementation of the LICA program and is outside the scope of these appeals.

[217] The Operators noted the Appellants raised issues related to the admissibility of evidence. The Operators recommended the evidentiary issues raised by the Appellants should be decided by the Board after the issues are determined. The Operators stated the Board can rule on the admissibility of evidence at the substantive hearing.

[218] The Operators argued that, based on the issues proposed, the Appellants intend to turn the hearing into a public inquiry to investigate their concerns with respect to the air shed and Alberta Environment policy. The Operators argued the issues must be specifically related to the reasonableness of issuing the Amending Approvals.

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[50] Appellants' submission, dated June 10, 2008, at page 6.

[219] After assessing each of the questions put forward by the Appellants, the Operators stated that the issues that may be considered by the Board are whether: the Amending Approvals meet the requirements of EPEA; the type or extent of monitoring required under the Amending Approvals is reasonable and appropriate; the Amending Approvals offer a reasonable level of monitoring, data gathering, and expertise as compared to the original approval monitoring conditions; and the Amending Approvals monitor the appropriate substances.

[220] The Operators argued the question on how the Approval Holders will deal with the increase in release events is speculative and assumes there will be an increase in release events that may cause harm to the residents. They explained the Amending Approvals relate to the monitoring of the air shed and will not result in any changes to the air emissions. The Operators stated the concerns regarding litigation over the issues is also entirely speculative and irrelevant to whether the Director properly issued the Amending Approvals.

[221] The Operators argued the question dealing with all issues to do with the air shed would turn the appeal into a public inquiry regarding all the concerns the Appellants have related to the air shed instead of issues related specifically to the Amending Approvals.

[222] The Operators stated the role and operations of the ERCB are beyond the scope of the Director's decision and not relevant to these appeals. The Operators explained the ERCB does not have the responsibility for enforcing air emission requirements under EPEA.

[223] The Operators stated the views and concerns of other operators are beyond the scope of these appeals because they are not parties to these appeals.

[224] In response to the suggested question on whether point sources and regional monitoring could occur simultaneously, the Operators considered this question could turn these appeals into a public inquiry of Alberta Environment's policy related to air monitoring. However, the Operators did accept the issue as it relates to whether the type or extent of the monitoring is reasonable and appropriate.

[225] The Operators explained the LICA program is not industry controlled, and the board of directors of LICA includes government, industry, and public members. The Operators

submitted the Appellants' issue on conflict of interest is directed at Alberta Environment's policy on regional air shed monitoring, not the specific Amending Approvals.

[226] The Operators stated any promises made to the Cold Lake First Nations are not relevant to the Appellants' appeals.

[227] The Operators explained the Amending Approvals have nothing to do with liability, compliance, and enforcement, and therefore, are irrelevant to and beyond the scope of these appeals.

[228] The Operators argued the question regarding audits and reviews is not relevant to the issuance of the Amending Approvals, because audit and review conditions are not part of the conditions of the Amending Approvals.

[229] The Operators argued the specific qualifications of the LICA personnel are not relevant because the Operators and Imperial Oil are responsible for ensuring the LICA program is properly carried out under the Amending Approvals.

[230] The Operators objected to the use of the word "polluters," because all of the facilities governed by the Amending Approvals are approved, licenced facilities operating under conditions that establish emission limits.

[231] The Operators made no comments on whether there is any bias on the part of counsel for Imperial Oil.

[232] The Operators stated the government requirements for selective catalytic reduction and ultra-low nitrogen oxide burners to reduce emissions are not relevant to these appeals.

C. Imperial Oil's Submission

[233] Imperial Oil argued the issues raised by the Appellants are of general concern about the environment and not directly related to Imperial Oil's Amending Approval. Imperial Oil argued that all issues to do with air shed management involve many other parties and statutory bodies that go well beyond the scope of these appeals. Imperial Oil argued these matters fall within the jurisdiction of the Clean Air Strategic Alliance and are not open for

review in the context of the Amending Approvals. Imperial Oil stated the involvement of the 50 other operators in the area is irrelevant to the monitoring requirements imposed in the Amending Approvals.

[234] Imperial Oil explained the role of the ERCB is irrelevant to the regional monitoring program created by the Amending Approvals.

[235] Imperial Oil explained it continues to undertake point source monitoring for compliance purposes. Imperial Oil stated the data produced from the existing ambient air monitoring devices that will be discontinued by the Amending Approval confirm that the current location and operation of these devices does not contribute any meaningful information to the understanding of regional air quality.

