

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – November 1, 2011

**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 Kent and Ingrid Vipond, Bernie and Margie Brown, Robert and Lisa Cowling, Bruce and Marcia Jeffers, Ian and Corrinne Zeer, and Jesse, Sarah, and Harji Hari and Haralta Ranches with respect to *Environmental Protection and Enhancement Act* Approval No. 241939-00-00 issued to EcoAg Initiatives Inc. by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Document Production Motion: *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (01 November 2011), Appeal Nos. 09-006-009, 016, & 019-ID2 (A.E.A.B.).

**BEFORE:**

Mr. Alex G. MacWilliam, Panel Chair.

**SUBMISSIONS BY:**

**Appellants:**

Mr. Kent and Ms. Ingrid Vipond; and Mr. Robert and Ms. Lisa Cowling and Mr. Bruce and Ms. Marcia Jeffers, represented by Ms. Teresa Meadows, Miller Thomson LLP.

**Director:**

Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham and Mr. Andrew Bachelder, Alberta Justice.

**Approval Holder:**

EcoAg Initiatives Inc., represented by Mr. Kelly Nicholson, Field LLP.

## **EXECUTIVE SUMMARY**

Alberta Environment issued an approval to EcoAg Initiatives Inc., authorizing the construction, operation, and reclamation of the High River Waste Management Facility, located near High River, Alberta, for the collection and processing of waste to produce fuel (commonly referred to as biogas).

The Board received Notices of Appeal from several persons including Mr. Kent and Ms. Ingrid Vipond, Mr. Robert and Ms. Lisa Cowling, and Mr. Bruce and Ms. Marcia Jeffers.

The Board addressed a number of preliminary motions, including a request by the Cowlings and Jeffers, and the Viponds (collectively the Applicants) that additional documents be produced.

Following consideration of the written submissions filed by the Applicants, EcoAg Initiatives, and Alberta Environment, the Board made its rulings on the document production request, with written reasons to follow.

The Board ordered EcoAg to provide baseline soil testing data in its possession. If Alberta Environment prepares reports relating to its review of the Groundwater Monitoring Program Proposal prior to the hearing, these reports are to be produced as soon as practical.

Alberta Environment and EcoAg do not have to produce the Air Emissions Report, Nutrient Soil Amendment Land Application Report, analytical results of waste streams, and annual and monthly waste reports, because the facility is not operational and, therefore, no such records exist. The Board cannot order the creation of documents such as an updated and annotated approval application. In addition, the Board determined that documents related to waste streams, groundwater, and security were included in the record and updates previously provided by Alberta Environment and, therefore, an order to produce these documents was not required.

The Enforcement Order previously issued to EcoAg by Alberta Environment does not relate to the Approval or facility and, therefore, neither the Enforcement Order nor the details of the investigation were ordered to be produced. However, as the Enforcement Order is a public document, the Board requested the Director provide the Viponds with a copy of the Enforcement Order. The Board also requested the Director provide the Viponds with a copy of their complaint log.

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## **I. BACKGROUND**

[1] On June 23, 2009, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 241939-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), to EcoAg Initiatives Inc. (“EcoAg” or the “Approval Holder”) authorizing the construction, operation, and reclamation of the High River Waste Management Facility (the “Facility”) located near High River, Alberta, for the collection and processing of waste to produce fuel. This fuel is commonly referred to as “biogas.”

[2] Between July 22 and September 29, 2009, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Kent and Ms. Ingrid Vipond (the “Viponds”) (09-006), Mr. Bernie and Ms. Margie Brown (09-007), Mr. Robert and Ms. Lisa Cowling (the “Cowlings”) (09-008), Mr. Bruce and Ms. Marcia Jeffers (the “Jeffers”) (09-009), Mr. Ian and Ms. Corrinne Zeer (09-016), and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches (09-019) (collectively, the “Appellants”). The Board notified the Approval Holder and the Director of the Notices of Appeal, and requested the Director provide the Board with a copy of all documents in his possession relating to the application and the issuance of the Approval (the “Record”).

