
ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 2, 2018

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 an appeal filed by Normtek Radiation Services Ltd. with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 00048516-01-04 issued to Secure Energy Services Inc. by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Normtek Radiation Services Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Secure Energy Services Inc.* (2 March 2018), Appeal No. 16-024-D (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTICIPANTS:

Appellant: Normtek Radiation Services Ltd., represented by Mr. Cody Cuthill.

Approval Holder: Secure Energy Services Inc., represented by Ms. Allison Sears, Stikeman Elliot LLP.

Director: Mr. Todd Aasen, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Michelle Williamson and Ms. Meagan Bryson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Amending Approval under the *Environmental Protection and Enhancement Act* to Secure Energy Services Inc. (Secure), allowing Secure to dispose of naturally occurring radioactive material (NORM) below specific radioactive levels into an existing hazardous waste landfill near Drayton Valley.

The Environmental Appeals Board (the Board) received a Notice of Appeal from Normtek Radiation Services Ltd. (Normtek) appealing the decision to issue the Amending Approval.

Secure filed a motion asking the Board to dismiss the appeal on the basis Normtek was not directly affected by the decision to issue the Amending Approval. For Secure to have a valid appeal before the Board, it must be directly affected by the Amending Approval.

Normtek filed a motion asking the Board to issue a stay of the Amending Approval pending the outcome of the appeal.

After receiving and reviewing written submissions provided by Normtek, Secure, and AEP, the Board determined Normtek did not provide sufficient evidence to show it was directly affected by the Amending Approval. Normtek's concerns were primarily economic, and it did not demonstrate its use of a natural resource would be affected by the Amending Approval. The Board dismissed Normtek's appeal because being directly affected is a prerequisite to having a valid appeal.

As there was no valid appeal before the Board, the stay request filed by Normtek could not be considered. The Board can only consider granting a stay where there is a valid appeal before it.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's (the "Board") decisions and reasons in the preliminary motions made in respect of the appeal of Amending Approval No. 00048516-01-04 (the "Amending Approval"), issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director") to Secure Energy Services Ltd. (the "Approval Holder"). The decision to issue the Amending Approval was appealed by Normtek Radiation Services Ltd. (the "Appellant" or "Normtek").¹

[2] The Amending Approval was issued for the Approval Holder's Class I Hazardous Waste Landfill (the "Landfill") in the Pembina area near Drayton Valley, Alberta. The Amending Approval allowed for the disposal of naturally occurring radioactive material ("NORM") below specified activity levels (levels of radiation) in the Landfill. NORM is a by-product of certain industrial activities.²

[3] The Approval Holder made a preliminary motion asking the Board to dismiss the Appellant's appeal on the basis the Appellant was not directly affected by the Director's decision to issue the Amending Approval. The Appellant made a preliminary motion requesting a stay of

¹ As the Board will discuss, the Notice of Appeal (EAB 16-024) and written submissions filed by the Appellant appears to refer to Mr. Cuthill (the individual) and Normtek (the corporation interchangeably). The Board will use "Mr. Cuthill" when referring to the individual and "Normtek" when referring specifically to the corporation.

² According to Alberta Labour:

"Although the concentration of NORM in most natural substances is so low that this risk is generally regarded as negligible, higher concentrations may arise as the result of industrial operations such as:

- mineral extraction and processing - NORM may be released or concentrated in a process stream during the processing of ore...;
- oil and gas production - NORM may be found in the fluids and gases from hydrocarbon-bearing geological formations;
- metal recycling - NORM-contaminated materials are redistributed to other industries...;
- forest products and thermal-electric production - mineral ashes left from combustion may concentrate small amounts of NORM naturally present in plant material and coal;
- water treatment facilities - fresh or wastewater is treated ... to remove minerals and other impurities from the water being treated and may release radon...;
- tunneling and underground working - in areas where small amounts of indigenous radioactive minerals or gases may be present...."

the Amending Approval pending the outcome of the appeal. These reasons address both preliminary motions.

[4] The Board received and reviewed written submissions from the Appellant, the Approval Holder, and the Director (collectively, the “Participants”) on these preliminary motions. The written submissions provided by the Participants to the Board form the basis for the Board’s decisions.

[5] Section 91(1)(a) of EPEA³ states the Board may only accept an appeal if the person filing the Notice of Appeal is directly affected by the decision to issue the Amending Approval. Following consideration of the written submissions provided by the Participants, the Board determined the Appellant was not directly affected by the decision to issue the Amending Approval, and therefore, the appeal was not properly before the Board. Pursuant to section 95(5)(a)(iii) of EPEA,⁴ the Board dismissed the appeal.

[6] As the appeal is dismissed, the Board could not consider the stay application. The Board can only consider granting a stay where it has a valid appeal before it.⁵

See: OHS Code Explanation Guide 2009, Part 20 Radiation Exposure (Alberta Labour: 2009) at <https://work.alberta.ca/occupational-health-safety/ohs-code-explanation-guide.html>.

³ Section 91(1)(a) of EPEA 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” (Emphasis added.)

⁴ Section 95(5) of EPEA states: “The Board may (a) dismiss a notice of appeal if ... (iii) for any reason the Board considers that the notice of appeal is not properly before it...”

⁵ Section 97(2) of EPEA states: “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.”

II. PRELIMINARY MATTERS

A. Late Filed Submission

[7] In addressing the two preliminary motions before it, the Board set a schedule for filing written submissions and provided the schedule to the Participants. The Approval Holder filed its written submission 12 minutes past the deadline set in the schedule. The Appellant argued the Board should not accept the Approval Holder's written submission because it was filed late. The Appellant did not provide any evidence to the Board to show the late filing of the Approval Holder's written submission prejudiced the Appellant. Further, the Appellant did not request an extension of time to file its written rebuttal submission as a result of the Approval Holder's late-filed submission.

[8] Therefore, the Board does not believe the Appellant was prejudiced by the Approval Holder's written submission being filed 12 minutes late. Accordingly, the Board received and reviewed the Approval Holder's written submission, as it did with all the written submissions provided by the Participants.

B. Improper Rebuttal

[9] The Approval Holder expressed concern about the Appellant's rebuttal submission, noting the Appellant included new evidence that was not in its initial written submission. In the Board's view, the purpose of a rebuttal submission is to respond to arguments in the written submissions of the other participants, which were not anticipated. A rebuttal submission is not to be used to split arguments and present new evidence, preventing the other participants an opportunity to respond. Although the Appellant provided additional evidence in its rebuttal submission, most of this evidence was not relevant to determining whether the Appellant was directly affected and, therefore, it did not influence the Board's decision.

[10] The Board notes the Appellant's written submissions raised arguments that were more relevant to issues that might have been considered by the Board at a hearing of the substantive matters raised in the Notice of Appeal. Even though the Board reviewed this information, much of it was not relevant to the Approval Holder's preliminary motion, namely, whether the Appellant was directly affected by the Director's decision to issue the Amending

Approval. Therefore, the Board is of the view, the additional evidence included in the Appellant's written rebuttal submission did not result in prejudice to the Approval Holder. As a result, there was no need to provide the Approval Holder with an opportunity to respond to this additional evidence by way of a further written submission.