[236] Imperial Oil stated LICA's role and ability to perform monitoring tasks are governed by the Air Monitoring Directive. Imperial Oil stated that qualifications of personnel, laboratory qualifications, standards for quality assurance, stewardship, and auditing are governed by a program that operates independent of the Amending Approvals and are not affected by the Amending Approvals.

[237] Imperial Oil stated that fugitive emissions are managed through the original approval, and the relevant section was not altered by the amendment. Imperial Oil explained it does not operate cold flow tanks under its Amending Approval. Imperial Oil stated federal Canadian Council of Ministers of the Environment standards for catalytic reduction and ultra-low-nitrogen-oxygen burners fall outside the realm of air monitoring.

[238] Counsel for Imperial Oil verified he acts for Imperial Oil and not LICA.

D. Director's Submission

[239] The Director submitted that an issue, to be eligible to be heard, must be raised in the Notice of Appeal, within the jurisdiction of the Director under EPEA, relevant to the application that was before the Director, and clear so that the parties can fairly address it.

[240] The Director stated that an appeal of an amending approval decision does not result in the entire approval being opened for review, so only the issues going to the amendment decision being confirmed, reversed, or varied are appropriate.

[241] The Director assessed the specific issues contained in the Appellants' submission. The Director considered the following issues are not proper appeal issues:

- all issues to do with air shed management, past, present, and the foreseeable future, because it is beyond the scope of the approval amendment applications;
- inclusion of the three LICA tendered studies because this is a procedural matter;
- issues regarding the ERCB because the ERCB does not have the responsibility of enforcing EPEA approval air emission requirements;
- issues regarding other operators in the area because they are not participants to these appeals;
- if LICA or Alberta Environment could become involved in litigation over the issues, because it is irrelevant to the Director's decision;
- if there is a conflict or bias to have the Approval Holders operate or cause to be operated the LICA Air Quality Monitoring Program Network;
- what promises were made to the Cold Lake First Nations; issues related to exceedance events and enforcement of the polluter pays principle because the Amending Approvals do not affect the Approval Holders' responsibilities relative to emission limits or ambient air quality objectives;
- whether Alberta Environment will provide its audit of LICA, because this is a procedural question that will depend on the issues set;
- issue of LICA checking for non-compliance, because the Amending Approvals do not affect response to non-compliance;
- if Mr. Miller represents Imperial Oil or LICA and if there is a conflict; and

- the issue of government requirements for selective catalytic reduction and ultra-low nitrogen-oxide burners to reduce emissions.

[242] The Director submitted the issue of whether the Amending Approvals follow the requirements of EPEA ensuring ambient air quality guidelines, human health security, and environmental safety are met is unclear. The Director recommended an alternative issue would be: "Is the monitoring program required by the Amending Approvals properly designed in terms of substances monitored, monitoring locations, and monitoring equipment?"[51] The Director suggested the issue worded this way would also cover the Appellants' concerns regarding monitoring point source and regional monitoring simultaneously; whether LICA will be able to offer the same level of protection, data gathering, and expertise as the pervious approvals offered; whether the Amending Approvals meet the Director's mandate under EPEA and if LICA is up to the job; how the regional approach deals with unlicenced, fugitive emissions contribution to regional air quality, health impacts, and environmental protection of the LICA air shed; and how will LICA monitor individual polluters.

[243] The Director suggested the Appellants' second question regarding increased release events and future risks to their health and the environment could be reworded to provide more clarity. The Director stated this would also address the Appellants' concern whether LICA is up to the job and if the Director's mandate under EPEA is being met.

[244] The Director also suggested the issue of audits and reviews of the data could be revised.

[245] The Director also recommended revising the Appellants' question on the qualifications of LICA personnel.

[246] The Director suggested the following as appropriate appeal issues:

"a. Is the monitoring program required by the Amending Approvals properly designed in terms of substances monitored, monitoring locations, and monitoring equipment?

b. Is the monitoring program required by the Amending Approvals properly designed having regard to the potential for facility upset conditions?

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[51] Director's submission, dated June 26, 2008, at paragraph 27.

c. Do appropriate quality assurance/quality control procedures exist for the LICA Air Quality Monitoring Network?

d. Do personnel responsible for operation of the LICA Air Quality Monitoring Network have appropriate training and qualifications?"[52]

E. Appellants' Rebuttal Submission

[247] The Appellants asked that the wording be kept the same as in their original submission for issues 1, 2, 8, and 9. They asked that issues 3, 4, 5, 11, 12, 13, 14, 15, and 19 be kept. The Appellants conceded on issues 6, 7, 10, 16, 17, 18, 20, and 22. The Appellants thanked Imperial oil for its response to issue 21 regarding who its counsel is representing.