[3] The Record was received on August 21, 2009, updates were provided on March 31, 2010, October 8, 2010, and October 29, 2010 (collectively the “Updates”), and the Director also provided a number of policy documents (the “Policy Documents”) on December 17, 2010. Copies of these documents were provided to the Appellants, the Approval Holder, and the Director (collectively the “Parties”).

[4] The Board held mediation meetings with the Parties on October 30, 2009, in High River and on March 9, 2010, in Calgary. No resolution was reached, and the Board proceeded with the hearing process.

[5] On September 21, 2010, the Board asked the Parties to provide submissions on a number of preliminary motions, including: “What documents should be disclosed and provided to the Appellants?” The Board received submissions on the preliminary motions between October 12, 2010 and November 15, 2010.

[6] In a letter dated November 25, 2010, the Board advised:

“The Board requests the Appellants review their requests for documents. If the Appellants believe the documents they are requesting are not included in the Record from Alberta Environment or in the EcoAg public documents provided during mediation that relate to the Approval or Enforcement Order (see attached list), and are relevant to the issue to be heard and are required in order to make their case before the Board, then the Appellants can request the documents from Alberta Environment or EcoAg. If Alberta Environment or EcoAg decide not to provide the documents, then the Appellants can make a formal request to the Board for the documents by December 6, 2010. The formal request must contain an explanation as to why the document is relevant and required to make their case before the Board.” (Emphasis deleted.)

The list attached to the letter was an index of all documents received by the Board that were to be provided to the Panel hearing the appeals. These documents included the Director’s Record, the Updates, the Policy Documents, and additional documents received during the mediation that were determined to be public documents.

[7] On December 3, 2010, the Board received a formal document production request from the Viponds, and on December 6, 2010, the Board received a formal document production request on behalf of the Jeffers and the Cowlings. None of the other Appellants filed requests. Response submissions were filed by the Director on December 14, 2010, and by the Approval Holder on December 15, 2010. The Board notes that it appears the Viponds, the Jeffers, and the Cowlings did not attempt to resolve the document production issue directly with the Director or the Approval Holder as was requested by the Board.

[8] On January 4, 2011, the Board issued a letter advising of its decision respecting the document production requests and directing the Director and the Approval Holder to comply with two of thirteen requests.<sup>1</sup> These are the Board’s reasons for that decision.

## **II. REQUESTS**

[9] The Board will discuss the submissions of the Jeffers and Cowlings, the Viponds, the Director, and the Approval Holder, as part of its analysis below. A summary of the requests by the Jeffers and Cowlings and the Viponds is provided here to detail the nature of the requests.

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<sup>1</sup> The Director and Approval Holder subsequently complied with the Board’s decision by providing the various documents to the Board and the Parties as ordered by the Board.

[10] The Jeffers and Cowlings requested the Board order that:

1. EcoAg and/or the Director provide "... an updated and annotated version of the original approval application that identifies where changes to the facility and facility processes as proposed in the original application have occurred ...";
2.
  - (a) EcoAg provide the two annual reports required pursuant to the Approval, specifically the Annual Air Emissions Report and the Annual Nutrient Soil Amendment Land Application Report; and
  - (b) in the event these two annual reports have not been filed, the Director provide written confirmation he waived the requirement for these reports;
3. EcoAg provide any baseline soil testing data that has been collected as required by the Approval;
4.
  - (a) EcoAg provide any "... analytical results of all waste streams that will be processed at the facility ..."; and
  - (b) EcoAg provide the annual and monthly waste reports submitted to the Director;
5.
  - (a) EcoAg provide "... any additional or updated information associated with the 2009 Groundwater Exploration Report ..."; and
  - (b) the Director provide any documents "... regarding the status of [his] review of the Groundwater Monitoring Program ..." required under the Approval; and
6.
  - (a) the Director provide any documents "... regarding the basis for assessing the security requirements for the facility ..."; and
  - (b) the Director provide "... confirmation that the security basis requirements have been set at \$10,000."