C. Who is the Appellant?

[11] The Notice of Appeal (EAB 16-024) filed to initiate this appeal indicated Mr. Cody Cuthill (the principle of Normtek) was the person filing the appeal. However, the language used in the body of the Notice of Appeal referred to "we." The Board understands "we" to mean both Mr. Cuthill and Normtek. In the written submissions filed by the Appellant, most of the discussion as to who is directly affected appeared to focus on the corporation, Normtek. However, from time to time the Appellant appeared to refer to Normtek, the corporation, and Mr. Cuthill, the individual, interchangeably. The Board notes that both the corporation and the individual are "persons" under EPEA.

[12] The Board wishes to be clear it has determined that neither Normtek nor Mr. Cuthill are directly affected by the Director's decision to issue the Amending Approval. The written submissions of the Appellant did not provide sufficient evidence to demonstrate that the natural resources used by either Normtek or by Mr. Cuthill are directly affected by the Amending Approval. In the following summary of the submissions of the Participants, and in its analysis and decision, the Board will use the term "Appellant" to reflect that Normtek and Mr. Cuthill are being referred to interchangeably. The Board notes that in the written submissions, Mr. Cuthill did not appear to distinguish between direct effects on himself as an individual, on himself as the principal of Normtek, or on Normtek as the corporation.

III. DIRECTLY AFFECTED

A. Submissions

[13] The Appellant's written submissions raised arguments that are not relevant to the issue of whether the Appellant is directly affected by the Director's decision to issue the Amending Approval. Many of the Appellant's arguments were more relevant to issues that may be considered by the Board at a hearing of the substantive matters raised in the Notice of Appeal.

The Approval Holder and the Director responded to many of these arguments. Further, the Appellant's rebuttal submission was mainly a repetition of the arguments advanced in its initial written submission. As stated, rebuttal is not intended to provide a participant the opportunity to repeat or expand on what it has already said. Notwithstanding these concerns, in order to provide a complete record, the Board has tried to summarize all the arguments presented by the Participants regardless of whether they were relevant to the issue of whether the Appellant was directly affected.

1. Appellant

[14] The Appellant explained it specializes in providing consulting services for the management of radioactive material and services to decontaminate radioactive equipment using appropriate management techniques, which meet industry best practices and internationally accepted principles. The Appellant stated the Approval Holder's Landfill does not provide these services and only handles the disposal of waste. The Appellant argued Alberta Environment and Parks ("AEP") failed to develop any formal policies, procedures, or legislation regarding radioactive material, even though jurisdiction was transferred to the Province 16 years ago.

[15] The Appellant explained the standard industry practice for handling radioactive material in Canada is to classify and segregate radioactive waste with "activities" (i.e. levels of radioactivity) less than 70 Becquerels per gram (Bq/g)⁶ for short-lived radionuclides and less than 5 Bq/g for long-lived radionuclides, from radioactive waste with activities exceeding these limits. The Appellant said the low activity long-lived waste (5 Bq/g or less) can be disposed of at a hazardous landfill in British Columbia, which complies with internationally accepted principles and practices. The higher activity long-lived radionuclides (greater than 5 Bq/g) must be disposed of in geological formations. The Appellant said only two decontamination facilities, which specialize in the management of the higher activity waste, have been licenced in Western Canada. These are the Appellant's facility in British Columbia and another facility in Saskatchewan.

⁶ According to the Nuclear and Radiation Glossary (Canadian Nuclear Safety Commission) "Becquerel (Bq): The [international scientific] unit of radioactivity, equal to one transformation (decay) per second. The [B]ecquerel

[16] The Appellant stated present and future Albertans, including the Appellant, its shareholders, and its employees, are directly and adversely affected by the Director's decision to allow the disposal of high activity radioactive waste in a manner that does not comply with industry standard practices. According to the Appellant, the improper handling of this waste will cause harm to the environment and the economy.

[17] The Appellant argued a person does not have to live next to a project to be considered directly affected. The Appellant said it would be severely impacted economically by the approved project (allowing the Approval Holder to dispose of this waste in its Landfill). The Appellant stated the environment would be directly affected, which in turn would directly affect the Appellant, its shareholders, and its employees.

[18] The Appellant stated it, as well as its shareholders and employees, would be financially affected, and it would have to lay off employees and shut down its operations. The Appellant said over 99 percent of equipment and produced water filters, both contaminated with NORM, would now be approved for direct disposal to the Approval Holder's Landfill, rather than using the services provided by the Appellant. According to the Appellant, its decontamination services and geological disposal services are more environmentally responsible options. The Appellant stated the Amending Approval allows the Approval Holder to accept objects with radioactive surface contamination exceeding the Canadian Guidelines⁷ for disposal at its Landfill. The Appellant said the polluters will not have to pay for the effects of their pollution since they will not have to decontaminate their equipment. The Appellant argued this would be contrary to the polluter pays principle in section 2(i) of EPEA.⁸

supersedes the non-[international scientific] unit curie (Ci).” See: <http://nuclearsafety.gc.ca/eng/resources/radiation/introduction-to-radiation/nuclear-and-radiation-glossary.cfm#>.

⁷ Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials (NORM) (Health Canada: 2013) at <https://www.canada.ca/en/health-canada/services/environmental-workplace-health/reports-publications/environmental-contaminants/canadian-guidelines-management-naturally-occurring-radioactive-materials-norm-health-canada-2000.html> (“Canadian Guidelines”).

⁸ 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: ...

(i) the responsibility of polluters to pay for the costs of their actions....”

[19] The Appellant stated the Approval Holder will receive an economic benefit from receiving equipment that no longer needs to be decontaminated, and it can be assumed this will be at the Appellant's expense. The Appellant stated the investment it has made in developing decontamination methods and custom proprietary decontamination equipment will be impacted because the equipment would no longer be utilized.

[20] The Appellant said the Director failed to classify the waste being accepted for disposal in the Landfill. The Appellant argued it would be reasonable to assume there would be environmental effects if high activity long-lived radionuclides were disposed of in a landfill not designed to accept this type of waste. The Appellant said the Landfill is not designed to the standards of internationally recognized principles and experts.

[21] The Appellant stated its consulting services would be affected by the Director's decision not to follow industry standard practice, and this would have a negative economic effect on the Appellant. The Appellant said, as a result of the Amending Approval being issued, over 99 percent of all oilfield waste could now be disposed of in the Approval Holder's landfill.

[22] The Appellant argued its employees would no longer be required, and the environment would be affected because the approved disposal scheme does not meet best practices or recommendations for handling radioactive material. The Appellant said it has a "duty to protect" the environment, and it does this through its consulting services, which would be negatively impacted by the Director's decision. The Appellant said the impact would be financial and environmental as it would be inappropriate to advise clients that international associations recommend geological disposal, but geological disposal is not required in Alberta. The Appellant stated future generations should not be subject to the actions of today, especially when other options are available for disposal of high activity radioactive waste.

[23] The Appellant stated the disposal of NORM waste in the Landfill will affect those working in and around the Landfill, including the Appellant's employees who enter the site to deliver waste for clients and who use the lands surrounding the Landfill. The Appellant argued that, other than financial gain, there is no benefit to the Approval Holder to dispose of radioactive waste in the Landfill, particularly when a method to dispose of the waste already

exists. The Appellant stated it has a “special interest” in the Director’s decision because its business is protecting the health and safety of the environment and Albertans.