F. Discussion

[248] In order for a concern to be an actual issue at a hearing, the concern expressed must have been included in the Notices of Appeal and be specific to the approval, or in this case the Amending Approvals, being appealed.

[249] The Appellants provided the Board with a number of matters they wanted answers to. Not all of the matters are properly before the Board, and most of these were conceded by the Appellants. The other Participants also argued most of these matters were not properly before the Board. Therefore, the Board will look at only those matters that were not conceded to by the Appellants.

[250] The Appellants wanted to discuss all issues regarding the air shed management. The issues the Board can hear must be related to the Amending Approvals appealed. Filing an appeal does not open the door for an appellant to discuss every concern they have in the area. Those conditions in the Approval Holders' original approvals that were not changed in the Amending Approvals are not before the Board. The issues must focus on the Amending Approvals. If there is information on past management that is relevant to the issues, the information can be used as evidence to support or demonstrate the need for changes to the LICA monitoring program.

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[52] Director's submission, dated June 26, 2008, at paragraph 28.

[251] The Appellants express a number of concerns that relate to Alberta Environment policy rather than to specific provisions of the Amending Approvals. The Board is authorized to recommend any decision that the Director might have made in issuing his decision. That does not include making or changing Alberta Environment policy. In making its recommendations to the Minister, the Board is concerned with whether the Director properly interpreted and implemented Alberta Environment policy in issuing the Amending Approvals. In this regard, matters related to what is the relevant Alberta Environment policy with respect to any element of the Amending Approvals are certainly an important consideration.

[252] The matter of what documents can be included in the submissions is a procedural matter, not an issue to be heard at the hearing. All of the LICA tendered studies are within the public domain and can be used by any of the Participants in the preparation of their submissions. With respect to the Alberta Environment audit of LICA, the Director argued this is a procedural question that will depend on the issues set. If the Appellants believe the information is relevant to the issues identified by the Board that will be heard at the hearing, they can request the Director provide a copy to them or they can use the *Freedom of Information and Privacy Act* to request the audit records.

[253] The Appellants wanted information on promises made by LICA to the Cold Lake First Nations. The Cold Lake First Nations did not file a Notice of Appeal. They are not a party to these appeals. Therefore, the Board will not hear submissions on promises made or not made to the Cold Lake First Nations.

[254] The Appellants raised questions regarding the role of the ERCB in checking compliance and ambient air quality requirements in the air shed. The Board does not have the jurisdiction to review the actions of ERCB inspectors. As stated by the Director, the ERCB does not have the responsibility of enforcing EPEA approval air emission requirements. It is the responsibility of Alberta Environment. Therefore, the issue of the role of the ERCB is not properly before the Board and the Board will not call representatives of the ERCB to appear as witnesses.

[255] The remaining issues raised by the Appellants (numbers 1, 2, 8, 9, 11, 13, and 14) have some relevance to the Amending Approvals. The Appellants raise the issues of the

adequacy of the monitoring requirements to protect the environment and human safety. This includes reporting requirements, such as frequency and substances monitored, and if the location and type of monitoring to be done is sufficient.

[256] The Appellants expressed concern that upset conditions may occur and questioned if the regional approach to monitoring would adequately deal with such conditions. The Board notes that the Appellants referred to increases in release events, but as the Amending Approvals deal with monitoring conditions only, it is difficult to see how this will result in additional releases from the facilities covered by the Amending Approvals. However, underlying this concern is whether the monitoring program will be sufficient to protect the public living in the air shed and the environment.

[257] The Appellants were concerned with having LICA oversee the air shed monitoring and whether the personnel responsible for conducting the monitoring will be adequately trained.

[258] The Board also reviewed the submissions from the other Participants. Based on their input and responses to the Appellants list of issues, the Board has determined that the issues that will be heard at the hearing are:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?
2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?
3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?
4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

[259] The Operators raised concern that the hearing will become a public inquiry if all of the Appellants' concerns regarding the air shed and Alberta Environment policy are heard.

The Board has identified the issues that will be heard at the hearing. Evidence outside of these issues will not be considered by the Board in preparing its recommendations. All of the Participants will be given a limited amount of time to present their evidence and arguments, so it is important that they focus their submissions to the identified issues.