[11] The Viponds requested the Board order:

1. the Director provide "... a complete copy of the Enforcement Order ... issued against Tongue Creek Feeders Ltd.";
2. the Director provide "... ALL DETAILS OF THE INVESTIGATION leading to this Enforcement Order ..." (emphasis in the original); and
3. the Director provide "... a copy of the log of calls made by ourselves to the [Alberta Environment] 24 hour Complaint Line ... for the years 2008, 2009, and 2010."

### III. Legal Principles

#### A. The Board's Power to Compel Document Production

[12] The Board has previously considered its authority to order the production of documents in the *Imperial Oil* and *Maga* cases.<sup>2</sup> As discussed in these cases, the Board's power to compel the production of documents is found in section 95(1) of EPEA, which grants the Board the powers of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39.<sup>3</sup> Sections 4 and 5 of the *Public Inquiries Act*, which detail the powers of a commissioner, provide that:

- “4. The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.
5. The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.”

[13] Although the Board is given the same powers of enforcement as a court of record in civil cases and the same privileges and immunities as a judge of the Court of Queen's Bench, the power to require the production of documents is not identical to that of the civil court. The tests developed by the courts to determine when a person must produce documents during the civil discovery process do not apply directly to the Board. The matters before the Board are not in the nature of civil litigation. The matters before the Board are in the nature of a statutory right of appeal, governed by developed principles of administrative law and, in particular, the principles of procedural fairness.

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<sup>2</sup> See: Document Production Motions: *Imperial Oil Limited v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.) at paragraph 65, and Document Production: *Maga et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited* (13 February 2002), Appeal Nos. 02-023,024, 026, 029, 037, 047, and 074-ID3 (A.E.A.B.) at paragraph 46.

<sup>3</sup> Section 95(1) of EPEA states that the Board “...has all the powers of a commissioner under the *Public Inquiries Act*.”



[14] In *Imperial Oil*,<sup>4</sup> the Board reviewed cases dealing with the interpretation of what was then sections 3 and 4 (now sections 4 and 5)<sup>5</sup> of the *Public Inquiries Act* from Alberta and other jurisdictions with similar legislation.<sup>6</sup> Based on a review of those cases, the Board identified a number of principles that must be considered in order to compel the production of documents. These principles are:

1. The documents being produced to the Board must help resolve the appeal. The Board does not have the jurisdiction to order a party to merely produce documents to another party.
2. The Board's power is in the form of a *subpoena duces tecum*.<sup>7</sup> The Board may only order a witness to appear and compel the witness to produce documents. The Board may not order the production of documents without a witness. The evidence should be presented to the Board in the context of a witness testifying before the Board.
3. Any documents the Board compels to be produced must be in the possession of the witness, if available, or the next best witness, and the Board's order must require that witness to attend and testify.
4. Any documents the Board compels to be produced must be "... required for the full investigation of the matters into which ... [the Board is] appointed to inquire."<sup>8</sup> The documents the Board compels to be produced must be necessary for the Board to consider the subject matter of the appeal before it.

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<sup>4</sup> See: Document Production Motions: *Imperial Oil Limited v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.) at paragraph 65.

<sup>5</sup> The *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 4 and 5 replaced the *Public Inquiries Act*, R.S.A. 1980, c. P-29, s. 3 and 4 on January 1, 2002.