[24] The Appellant said the Director’s decision discourages it from pursuing the development of radioactive waste legislation or more formal policies and procedures that meet industry best practices, as the Amending Approval does not meet these policies and procedures. The Appellant argued this was contrary to sections 2(d), (e), (f), and (g) of EPEA.⁹

[25] The Appellant argued its shareholders, its employees, and the environment are directly and adversely affected by the Director’s decision to disregard current practices by eliminating the need for decontamination. The Appellant said the environment will be affected by allowing the disposal of NORM waste in the Landfill because, according to the Appellant, the Landfill is not designed to accept this waste and the Landfill does not have institutional controls for managing long-term effects of long-lived radionuclides.

[26] The Appellant stated all Albertans, including its shareholders and its employees, will be directly affected, now and in the future, by the impact the Director’s decision will have on the ability to use, hunt, fish, or enjoy the lands surrounding the Landfill.

[27] The Appellant stated allowing the disposal of NORM waste in the Landfill would contravene section 2(a) of EPEA and would contradict section 2(b) of EPEA¹⁰ as generators

⁹ Sections 2 of EPEA state:

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

- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment....”

¹⁰ Sections 2 of EPEA provide:

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

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

would take the cheaper landfill option to dispose of NORM waste instead of the geological disposal method currently available.

[28] The Appellant stated it was likely that levels of radiation at the Landfill would be higher than the levels allowed in the Canadian Guidelines and the levels outlined in the radiological assessment included in the application for the Amending Approval. According to the Appellant, these higher levels will affect the health and safety of the environment, the public, and its shareholders and employees.

[29] The Appellant stated the decision to issue the Amending Approval, which allows for all NORM waste to be accepted at the Landfill without completing an assessment on some of the waste and not providing activity limits for some of the waste, will (1) increase the likelihood of environmental damage and exposure to future generations, (2) increase the potential for environmental exposure to workers and the public entering the Landfill during the operational phase, and (3) inhibit appropriate development of regulations as it sets a precedent for other landfill operators. The Appellant argued this is not consistent with the purposes of EPEA.

[30] The Appellant raised concerns about the requirement for quarterly air monitoring. The Appellant said air quality monitoring may be acceptable for low concentrations of long-lived radioactive waste, but air quality monitoring does not address the effect on drivers entering the Landfill, including the Appellants employees. These effects could occur during offloading procedures and the decontamination of the trucks.

[31] The Appellant stated the majority of NORM waste is generated in British Columbia, so the Approval Holder will be accepting waste from out of the Province, thereby giving the Approval Holder a competitive advantage over the Appellant. The Appellant said its collapse, due to the loss of business, would negatively affect those generators who want to handle their waste in accordance with recommended practices, and this would affect the development of more formal regulations. Advocating for the development of more formal regulations is part of the Appellant's mandate.

(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"

[32] The Appellant said the Amending Approval provides the Approval Holder with a low-cost option of dealing with its own waste, even though it is detrimental to the environment. The Appellant argued this is contrary to the polluter pays principle in EPEA, and negatively affects the Appellant's business.

[33] The Appellant argued the Director has no statutory authority to issue the Amending Approval and, therefore, has no authority to determine whether the Appellant is directly affected. The Appellant stated the Alberta Energy Regulator ("AER") has the appropriate authority, given the main waste stream for the Landfill is oilfield waste. The Appellant argued the Approval Holder was aware the AER has experience in dealing with NORM waste but chose to apply to AEP for the Amending Approval. According to the Appellant, AEP has no experience approving facilities for oilfield waste and radioactive waste.

[34] The Appellant said the approach to handling radioactive waste is to maintain exposure to levels as low as reasonably possible. The Appellant stated the acceptance of waste with high levels of radioactivity into a landfill, which has the potential to affect future generations, contradicts this management principle. According to the Appellant, geological disposal is the only appropriate method for long-lived radionuclides of high activity levels.

[35] The Appellant stated that all Albertans are affected by the Director's decision, but its shareholders and employees are affected to a higher degree in both economic and non-economic terms. The Appellant said it provides the industry with no-cost advice on safety related issues, such as policy development, to ensure industry complies with international standards and with occupational health and safety regulations. The Appellant said the Director's decision "...will probably and highly likely drive us out of business. This would be a negative impact on the environment since no other company presently ... [provides this type of advice]."¹¹

[36] The Appellant stated the Amending Approval will cause environmental damage. The Appellant said all Albertans are directly affected by the Director's decision. The Appellant said its shareholders and its employees have the same interest as Albertans, as well as having a unique interest. The Appellant explained there are a limited number of companies that specialize

¹¹ Appellant's submission dated August 26, 2016, at paragraph 26.

in dealing with NORM waste. Therefore, the Appellant is uniquely affected since it will not be able to provide its services, which prevent environmental damage from occurring. The Appellant stated this would cause adverse effects to the environment for all Albertans and future generations, and it would cause immediate economic effects to the Appellant's shareholders and employees.

2. Approval Holder

[37] The Approval Holder explained the Amending Approval allows it to accept NORM waste within specified maximum limits and subject to specific monitoring, sampling, reporting, and handling conditions at its existing Landfill.

[38] The Approval Holder stated the Appellant failed to establish it is directly affected by the Amending Approval. The Approval Holder said the Appellant's interests are purely commercial, and it is making improper use of the Board's appeal process to seek protection from fair competition. The Approval Holder stated the Appellant failed to demonstrate the Approval Holder's acceptance of NORM waste, in accordance with the terms and conditions of the Amending Approval, will harm a natural resource used by the Appellant or will harm the Appellant's use of a natural resource. The Approval Holder argued there is no connection between the alleged economic effects on the Appellant and any effects on the environment.

[39] The Approval Holder noted most of the Appellant's submission related to the substantive merits of the appeal, not the directly affected issue. The Approval Holder submitted the Appellant mischaracterized several key issues and advanced interpretations of various Canadian and international NORM guidelines that cannot be sustained, specifically:

- The Approval Holder is only permitted to accept (1) naturally occurring isotopes, (2) non-Transportation of Dangerous Goods regulated waste, and (3) non-Canadian Nuclear Safety Commission regulated waste, all of which falls within the "very low level" NORM waste category. This waste is appropriate for landfill disposal in accordance with the Canadian Guidelines, and in accordance with international standards and best practices.
- 5 Bq/g for radium 226 is not industry standard practice for landfill disposal of NORM waste.

- Landfills do not have the same classification system in British Columbia as landfills in Alberta.
- There are no geological disposal options for NORM waste in Canada. The salt caverns licenced for NORM waste only accepts sludges and liquids, not solid NORM waste. Solid NORM waste is suitable for landfill disposal.
- The Minister responsible for EPEA has no obligation to pass regulations addressing NORM waste. AEP has developed the Interim Waste Management Information Sheet: Management of NORM Waste in Alberta and the Amending Approval is consistent with the guidelines set out in this Information Sheet.