X. AMENDING APPROVAL

A. Appellants' Submission

[260] The Appellants considered due process may not have been followed each time the Director issued a further amending approval before a resolution was reached regarding the Appellants' Statements of Concern. The Appellants stated this occurred with all of the Approval Holders except Husky Oil.

[261] The Appellants explained many of the amendments were not advertised locally. The Appellants stated that, given their limited resources, they could not appeal each amendment, but this did not mean they were not gravely concerned.

[262] The Appellants argued that effective monitoring, data collection systems, and environmental protection are not in place, and the Director did not follow due process and consideration in granting the amending approvals to CNRL. The Appellants argued the Amending Approvals should be rescinded or put into abeyance until the Appellants' health and environmental concerns are resolved and the appeals heard.

B. EnCana, CNRL, Husky Oil, and Shell Submission

[263] The Operators explained Amending Approval No. 11115-03-04 rescinds and replaces Amending Approval 11115-03-02, which is the Amending Approval under appeal with respect to CNRL's operations.

[264] The Operators stated that, arguably, the Board is now without jurisdiction to consider the Appellants' appeals as they relate to CNRL, because there is nothing there for the Board to rule on and nothing for the Appellants to appeal, making the appeals related to CNRL

moot. The Operators explained Amending Approval No. 11115-03-04 substantially altered the earlier approvals, including the provisions related to the LICA monitoring program, by adding another facility, the Primrose East Expansion Project. The Operators assured the Board that CNRL did not intend to circumvent the appeals, and therefore, CNRL was prepared to consent to the Board considering, in place of an appeal of Amending Approval No. 11115-03-02, an appeal of sections 4.1.20 to 4.2.31 of Approval No. 11115-03-04 only,[53] because those conditions relate to the Primrose (North and South) and Wolf Lake projects only.

[265] The Operators summarized the position of CNRL as:

> "(a) only Sections 4.1.20 to 4.[1].31 of Approval No. 11115-03-04 should be considered by the Board, and the Appellants are not entitled to bring into this appeal any other provisions of Approval No. 11115-03-04;
>
> (b) the other provisions of Approval No. 11115-03-04 should remain valid and subsisting, and not be subject to appeal, notwithstanding CNRL's consent to allow the substitution of Sections 4.1.20 to 4.[1].31 of Approval No. 11115-03-04 for the Appellants' appeal of Amending Approval No. 11115-03-02;
>
> (c) an appeal of Sections 4.1.20 to 4.[1].31 of Approval No. 11115-03-04 is restricted to the Primrose (North and South) and Wolf Lake projects, which were covered by Amending Approval No. 11115-03-02, and will not in any way affect or relate to CNRL's operation of the Primrose East Expansion Project, including the air monitoring of that Project."[54]

C. Imperial Oil's Submission

[266] Imperial Oil stated that CNRL's dealings are irrelevant to Imperial Oil's Amending Approval.

D. Director's Submission

[267] The Director submitted that CNRL Amending Approvals No. 11115-03-03 and 11115-03-04 do not affect the Board's and the Minister's jurisdiction in respect of the appeals filed regarding Amending Approval No. 11115-03-02.

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[53] In comparing Approval No. 11115-03-04 with Approval No. 11115-03-02, it appears the sections that would apply in this discussion are sections 4.1.20 to 4.1.31, inclusive.

[268] The Director stated the Primrose East Expansion was fully approved on September 6, 2007, with the issuance of Amending Approval No. 11115-03-04. The Director explained that, as a matter of administrative efficiency, the approval was issued as a consolidation of the original approval plus the amendments. The Director stated the LICA monitoring program approval terms and conditions originally issued in Amending Approval No. 11115-03-02 are incorporated and form part of the consolidated approval. The Director submitted that, to the extent that the current appeals are valid, the Board is free to recommend and the Minister is free to confirm, reverse, or vary Amending Approval No. 11115-03-04 in so far as it incorporates Amending Approval No. 11115-03-02.

E. Appellants' Rebuttal Submission

[269] The Appellants stated the motion indicates new information was presented to the Board that was not available at the time the appeals were filed, resulting in prejudice to the Appellants. The Appellants stated this also calls into question the Director's statutory exercise of the approval process.

[270] The Appellants argued the Director's explanation that the Primrose East Expansion was fully approved as a matter of administrative efficiency contradicts the Operators' statement that the approval "…significantly altered the earlier approvals, including those provisions relating to LICA Air Quality Monitoring Program, by adding another facility…."[55] The Appellants noted the references to the Primrose North flue gas desulphurization in Approval No. 11115-03-00 has been removed in Approval No. 11115-03-04.