<sup>6</sup> See: *Co-operators General Insurance Co. v. Alberta (Human Rights Commission)* (1991), 80 Alta. L.R. (2d) 73 (Alta. Q.B); *United Assn. of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Alberta (Board of Industrial Relations)*, [1975] A.J. No. 270 (Alta. S.C.T.D.); *Furniture and Bedding Workers Union, Local 33 v. Alberta (Board of Industrial Relations)*, [1969] A.J. No. 12 (Alta. S.C.T.D.); *Calgary General Hospital Board v. Williams* (1983), 26 Alta. L.R. (2d) 220 (Alta. C.A.); *Halifax Shipyard Ltd. v. Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.); and *Nova Scotia (Attorney General) v. Police Review Board (N.S.)* (1999), 178 N.S.R. (2d) 59 (N.S.S.C). See also: Sopinka et al., *The Law of Evidence in Canada* (1992), where it states that "...the relevance of the documents sought to be produced is the relationship, connection or nexus between the documents and the matter being arbitrated."

<sup>7</sup> *Subpoena duces tecum* is defined as: "A court process, initiated by party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of person or body served with process." See: *Black's Law Dictionary*, 6<sup>th</sup> ed., s.v. "*subpoena duces tecum*."

<sup>8</sup> *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 4.

5. The documents must be relevant to the matters before the Board. They must be related to, connected with, or have a nexus with the appeal before the Board.<sup>9</sup>

[15] Applying these principles to the appeals now before us, the order of the Board requires:

1. The documents the Board orders produced must be produced to the Board and, as a matter of practice, the Board will provide the documents to the other Parties to the appeals.<sup>10</sup>
2. The party ordered to produce the documents shall provide at least one witness at the hearing, and this witness should be the best person available and in the best position to speak to the documents that are produced.
3. The documents the Board orders produced must be potentially relevant and necessary to the appeal and the issues before the Board.

## **B. Potentially Relevant and Necessary**

[16] In *Imperial Oil*,<sup>11</sup> the Board determined the Court's analysis in *Frenette*<sup>12</sup> is the starting point in assessing the issue of relevance. The test for potential relevance, as it relates to the exercise of its powers under the *Public Inquiries Act*, requires the documents a party is asking the Board to compel "... be related to, connected with, or have a nexus with the appeal

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<sup>9</sup> See: Document Production Motions: *Imperial Oil Limited v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.) at paragraph 65.

<sup>10</sup> The Board has developed a practice where it asks for the documents that will be produced by the witness to be produced ahead of time. While this is not consistent with a strict interpretation of the *subpoena duces tecum*, providing the documents to the other parties to the appeal at the hearing when the witness testifies would likely result in an adjournment request, which the Board likely would be required to grant on the basis of fairness. Providing the document to the other parties to the appeal ahead of time avoids this concern and results in a more efficient hearing for all parties and, in the Board's view, does not prejudice any of the parties.

<sup>11</sup> Document Production Motions: *Imperial Oil Limited v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

<sup>12</sup> See: *Frenette v. Metropolitan Life Ins. Co.*, [1992] 1 S.C.R. 647 at page 692. The Supreme Court of Canada quoted the British Columbia Court of Appeal in *Dufault v. Stevens*, (1978) 6 B.C.L.R. 199 at paragraphs 203 to 205:

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.... If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, e.g. the document is privileged."

before the Board ...”<sup>13</sup> and must be “... required for the full investigation of the matters into which ... [the Board is] appointed to inquire.”<sup>14</sup>

[17] Therefore, in determining whether to order the production of documents, the proper test is as prescribed by section 4 of the *Public Inquiries Act*: “Are the documents potentially relevant and necessary to the issues the Board is considering in the context of the appeal?” In making this determination, the Board has been guided by examining the issue to be decided in the hearing, the role the requesting party is playing in the hearing, and public interest considerations. The Board will examine these aspects as they relate to the requests before the Board and then consider each of the requests in turn.