[40] The Approval Holder accepts the Appellant is knowledgeable about NORM waste. However, the Approval Holder submitted the Appellant is not an expert in radiological assessment, and its comments regarding the radiological assessment filed with the Amending Approval application were without merit and should be disregarded.

[41] The Approval Holder stated the Appellant must prove on the balance of probabilities that it is personally directly affected by the Amending Approval, and to do that, it must prove there is a reasonable probability it will be harmed or impaired by the Director's decision to issue the Amending Approval. The Approval Holder noted the Appellant must show the Amending Approval will harm a natural resource it actually uses or will harm its actual use of a natural resource.

[42] The Approval Holder noted the Appellant must demonstrate there is a proximal connection between its use of a natural resource that will be harmed by the Amending Approval. Further, this connection cannot be based on a general interest or desire to prevent any environmental harm. It must show the environmental harm directly affects the Appellant.

[43] The Approval Holder noted the Appellant's written submission provides little information in support of the issue of whether and how the Appellant is directly affected by the Amending Approval.

[44] The Approval Holder argued the economic impacts alleged by the Appellant are speculative and unsubstantiated by any economic analysis, and the Appellant did not

demonstrate any connection between any economic impact and any environmental harm to a natural resource that it uses or to its use of a natural resource.

[45] The Approval Holder stated the Amending Approval does not permit the Approval Holder to accept high activity radioactive waste. The Approval Holder said the Appellant's position that its business merits protection from competition is wrong, and even if this claim had merit, the Appellant only provided bald assertions its business would lose revenue, or its proprietary decontamination equipment would no longer have value. The Approval Holder accepts that a significant aspect of the Appellant's business is consulting services. However, according to the Approval Holder, there is no support for the view the need for such services would be reduced because of the issuance of the Amending Approval.

[46] The Approval Holder argued additional NORM waste disposal options will build awareness in industry and help all NORM service providers expand their business. The Approval Holder suggested the Appellant may benefit as NORM awareness and compliance improves. According to the Approval Holder, as the generation of NORM waste increases with more drilling into shale formations, there will be an increase in the need for consulting and other NORM related services.

[47] The Approval Holder stated there are currently no options available in Alberta for the disposal of NORM waste. Currently, such waste is decontaminated and then the decontamination by-product is sent either to a landfill in British Columbia or for geological disposal in Saskatchewan. The Approval Holder said the Appellant did not provide any costs associated with its process. The Approval Holder submitted the Appellant's process actually increases waste volumes by adding fresh potable water to the NORM impacted materials, which then must be filtered at other waste management facilities or transported to Saskatchewan for geological disposal. In addition, the filters must be disposed of at a licenced NORM waste landfill. The Approval Holder said the handling process increases the radiological risks to workers, adds to total waste volumes, and is an unnecessary use of potable water.

[48] The Approval Holder stated the Appellant did not provide evidence in respect of how many employees it has and why they would be laid off. The Approval Holder said the Appellant's decontamination work and equipment will still be necessary since not all NORM

waste will meet the criteria under the Amending Approval to be allowed to be disposed of in the landfill. The Approval Holder said the industry will still require the decontamination of reusable and recyclable equipment contaminated by NORM. The Approval Holder stated the Amending Approval allows for an additional disposal option for solid NORM waste that cannot be reused or recycled. The Approval Holder also stated the location of the NORM waste might make transportation to its facility more expensive than disposal at the landfill in British Columbia or the salt caverns in Saskatchewan.

[49] The Approval Holder said the Appellant demonstrated nothing more than a general interest in environmental protection. The Approval Holder stated there was no evidence the Appellant or any of its employees has ever used any natural resource near the Landfill. The Approval Holder argued the hypothetical potential future use of the area for hunting or recreation presented by the Appellant is not adequate to demonstrate any connection between alleged effects on the environment and any economic impacts on the Appellant. The Approval Holder stated the Amending Approval does not have the potential to affect the environment that the Appellant relies upon for its livelihood. The Approval Holder argued the viability of the Appellant's business is not dependent on the protection of the environment around the Approval Holder's existing Landfill.

[50] The Approval Holder said there is no reason the Appellant's employees would have to enter the Landfill to deliver waste for clients. The Approval Holder said the Appellant has not historically been in the transport business and its employees have not delivered NORM waste to the Landfill. The Approval Holder noted the Appellant is not a current customer of the Landfill, and any suggestion the Appellant may become a customer in the future is speculative.

[51] The Approval Holder stated there is no reason for the Approval Holder's customers or consultants to enter the Landfill. It explained that third parties delivering NORM waste to the Landfill do not enter the actual landfill area, and there are strict delivery and handling requirements under the Amending Approval.

[52] The Approval Holder explained its safety procedures must meet occupational health and safety standards to protect its personnel who have daily exposure to NORM waste. The same safety procedures must be followed for anyone coming to the Landfill. The Approval

Holder said there is a significant safety margin for anyone who is only there for a short time to unload a truck.

[53] The Approval Holder stated, even if the Appellant became a customer delivering to the Landfill, it is unclear how unloading of NORM waste at the Landfill would be materially different from when the truck is initially loaded with the NORM waste.

[54] The Approval Holder stated the Appellant did not show how the Approval Holder's operations under the Amending Approval will harm a natural resource used by the Appellant or any of its employees, or how it will harm the use of a natural resource by the Appellant or any of its employees. The Approval Holder argued the Appellant failed to meet its burden to demonstrate the required connection between the alleged economic effects and any effects on the environment. The Approval Holder stated the alleged economic effects are speculative and unsubstantiated by any economic analysis or evidence.

[55] The Approval Holder submitted neither Mr. Cuthill personally nor Normtek are directly affected by the Director's issuance of the Amending Approval.

3. Director

[56] The Director submitted the Appellant is not directly affected by the Director's decision to issue the Amending Approval and has no standing before the Board.

[57] The Director explained the Amending Approval authorizes the Approval Holder to receive and dispose of NORM waste at its existing Landfill.

[58] The Director stated the Appellant operates a decontamination facility in Fort St. John, British Columbia, which decontaminates equipment contaminated with NORM. It gets the equipment from industries within Alberta and elsewhere that process natural resources. The Director noted the Appellant is a federal corporation, registered in Alberta as an extra-provincial corporation, and even though its decontamination facility is in Fort St. John, its corporate address is in Calgary, Alberta.

[59] The Director explained he found the Appellant not directly affected by the proposed amendment and, although he rejected the Appellant's Statement of Concern, he indicated the Appellant's concerns would be considered in making his decision.

[60] The Director stated most of the Appellant's concerns were not environmental in nature, and the majority reflected concerns of all Albertans in the present and in the future. The Director said few of the concerns suggested any probable direct causal effect on the Appellant except for:

1. exposure to radiation from the disposal of NORM waste in the Landfill will affect future generations and those working in and around the Landfill, including the Appellant's employees entering the Landfill to deliver waste for clients;
2. exposure to radiation from the disposal of NORM waste in the Landfill will affect all Albertans now and, in the future, including the Appellant's shareholders and employees who work, hunt, fish, or enjoy the lands surrounding the facility, and the lands that will be recreational lands at some time in the future; and
3. the Operations Plan allows for large quantities of radioactive waste to be accepted and not quantified, resulting in an increase in exposure to future generations, as well as the Appellant's personnel during offloading procedures and decontamination.