[271] The Appellants asked the Board to reconsider the issues surrounding the Shell application amendment and the EnCana amending approvals.

F. Discussion

[272] The Board raised this motion because the Director issued Amending Approval No. 11115-03-04 after the appeals were filed with the Board. Amending Approval No. 11115-

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[54] Operators' submission, dated June 26, 2008, at paragraph 84.

03-04 rescinds all previous approvals issued to CNRL relating to this site, including Approval No. 11115-03-02, one of the Amending Approvals under appeal. Technically, because Amending Approval 11115-03-02 no longer applies, the appeals as they relate to Amending Approval No. 11115-03-02 may be moot.

[273] The Board appreciates the position of CNRL and its willingness to proceed with the appeals as it relates to sections 4.1.20 to 4.1.31 of Amending Approval No. 11115-03-04. These sections incorporate the conditions set out in Amending Approval 11115-03-02. These sections represent the conditions appealed in these proceedings.

[274] Because the other sections of Amending Approval No. 11115-03-04 were not part of Amending Approval 11115-03-02 and have not been appealed, the Board can only hear arguments on sections 4.1.20 to 4.1.31 inclusive of Amending Approval No. 11115-03-04.

XI. CONCLUSION

[275] Based on the submissions provided on the preliminary matters, the Board determined the following on the preliminary matters.

A. Stay

[276] The Stay will not be granted because the Appellants did not demonstrate there would be irreparable harm in the time it takes for the appeals to be heard and a decision provided by the Minister. What will be lost is some data, but monitoring is still required under the Amending Approvals.

B. Mediation Confidentiality

[277] The interpretation of the Participants' Agreement to Mediate requires that all discussions made during a mediation meeting are confidential, unless all participants agree to release the information. Confidentiality does not apply to the Director's Record, the Board's file, or information available in the public domain.

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[55] Appellants' submission, dated July 25, 2008, at page 19.

C. Merit of Appeals

[278] The appeals raise an important issue – the effectiveness of a regional air monitoring program. The Appellants live in the area that will be monitored under the program. The appeals are not frivolous or vexatious.

D. Statements of Concern

[279] The appeals of the Ethel Lake Interveners, Ms. Rachel Stone, Mr. David Stone, Mr. George Elchuk, Mr. Andy Leroux, Ms. Mary Anne Leroux, and Ms. Marinda Stander are dismissed for failing to file a Statement of Concern.

E. Directly Affected

[280] The appeals of Ms. Inez Stone (Appeal Nos. 07-010-015) and Ms. Sally Ulfsten (Appeal Nos. 07-016-021) will be heard because they live in the air shed that will be monitored under the Amending Approvals. The appeals filed by the Cold Lake Fibromyalgia Support Group are dismissed because no information was provided to demonstrate how the group itself would be directly affected by the Director's decisions. Although the Board did not find the submissions provided the information required to find the appeals of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners validly before the Board, the Board recognizes the broad environmental issues these groups represent. Therefore, the Board will allow Ms. Stone to present the concerns of the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners as part of her submissions.

F. Adjourn Proceedings

[281] The Board will hold these appeals in abeyance pending the Approval Holders' and LICA's completion of the review of the LICA air shed zone, including the RWDI Report, and the Director's decision regarding the monitoring program. The Board understands the Approval Holders will submit plans to address items raised in the review to the Director by December 31, 2008.

G. Oral or Written Hearing

[282] The Board has scheduled an oral hearing for April 27 and 28, 2009.

H. Issues

[283] The issues to be heard at the hearing of these appeals, which takes into account the issues raised by the Cold Lake Fibromyalgia Support Group and the Ethel Lake Interveners, are as follows:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?

2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?

3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?

4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

I. Amending Approval

[284] Amending Approval No. 11115-03-02 is arguably moot because Amending Approval No. 11115-03-04 rescinds all previous amending approvals. However, the conditions in Amending Approval No. 11115-03-02 were incorporated into Amending Approval No. 11115-03-04. Therefore, the Board will hear arguments on conditions 4.1.20 to 4.1.31, inclusive, of Amending Approval 11115-03-04 issued to CNRL, because these conditions correspond to the conditions set out in Amending Approval No. 11115-03-02.

Dated on January 22, 2009, at Edmonton, Alberta.

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Steve E. Hrudey, FRSC, PEng
Chair

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Dan L. Johnson, PhD
Board Member

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Gordon Thompson, PEng
Board Member