#### **IV. Analysis**

##### **A. Issue**

[18] In determining whether the documents requested are relevant and necessary, the Board must take into account the issue it has determined will be considered at the hearing, specifically: Do the terms and conditions of the Approval adequately address the impacts of the Facility on the environment?<sup>15</sup>

[19] There are a number of considerations that are taken into account to determine whether a requested document is relevant and necessary. The issue before the Board only relates to the Approval and the operation of the Facility. Other operations owned and operated by the owner of the Approval Holder are not included in the issue. The Appellants have concerns about the Facility as approved, and some of the concerns arise from previous and existing operations on the Facility site and adjoining properties owned and operated by the Approval Holder’s owner. Although these other operations are not relevant to the Approval being appealed, there is an overlap between the operations and the Facility. Therefore, some of the information requested may have relevance to the appeals. In this case, the key consideration of the document requests is whether the document actually relates to the Approval and Facility and not just to the

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<sup>13</sup> *Halifax Shipyard Ltd. v. Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365.

<sup>14</sup> *Public Inquiries Act*, R.S.A. 2000, c. P-39, section 4.

<sup>15</sup> See: *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006-009, 016, 017, & 019-ID1 (A.E.A.B.).

other operations. If the document request applies only to the other operations, the Applicants would have to demonstrate a nexus between the documents and the issue of the appeals.

## **B. Role of the Party Making the Request**

[20] The matter before the Board involves the Director issuing an Approval for the construction, operation, and reclamation of the biogas Facility. The Appellants have the onus to demonstrate to the Board the Approval does not adequately protect the environment and themselves. In law, a party has the right to know the case against it and the right to defend itself.<sup>16</sup> In the Board's view, these are fundamental principles of natural justice and procedural fairness. Therefore, it is reasonable for the Appellants to seek documentation that is relevant to the issue in order to prepare and present their case.

## **C. Public Interest Considerations**

[21] The function of the Board is to prepare a Report and Recommendations for the Minister, and this requires the Board to consider the public interest, which includes the interests of the Parties before it. This factor needs to be considered in determining whether a particular document request is relevant and necessary. The Board's public interest mandate is made clear in section 2 of EPEA,<sup>17</sup> and while this section is broad, it specifically refers to the "well-being of society."

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<sup>16</sup> See: *The Board of Education v. Rice*, [1911] A.C. 179 H.L. See also: *IWA v. Consolidated Bathhurst Packaging Inc. v. LW.A. Local 269*, [1990] 1 S.C.R. 282.

<sup>17</sup> Section 2 of EPEA states:

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

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

[22] In carrying out its mandate, the Board is required, as outlined in sections 2(b) and (c) of EPEA, to balance a number of competing interests. While the degree of public interest varies depending on the type of appeal and the issues before the Board, the Board knows the current appeal has a public interest element. This is apparent by the number of Appellants and intervenor requests. The proper construction, operation, and reclamation of the Facility is a major concern to the residents living in the vicinity of the Facility.

[23] In deciding if a document is relevant, the Board must remain cognizant of the issue in these appeals and decide if the documents are relevant and necessary to determine one or more aspects of the specified issue. The Board must assess the requested documents to determine if they are relevant and necessary from the public interest viewpoint and then order them produced as required; this is a component of the Board's public interest mandate in section 2 of EPEA. As is discussed further below, in reviewing the issue and the documents requested, the Board concludes some of the documents requested are related to the issue but others do not appear relevant to the issue.

[24] The issue of how the Facility is operated and the possible environmental impacts are a matter of public concern to all Albertans and, in particular, those living in the surrounding area. Therefore, there is a strong public interest element in these appeals, and any documents the Board orders to be produced must be relevant and necessary from the public interest viewpoint.

[25] All of the Parties agreed the Board has the power to order the production of documents and to order that a witness appear at the hearing to speak to these documents.

#### **D. Jeffers and Cowlings**

##### **1. Updated and Annotated Approval Application**

[26] The Jeffers and Cowlings asked the Board to order the Approval Holder and/or the Director provide "... an updated and annotated version of the original approval application

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- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
  - (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
  - (j) the responsibility of polluters to pay for the costs of their actions;
  - (k) the important role of comprehensive and responsive action in administering this Act."

that identifies where changes to the facility and facility processes as proposed in the original application have occurred ....”