[61] The Director argued the Appellant's concerns about economic impacts are not tied to the environment, but are due to the fact the Approval Holder is allowed to engage in an activity that competes with some of the Appellant's business. The Director stated the Appellant's main concern is the Amending Approval will eliminate the demand for Appellant's decontamination services.

[62] The Director noted the Appellant's alleged economic interest claims, specifically that:

1. employees would be laid off when equipment contaminated with NORM is disposed of by the Approval Holder rather than decontaminated and disposed of by the Appellant, eliminating the need for the Appellant's decontamination services;
2. the Appellant would suffer economic loss from not designing custom proprietary decontamination equipment;

3. the Appellant's consulting business, which focuses on best practices for the disposal of radioactive waste, would no longer be required causing economic loss;
4. the Appellant's reputation would be negatively impacted by Alberta adopting different standards than what the Appellant relies on when consulting, speaking with, or advising clients;
5. the Appellant's business is based on a set of practices that allegedly disallowed the disposal of NORM waste in a landfill, which according to the Appellant, the Amending Approval changed;
6. the Director's decision to issue the Amending Approval would enable generators of radium 226 waste to take the cheaper landfill option rather than decontamination or geological disposal, thereby affecting the Appellant's shareholders and employees from working or using the natural resources in the area;
7. the Director failed to establish a classification system for radioactive waste disposal in Alberta, which affects the environment, the Appellant's shareholders and employees, and all Albertans;
8. the Appellant's business would be affected because the Approval Holder accepts produced water from waste generators at other locations and, in turn, produces NORM waste itself for which it had no authorization to accept until now; and
9. the Amending Approval would drive the Appellant out of business as the services it provides would be no longer needed, such as providing advice to the industry on safety issues and policy development to align with international and other standards.

[63] The Director stated the Appellant cannot claim standing based on geographic proximity. The Director noted the Appellant acknowledged it has no land holdings within the immediate area of the project.

[64] The Director said the only potential environmental effect related to the proximity of the project, included in the Appellant's submission, was the potential effect on employees who (1) are alleged to reside at hotels in the area and eat at restaurants in the area, (2) will enter the Landfill to deliver waste for clients, and (3) use the surrounding lands for work and recreational purposes.

[65] The Director argued these assertions are too speculative, hypothetical, or unsubstantiated to give the Appellant standing. The Director stated there is no evidence the Appellant does business with the Approval Holder, so there is no reason to expect its employees

to be at the Landfill. The Director said there was no evidence of specific locations near the Landfill where the Appellant's employees visit for business. There is also no evidence as to how frequently or how long the Appellant's employees are at these locations. The Director stated even if the information were available, it would have to be significant to justify a reasonable probability of a causal connection between the Amending Approval and use of the area by the Appellant or its employees.

[66] The Director said most of the Appellant's assertions lack evidence of specific effects that are any different than would be experienced by the public at large. The Director noted most of the Appellant's concerns related to impacts on all Albertans or future generations, which is not a sufficient basis to grant standing.

[67] The Director argued the Appellant cannot claim standing based on harm to a natural resource that may affect its economic interests. The Director explained NORM occurs naturally in the environment. It is the by-product of processing certain natural resources. The Director noted the production of NORM waste is not impacted by the Amending Approval, since it will continue to be generated, and the generators will need to find ways manage this waste. The Director said the disposal of NORM waste under the Amending Approval is in direct competition with the Appellant's decontamination business, but this is not sufficient grounds to grant standing.

[68] The Director argued the Appellant's assertions of potential economic impacts are speculative and hypothetical given there was no evidence the need for decontamination or consulting services would be eliminated or that the landfill disposal option would be cheaper.

[69] The Director stated it was difficult to see the causal connection between the Amending Approval and any reasonable or probable harm to the Appellant. The Director said the Appellant did not show the Amending Approval will harm a natural resource the Appellant uses or harm its use of a natural resource. The Director noted the Appellant is not a neighbour of the Landfill and its activities are not proximate to the lands covered by the Amending Approval. The Director stated the Appellant's concerns were the same as those of the general public, and the Appellant's alleged activities in the area were speculative, unsubstantiated, or hypothetical.

[70] The Director requested the appeal be dismissed on the basis that the Appellant does not have standing.

4. Appellant's Rebuttal

[71] The Appellant stated the Director authorized the acceptance of high activity waste, but the Director did not provide any documentation to show he actually considered high-activity waste in making his decision. The Appellant said the Director failed to understand the difference between low activity waste and high activity waste. The Appellant argued the Director's misinterpretation of the classification of waste will result in environmental harm and harm to a natural resource.

[72] The Appellant stated that all radioactive material at levels above Health Canada's Unrestricted Derived Release Limit will damage a natural resource if disposed of, but the degree of harm or damage to the environment is the concern. The Appellant said the Director's decision to issue the Amending Approval will result in harm to water, fish, wildlife, and plant life where they are exposed to the waste materials. The Appellant stated the radioactive materials can mobilize in the environment and contaminate the environment far away from the Landfill. The Appellant argued proximity is not required for the Board to grant standing.

[73] The Appellant argued that since the Director did not disagree that radioactive materials will harm the environment, the Appellant had provided sufficient evidence that harm to the environment will occur because of the Director's decision.

[74] The Appellant noted the Director admitted three of its concerns have probable direct effects. The Appellant said it only needed to establish a probable direct effect for one concern to have standing to bring this appeal.

[75] The Appellant said it was personally and individually affected in its use of the environment for hunting, fishing, driving all-terrain vehicles, snowmobiling, and camping. The Appellant stated the health of its employees would be affected, as they will be required to work at the Landfill and in the surrounding area, subjecting them to radioactive dust.

[76] The Appellant explained that one of its shareholders has Métis status and, therefore, has a legal right to use resources that may be harmed.

[77] The Appellant stated it has and will continue to work in the area. The Appellant stated some of its employees fished in the area.

[78] The Appellant explained it decontaminates over 50 percent of the equipment in the industry. The Appellant stated it will be required to provide services to its clients that will include providing disposal services at the Approval Holder's Landfill.

[79] The Appellant stated there are indirect effects of the Director's decision to issue the Amending Approval. The Appellant said there was a high potential of it going out of business based on the number of jobs the Appellant has completed that have the potential to be taken over by the Approval Holder. The Appellant stated that, if industry does not have access to the Appellant's expertise, the environment could be affected.

[80] The Appellant stated the decontamination aspect of its business will be affected, and that other aspects of its business, including providing advice on safety and attendance at international conferences, would be affected. The Appellant said its business includes providing expertise in recommended practices for industry to follow. The Appellant stated it would no longer design customized equipment, since it anticipated the current equipment would no longer be used.

[81] The Appellant said harming the environment would affect its shareholders and employees who use the Landfill. The Appellant also stated that the workers who use natural resources near the Landfill would be affected.

[82] The Appellant stated its main concern is harm to the environment and the economic interests tied to the harm to the environment. The Appellant said interests can be economic, environmental, or otherwise and, in this case, all three are affected.