[27] This request would have the effect of requiring the Approval Holder or the Director to “create” a document rather than “produce” a document that already exists. The Board does not have the jurisdiction under its document production powers to direct that a person create a document. As the Board is without jurisdiction to order such production, this request is denied.

[28] Further, as is the Board’s usual practice, the Board has already required that all documents considered by Alberta Environment in the approval process, including any changes to the original application, be provided to the Board by the Director as part of the Director’s Record and Updates. Copies of the Record and Updates received from the Director were subsequently provided to the Parties to these appeals. As a result, unless any party can specifically identify documents relating to changes to the original application that have not already been provided, the Board is not prepared to make an order for production in this regard.

## 2. Annual Reports - Air Emissions and Nutrient Soil Amendment Land Application

[29] The Jeffers and Cowlings asked for the disclosure of two annual reports required pursuant to the Approval, specifically the Annual Air Emissions Report and the Annual Nutrient Soil Amendment Land Application Report and, in the event these two annual reports have not been filed, order the Director to provide written confirmation he waived the requirement for these reports.

[30] The Director and Approval Holder stated that, as the Facility is not operational, there has been nothing to report. They advised the reports have not been filed. As such, they argued there was nothing for the Board to order produced. Since the Facility is not operational at this time, there are no emissions and no soil amendment has been produced that would have been applied to the land. There are no data to include in a report. Therefore, this request is denied.

[31] The Director also stated no formal waiver had been issued regarding these reports. As the Facility is not operational, it does not appear the Director is required to issue a formal waiver.

### 3. Baseline Soil Testing Data

[32] The document production request also asked for the Approval Holder to provide any baseline soil testing data that have been collected as required by the Approval.

[33] The Director submitted that, as the Facility is not operational, no such data has been provided to him. However, the Approval Holder advised these data have, in fact, already been collected pursuant to the Approval and provided to the Natural Resources Conservation Board. As these data were collected as a requirement of the Approval under appeal, the Board considers the data are potentially relevant to the matters before the Board. Therefore, the Board orders the Approval Holder produce the data and provide it to the Board no later than January 11, 2011. In making this decision, the Board notes the Approval Holder stated the data were previously provided to the Appellants, and the Approval Holder had no objections to producing the data.

### 4. Analytical Results and Reports

#### (a) Analytical Results of “Waste Streams”

[34] The Jeffers and Cowlings asked the Board to direct the Approval Holder to provide any “...analytical results of all waste streams that will be processed at the facility....”

[35] As noted by the Director, the request for the “...analytical results of waste streams that will be processed at the [F]acility ...” was somewhat unclear. The Board accepts the Director’s interpretation that this request was likely referring to the results of any analysis carried out on the feedstocks (i.e. the input) that will be processed at the Facility. In this regard, the Director again argued that, as the Facility is not operational, no such analytical results exist. The Board agrees. As with the annual reports discussed above, there is nothing for the Board to order produced and, therefore, this request is denied.

[36] With respect to what is expected to be used as feedstocks for the Facility, the Director refers to a number of documents that were included in the Director’s Record of August 29, 2007 to August 14, 2009 (referred to as AENV Record-August 20, 2009) and the Director’s Updated Record of August 2009 to March 15, 2010 (referred to as AENV Record-March 30, 2010). These documents appear to provide the best available answers to the Appellants’ request.

(b) Annual and Monthly Waste Reports

[37] The Jeffers and Cowlings asked the Board to order the Approval Holder to provide the annual and monthly waste reports submitted to the Director.

[38] To the extent this request is for analytical results for waste streams coming from the Facility and the Annual and Monthly Waste Reports that need to be filed with respect to these waste streams, the rationale applied to a number of the requests already considered, also applies here. As the Facility is not operational, there are no waste streams to analyze and, therefore, nothing to report. As a result, this request is denied.

5. Groundwater

(a) Groundwater Exploration Report – Additional Information

[39] The document production motion sought to have the Approval Holder provide “... any additional or updated information associated with the 2009 Groundwater Exploration Report...”

[40] The Director and Approval Holder stated in their submissions that all documents relating to the Groundwater Exploration Report have already been provided to the Board in the Director’s Records. The Board accepts these submissions, and notes that all Records received by the Board from the Director were subsequently provided to the Parties. The Board notes the Approval Holder specifically pointed to Tab 40 of the Director’s Updated Record (referred to as AENV Record-March 30, 2010). As a result, unless any party can specifically identify documents relating to the Groundwater Exploration Report that have not already been provided, the Board is not prepared to make an order for production in this regard and, therefore, denies this request.

(b) Director’s Review of the Groundwater Monitoring Program Proposal

[41] The Jeffers and Cowlings asked the Director to provide any documents “... regarding the status of [his] review of the Groundwater Monitoring Program...” required under the Approval.

[42] The Director submitted he is currently reviewing the Groundwater Monitoring Program Proposal, but at this time, there are no new documents available. As this is a requirement of the Approval under appeal, the Board views any documents related to the review



of the Groundwater Monitoring Program Proposal as potentially relevant to the matters before the Board. While there is currently nothing for the Board to order produced, it is possible that between now and the date of the hearing, the Director will prepare documents relating to his review. Therefore, the Board orders that any documents prepared by the Director in his review of the Groundwater Monitoring Program Proposal be produced as soon as practical.

[43] In making this order, the Board anticipates there may be a series of documents prepared by the Director related to his review, and the Board will rely on his judgment and that of his legal counsel to produce the documents as they become available. The Board is not ordering the Director to specifically “create” any documents. The only documents that are to be produced are those that are prepared in the ordinary course of his review. However, the Board does request that, in any event, as part of the evidence the Director presents at the hearing, he provide a status report on his review. Finally, the Board wishes to be clear that in ordering the Director to produce documents that are prepared in the ordinary course of his review, this does not include documents that are subject to solicitor-client privilege.

## 6. Security

[44] The Jeffers and Cowlings asked the Board to order the Director to provide any documents “... regarding the basis for assessing the security requirements for the facility...” and “... confirmation that the security basis requirements have been set at \$10,000.”

[45] The Director and Approval Holder advised in their submissions that all documents relating to the security required for the Facility were provided to the Board in the Director’s Record and Updates. The Board accepts these submissions and notes the Record and Updates provided to the Board were subsequently provided to the Parties. Therefore, unless any party can specifically identify documents relating to the security that have not already been provided, the Board is not prepared to make an order of production in this regard and, therefore, this request is denied.

## E. Viponds

### 1. Enforcement Order

[46] The Viponds asked the Board to order the Director to provide “... a complete copy of the Enforcement Order ... issued against Tongue Creek Feeders Ltd.”

[47] The Enforcement Order relates to a separate, albeit related corporation, Tongue Creek Feeders Ltd., and its Registrations to operate. It does not relate to the Approval. As such, the Board does not view the Enforcement Order as relevant to the issue to be heard in these appeals. Therefore, the Board will not order the production of the Enforcement Order for the purpose of the Hearing.

[48] That being said, the Enforcement Order is a public document and, as such, in the Board's view, the Viponds are entitled to a complete copy. Therefore, the Board requests the Director provide the Viponds with a complete copy of the Enforcement Order and any subsequent amendments, no later than January 11, 2011. The Board requests the Director provide the Board with a copy of the transmittal letter confirming this has been done. The Viponds are free to make arguments before the Board at the hearing and in their written submission as to how the Enforcement Order is relevant to the issue set by the Board. If they choose to proceed with this argument, they are required to provide the Board with a copy of the Enforcement Order and amendments with their written submission.

## 2. Details of the Investigation

[49] The Viponds have requested the Board order the Director to provide "... all details of the investigation leading to this Enforcement Order ...."<sup>18</sup> (Emphasis deleted.) Again, the investigation in question relates to a separate, albeit related corporation, Tongue Creek Feeders Ltd., and its Registrations to operate. While the Board understands that Tongue Creek Feeders will be a source of feedstocks for the Facility under the Approval being appealed, Tongue Creek Feeders Ltd. and its operations are not under appeal. Therefore, the details of the investigation leading to the Enforcement Order are not relevant to the appeals before the Board. As such, this request is denied.