[83] The Appellant argued it does not have to prove geographic proximity and it is only something the Board looks at to verify a direct affect. The Appellant explained the lands around the Landfill are public lands. The Appellant argued if proximity was required, such as owning adjacent lands, then this requirement would have been specified in EPEA, and it would exclude all persons when public lands are involved. The Appellant said proximity is the use of

the area. The Appellant stated its employees work in the area, work at the Landfill, and will use the resources surrounding the Landfill.

[84] The Appellant argued it does not have to substantiate the locations it goes to or the length of time spent in the area since this is “proprietary information.” The Appellant stated it does work in the area and it will continue to work in the area and use the resources. The Appellant said it will drink water at the hotels and restaurants in the area, eat wildlife and fish from the area, and will end up using contaminated lands for recreation.

[85] The Appellant explained short-lived radioactive materials have an immediate harmful effect on the environment, but the effects of radioactive materials can occur in the future, so the test for directly affected should be different when considering long-lived radionuclides. The Appellant questioned who will represent those in the future if technical experience is not sufficient to be granted standing. The Appellant said the environmental damage has the potential only to occur in the future, and the adverse effect may not be observed for hundreds or thousands of years. The Appellant argued it is not reasonable for an appellant to have to show it is harmed by an action of the Director today when the harm to the environment has not yet occurred.

[86] The Appellant said the health effects that could occur include the risk of cancer. The Appellant stated other Albertans do not work in the NORM business and are not required to use the Landfill or be in the area for work.

[87] The Appellant stated it is easy to conclude that, based on economics, if it is cheaper to dispose of something in a landfill than it is to decontaminate and manage the waste properly, and businesses will choose the landfill option. The Appellant said no business can survive doing only those jobs having activity levels above those allowed for disposal in the Landfill under the Amending Approval.

[88] The Appellant argued the Director and Minister have not upheld their responsibilities under EPEA with regards to the Amending Approval and, therefore, the Appellant is not required to show how it is directly affected. The Appellant stated:

- no policies or procedures have been developed for radiological protection or radioactive waste management as required under section 11 of EPEA;¹²
- the Minister has not developed any radioactive waste management policies as outlined in section 12(a) of EPEA;¹³ and
- AEP failed to comply with studies and assess information regarding radioactive waste disposal pursuant to section 12(c) of EPEA.¹⁴

The Appellant notes that AEP worked with the AER to develop a technical report, but the participants could not agree on the classification of radioactive waste nor limits acceptable for landfills. The document was rejected by the AER as an “official government document” and should not be used in applications. Without the study and review of radioactive waste facilities, the Director made an improper decision causing environmental harm now and in the future.

[89] The Appellant argued, in the case of long-lived radionuclides, it is not possible to establish a direct personal or private interest and, therefore, the requirement to show direct personal or private interest is not required to have standing. The Appellant stated its business and interest in proper environmental stewardship, which includes protecting the environment in the present and in the future, are all that is needed to obtain standing. The Appellant argued it only needs to show environmental harm to future generations. The Appellant noted international organizations have stated that it is impossible to determine the effects on long-lived radionuclides because the effects will not happen for hundreds or thousands of years in the future.

¹² 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 in promoting human health through environmental protection.”

¹³ Section 12 of EPEA provides:

“The Minister

- (a) is responsible for the establishment of the policies, programs, services and administrative procedures of the Department, and for co-ordination with other departments of the Government and with Government agencies of matters pertaining to the environment....”

¹⁴ Section 12 of EPEA states:

“The Minister...

- (c) shall compile, study and assess information related to the environment for the purpose of better carrying out the Minister’s functions and responsibilities under this or any other Act with a view to providing that information to departments of the Government, Government agencies and the public....”

[90] The Appellant said short-lived radionuclides can have a direct effect on the Appellant's shareholders and employees that is economic, environmental, and in other ways. The Appellant said its business is environmental in nature as it provides sound, environmentally safe, management of radioactive material, which complies with internationally recommended practices. The Appellant explained the advice it provides is for monetary gain and non-monetary purposes, such as educating the industry about safe working procedures.

[91] The Appellant stated its interest is above that of any Albertan since the Amending Approval is related to radioactive waste, and most Albertans only have a general interest in environmental protection.

[92] The Appellant argued its interests are not purely economic, but the Approval Holder's interests are, given the Approval Holder is now allowed to obtain market share using an existing asset with no further requirements other than additional monitoring. The Appellant said it has no issue with the Approval Holder building a facility designed to accept radionuclides at the levels it wants to accept.

[93] The Appellant stated if the Landfill accepted low concentrations of radioactive material the Appellant would not suffer economic hardship. The Appellant said it is unfair competition if one business handles radioactive waste in accordance with recommended practices and the other business "dumps" the waste. The Appellant argued its economic interests are not purely commercial. The Appellant explained some of the work its employees do will involve taking waste to the Landfill for disposal. The Appellant said some of its consulting services would no longer be required, as generators would no longer need to classify their waste. The Appellant said it does not have to show which work would be lost or show a dollar value of the economic impact. The Appellant stated the effect on it is unique because there are few businesses that do this type of work.

[94] The Appellant stated it is reasonable to assume contaminated equipment would go directly for disposal in the Landfill rather than for decontamination at the Appellant's facility. The Appellant expected to lose more than 90 percent of its equipment decontamination business even though the equipment is typically recyclable. The Appellant expected it will lose all its

filter decontamination business with respect to contamination greater than 5 Bq/g, as waste generators use the less costly option of disposal at the Landfill.

[95] The Appellant stated 99 percent of its work will be affected, and the Appellant would lose the consulting services component of its business. The Appellant said, even if the work is not lost, the time involved in doing the work will decrease, thereby reducing revenues.

[96] The Appellant explained its income from transporting waste to Saskatchewan will decline since the waste would be taken to the Approval Holder's Landfill instead.

[97] The Appellant said its business is safety, as it provides advice and services to protect the public from the hazards of radiation.

[98] The Appellant explained it works with metal recyclers to obtain metal from them, decontaminating the metal, and then returning the metal for further processing. The Appellant said being able to dispose of these metals will result in these raw materials being lost to the Landfill.

[99] The Appellant stated Albertans do not want hazardous waste imported into the Province for disposal in a landfill. The Appellant said the Amending Approval undermines British Columbia's NORM industry because the Appellant is the only licenced facility in British Columbia. The Appellant said the Director's decision will negatively affect British Columbia if the Appellant is no longer economically viable. The Appellant stated, if the Amending Approval did not include high level long-lived radionuclides, the Appellant would not have a concern.

[100] The Appellant argued it will be harmed since a natural resource it uses would be affected and its use of a natural resource will be affected by the Director's decision. The Appellant noted the Director did not disagree with the information provided by the Appellant outlining the harm to the environment, which will occur from radioactive materials. The Approval Holder confirmed this by stating the same protection measures are utilized for loading and unloading waste, suggesting harm in both cases.

[101] The Appellant said the degree of harm depends on whether best practices for radioactive waste management are followed. The Appellant noted the Board has never identified the degree of harm to a natural resource that is required for the directly affected test.