[50] The Board notes that even if the details of the investigation being requested by the Viponds did relate to the matters under appeal, the Board would be very hesitant to order production of documents containing the information. As the Board understands it, the investigation is still on-going and the Enforcement Order is still open. There are significant public interest reasons for maintaining the confidentiality of such information.<sup>19</sup> Therefore, the

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<sup>18</sup> Viponds' submission, dated December 3, 2010.

<sup>19</sup> Both EPEA and the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, include

Board would have to be provided with very compelling reasons to consider ordering the production of such information even in a limited way. No such reasons have been provided by the Viponds.

### 3. Complaint Logs

[51] The Board was asked to order the Director to provide "... a copy of the log of calls made by ourselves [the Viponds] to the [Alberta Environment] 24 hour Complaint Line ... for the years 2008, 2009, and 2010."

[52] Based on the material that has been provided to the Board by the Appellants in these appeals, it is clear the Viponds and the other Appellants have a long record of filing complaints with Alberta Environment about the problems they were experiencing with facilities operated by related companies. However, as the Facility that is authorized under this Approval is not operational, the Board is unclear as to how the complaint logs kept by the Director are relevant to these appeals. As such, the Board will not order the production of the complaint logs requested by the Viponds for the purpose of the hearing.

[53] However, in the Board's view, neither EPEA nor the *Freedom of Information and Protection of Privacy Act* prohibit the Viponds from obtaining copies of "their" complaint logs. Further, the Board notes that in other appeals, the Director has provided copies of complaint logs to the individuals that filed the complaint. In the Board's view, individuals who file complaints with the Director are entitled to copies of their complaint logs.

[54] As such, the Board requests the Director provide the Viponds with a copy of the complaint logs they requested no later than January 11, 2011. The Board requests the Director provide the Board with a copy of the transmittal letter confirming this has been done. The Viponds are free to make arguments before the Board at the hearing and in their written submission for the hearing as to how the complaint logs are relevant. If they choose to proceed with this argument, they are required to provide the Board with the complaint logs with their written submission. However, in allowing the Viponds to make such arguments, the Board strongly encourages all of the Appellants to stay focused on the issue at the hearing of the appeals, which is the Approval for the Facility.

## V. DECISION

[55] The Board orders the Approval Holder provide the baseline soil testing data. In order to allow all Parties adequate time to review the documents ordered to be produced, the Board set the due date of January 11, 2011. In addition, if the Director prepares reports relating to his review of the Groundwater Monitoring Program Proposal, these reports are to be produced as soon as practical.

[56] The Director and Approval Holder do not have to produce the Air Emissions Report, Nutrient Soil Amendment Land Application Report, analytical results of waste streams, and annual and monthly waste reports, because the Facility is not operational and, therefore, no such documents are available. The Board cannot order the creation of documents such as an updated and annotated approval application. In addition, the Board finds documents related to waste streams, groundwater, and the security were included in the Director's Record and Updates and, therefore, do not have to order the production of these documents.

[57] The Enforcement Order does not relate to the Approval or Facility and therefore neither the Enforcement Order nor the details of the investigation will be ordered produced. However, as the Enforcement Order is a public document, the Board requests the Director provide the Viponds with a copy of the Enforcement Order. The Board also requests the Director provide the Viponds with a copy of their complaint log. If the Viponds use the complaint logs and the Enforcement Order as part of their submissions for the hearing, they are to provide copies of the documents with their written submission.

[58] The hearing is scheduled for February 9, 10, and 11, 2011, in Okotoks, Alberta.

Dated on November 1, 2011, at Edmonton, Alberta.

*“original signed by”*

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Alex G. MacWilliam  
Panel Chair