[102] The Appellant said it will have to go to the Landfill to dispose of waste as requested by its clients and, therefore, its employees will be directly exposed to the air at the Landfill. The Appellant said its employees will be exposed to gamma radiation and radon gas. The Appellant said it is reasonable to assume, and it is probably likely, that the Appellant would be in the area since it works for generators in the area, the Landfill allows for imported material, and the NORM industry is small. The Appellant anticipated it would increase the number of times it will be disposing of waste from the current weekly basis.

[103] The Appellant stated it uses the area for recreation, such as fishing, when conducting work in the area. The Appellant said it has a legal right to use public lands, and one of its shareholders is First Nations and, therefore, has additional rights. The Appellant argued the right to use the land is sufficient to grant standing. The Appellant argued its shareholder who has rights to the land through his First Nations status does not have to show when or even if he will use the public lands surrounding the Landfill. The Appellant submitted it has standing if, for no other reason, its shareholder has legal rights and is a party to the appeal.

[104] The Appellant does not agree with the Approval Holder's statement the Appellant's interest was purely economic and it was making improper use of EPEA to seek protection from fair competition. The Appellant said it is not in the business of disposal and the Approval Holder is not in the business of decontamination. The Appellant said it provides sound advice to industry regarding radioactive waste management to protect the environment. The Appellant argued allowing disposal of equipment to prevent decontamination and recycling of equipment goes against the principles of any waste management practice, not just radioactive waste management.

[105] The Appellant stated because of the Amending Approval, organizations will not choose to licence salt caverns, a sound waste management practice, as it would be more economical to dispose of waste in a landfill.

[106] The Appellant argued, since the harm will occur far into the future, it is not possible to show a personal interest as the effect has not yet occurred so there is no requirement to show use. The Appellant said future generations will be harmed by using the Landfill, especially as the landfill cap erodes and radioactive waste migrates to the surrounding resources.

[107] The Appellant stated it directly competes with the Approval Holder since the Appellant is a decontamination business and the Approval Holder's business is waste disposal. The Appellant said it will use the Approval Holder's Landfill and encouraged approval of the Landfill, but only for waste falling below acceptable radioactive levels. The Appellant explained most of its business is equipment decontamination. The Appellant said it does not oppose changes that will affect its consulting business from being affected by another disposal site. However, it does oppose another disposal site that does not follow the recommended practices of international organizations and the Canadian Guidelines. The Appellant believed the Director's decision will set a precedent leading to the development of other landfills in Alberta.

[108] The Appellant stated its appeal is unique and, as this is the first time radioactive waste will be disposed of in Alberta, careful consideration must be given to the impact on the Appellant and the potential effect on future generations. The Appellant argued that if a business provides services according to recommended practices while another does not, then the business that follows recommended practices is directly affected.

[109] The Appellant stated that risk to its workers is an issue, but it has developed strict policies for dealing with the waste to minimize the risk. The Appellant said the risk to future generations is more of a concern because they did not create the issue and will not be able to mitigate the issue.

[110] The Appellant stated there is no requirement to provide the number of people that work for the Appellant since the number changes depending on the time of year. The Appellant said many its projects would be impacted given the acceptance criteria in the Amending Approval.

[111] The Appellant said the Approval Holder's statement that it is not a customer of the Landfill and will not become one suggests unfair competition. The Appellant noted the Approval Holder can ban the Appellant from the Landfill. However, the Appellant stated the suggestion it would not use the Approval Holder's Landfill was unrealistic given the size of the industry. The Appellant said the Approval Holder wants an economic advantage in the industry for the purposes of financial gain at a cost to the environment. The Appellant said this does not meet the basic principle of radiation protection, which is justification. The Appellant stated its

potential demise due to unfair practices by the Approval Holder would prevent economic growth and prosperity in an environmentally responsible manner.

[112] The Appellant stated it would not have filed a Notice of Appeal if the Approval Holder had applied for low concentrations of long-lived radioactive material. The Appellant said it is the limit for the level of radioactivity that is of most concern and that causes harm.

[113] The Appellant disagreed with the Approval Holder's statement the Board's mandate does not include regulating competition or protecting parties from unfair competition, particularly when an approval holder obtained an approval with a competitive advantage that is not environmentally responsible and does not follow industry practice. The Appellant argued the Approval Holder obtained the Amending Approval for the sole purpose of acquiring a competitive advantage.

[114] The Appellant argued the environmental harm to Albertans will be greater as the Approval Holder draws waste and recyclable material from other provinces to be disposed of in the Landfill.

[115] The Appellant stated the Approval Holder did not provide evidence regarding the need within the industry for the Landfill. The Appellant believed there is no need for the Landfill since lower level waste is disposed of in the landfill in British Columbia, and higher activity waste is disposed of in salt caverns.

B. Legislation and Previous Cases

[116] Before the Board can accept a Notice of Appeal as valid, the person filing the Notice of Appeal must be shown to be directly affected by the decision being appealed. Under section 91(1)(a) of EPEA, a person who is directly affected by the decision of the Director, here the issuance of the Amending Approval, has the right to file a Notice of Appeal with the Board.¹⁵

¹⁵ Section 91(1) of EPEA 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 Amending 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

The Board has previously considered the term “directly affected” in numerous decisions, providing a framework to determine if an appellant should be given standing before the Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and the decision whether an appellant is directly affected will be governed by the particular circumstances of each case.¹⁶

[117] The test for determining whether a person is directly affected has two elements: the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,¹⁷ the Board stated “...the word ‘directly’ requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Amending Approval in question.”¹⁸

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

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

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- (i) by the Amending 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”

¹⁶ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

¹⁷ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)) (“*Kostuch*”).

¹⁸ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)).

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”¹⁹

[119] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person “...must have a substantial interest in the outcome of the Amending Approval that surpasses the common interest of all residents who are affected by the Amending Approval.”²⁰ In *Kostuch*, the Board considered its previous decision in *Ross*, saying directly affected “...depends upon the chain of causality between the specific activity approved ... and the environmental effect upon the person who seeks to appeal the decision.”²¹

[120] Further, in *Kostuch* the Board stated the determination of directly affected is a “...multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act.”²²

¹⁹ *Kostuch v. Alberta (Director, Air and Water Amending 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 Amending 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 Amending Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

²⁰ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)) citing *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) at paragraph 17 (“*Ross*”).

²¹ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)) citing *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) at paragraph 17.

²² *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)).

The Board further stated:

“If the person meets the first test, they must then go to show that the action by the Director will cause a direct effect on that interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified.”²³

[121] A similar view was expressed in *Paron*,²⁴ where the Board held the

“...Appellants are also concerned that the Amending Approval Holder has been able to obtain an Amending Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar Amending Approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Amending Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Amending Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar Amending Approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”²⁵

[122] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show it is directly affected, is on the Appellant. In *Paron*, the Board held that:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Amending Approval. They have failed to present facts, which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”²⁶

²³ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)).

²⁴ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) (“*Paron*”).

²⁵ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.).

²⁶ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

The Board's Rules of Practice also make it clear the onus is on the Appellant to prove it is directly affected.²⁷ The onus or burden of proof issue, in a slightly different context, has been determined by the Court of Queen's Bench.²⁸

[123] In the *Court*²⁹ decision, Justice McIntyre reversed a standing decision based on the Board's previous cases and provided the following summary on the principles of 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.D. No. 33 [("*Bildson*")] at para. 4.

...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the Amending 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

²⁷ Section 29 of the Board's Rules of Practice provide:

"Burden of Proof

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

²⁸ See: *Imperial Oil Ltd. v. Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

²⁹ *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.).

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 Amending 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.”³⁰

³⁰ *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.); *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.) (“*Mizera*”); 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.)) (“*Vetsch*”). Note: The Alberta Energy and Utilities Board (AEUB) is now the AER.

[124] 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....”³¹

[125] When assessing the directly affected status of an appellant, the Board determines how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also assesses how the person uses the area in which the project is located, 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 it is directly affected.³²

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

[127] The effect does not have to be unique in kind or magnitude.³³ 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 must be more than the generalized interest that all Albertans have in protecting the environment.³⁴

³¹ *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.).

³² *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.).

³³ 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.).

³⁴ See: *Kostuch v. Alberta (Director, Air and Water Amending 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 Amending 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 Amending Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[128] An appellant must show how its personal interest will be affected by the decision of the Director, and it is of assistance to the Board if the type of interest the appellant claims to be affected is supported by the legislation, such as being included in the purpose section of EPEA. The interests identified in EPEA include the protection of the integrity of the environment, human health, economic growth, and sustainable development.³⁵

C. Analysis

1. Introduction

[129] The first preliminary motion before the Board is an application to determine whether the Appellant is directly affected by the Director's decision to issue the Amending Approval. As discussed, for the Notice of Appeal to be validly before the Board, the person filing the Notice of Appeal must be directly affected by the Director's decision to issue the Amending Approval.

[130] The Amending Approval issued in this case allows the Approval Holder's Landfill to accept NORM waste, which is a naturally occurring radioactive by-product of certain

³⁵ 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;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act."

industrial processes. The Landfill could not accept this type of waste until the Amending Approval was issued. The Board understands the Approval Holder's Landfill is the first facility in Alberta authorized to receive NORM waste from industry.

[131] Prior to issuance of the Amending Approval, the Appellant was the only business in Alberta and British Columbia engaged in the disposal of NORM waste. The Appellant explained part of its business is educating and consulting with industry to help manage radioactive waste. The other part of the Appellant's business involves handling NORM waste by decontaminating the waste material and then disposing of the radioactive portion of the material in its landfill in Fort St. John, British Columbia or in salt caverns in Saskatchewan.

[132] With the issuance of the Amending Approval, a "third option" now exists for managing NORM waste. The Appellant's written submissions make it clear it is appealing the Director's decision because it is concerned about the "financial and commercial" implications to its business due to the change in the way AEP is regulating radioactive materials, as reflected in the Amending Approval.³⁶ According to the Appellant, this change:

“[c]reates confusion within an industry already lacking radioactive waste management regulations. Does not afford the same level of environmental safety as that afforded in other provinces.... We would ask the Board to recommend to the Minister to vary the [Director's] approval for radium 226 to 5 Bq/g which is consistent with the [British Columbia] Licensed Hazardous waste facilities until such time as the request for amendment can be reviewed by the AER giving consideration to the concerned addressed in this appeal or reverse the [Director's] approval until such time as formal policies have been implemented on radioactive waste in Alberta.”³⁷

[133] In its written submissions, the Appellant identified a number of environmental concerns it has with the disposal of NORM waste in the Approval Holder's Landfill. Most of these environmental concerns relate to the potential merits of the appeal. The *Court* decision states the determination whether an appellant is directly affected is a preliminary matter and must be determined before hearing the substantive issues. The Board cannot hear submissions related to the substantive merits of an appeal and then, based on those submissions, determine whether

³⁶ Notice of Appeal, EAB 16-024, dated July 28, 2016, page 1.

³⁷ Notice of Appeal, EAB 16-024, dated July 28, 2016, pages 1 and 2.

an appellant has standing to bring the appeal. It is necessary for an appellant to provide evidence along with its arguments, but the evidence presented needs to demonstrate the effect of the decision being appealed on the person seeking standing.

[134] In this case, evidence must be presented to show the Appellant is directly affected by the Director's decision to issue the Amending Approval to allow the Approval Holder to accept NORM waste. At this stage in the appeal process, the Board does not require the Appellant to provide conclusive proof it is directly affected. What the Appellant needs to show is that there is a reasonable possibility, based on the balance of probabilities, of a direct effect on the Appellant and that the direct effect relates to an environmental impact.

[135] Putting aside the evidence and arguments that go to the merits of the appeal, in response to the question as to how it is directly affected, the main argument put forward by the Appellant is that its business will suffer because of the issuance of the Amending Approval. Specifically, the Appellant argued it is directly affected because it will suffer significant economic losses resulting from the competition created by the Director's decision to issue the Amending Approval.

[136] The Appellant argued that because the Amending Approval creates a new "third option" for the disposal of NORM waste, the industry will choose to dispose of its NORM waste at the Approval Holder's Landfill instead of using the decontamination services of the Appellant. The Appellant suggested the competition created by the Director's decision to issue the Amending Approval is so great that the Appellant will likely go out of business. This potential result, according to the Appellant, demonstrates it is directly affected.

2. Economic Interests

[137] The Board has dealt with this type of economic argument in previous cases. Two of these cases were discussed in the written submissions filed with the Board: *Byram Industries*³⁸ and *Gadd*.³⁹ Applying the reasoning in these prior decisions to this appeal, the Board has

³⁸ *Byram Industries Services Ltd. v. Director, Central Region, Regional Services, Alberta Environment re: Wasteworks Inc.* (28 April 2005), Appeal No. 04-057-D (A.E.A.B.) ("*Byram Industries*").

³⁹ See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-051 and 03-152-ID1 (A.E.A.B.) ("*Gadd*").

determined the economic impact that may occur to the Appellant, as the result of the Amending Approval, is insufficient to demonstrate that the Appellant is directly affected. Respectfully, it is clear from the Appellant's written submissions its primary concern is the impact the Amending Approval will have on its business, and its concern with the impact to the environment is incidental.

a. *Byram Industries*

[138] In *Byram Industries*, the appellant (Byram Industries) was opposing the development of a new landfill (the Wasteworks landfill) in the same area where it operated a landfill (the Byram Industries landfill). The appellant argued the environment would be impacted because the additional competition would leave the appellant with fewer financial resources to undertake environmental protection work. Byram Industries argued,

“... its interest in [the Wasteworks] Approval relates to the policies underlying EPEA, specifically the need for economic growth and prosperity in an environmentally responsible manner, the principle of sustainable development, and the importance of preventing and mitigating the environmental impact of development. It stated the potential adverse effects of the issuance of the [Wasteworks] Approval include economic and environmental interests. [Byram Industries] stated the [Wasteworks landfill] is located approximately 36 kilometres across land from its operations and 53 kilometres away when taking the most direct route by road. [Byram Industries] explained it services the same geographic area and the same market as the proposed [Wasteworks] landfill, and since there is an oversupply of landfill capacity in Alberta, it expects to lose revenue due to the additional landfill. [Byram Industries] argued, ‘potential adverse economic effects are [a] sufficient pre-requisite to standing.’”⁴⁰
[Footnotes not included.]

[139] The two problems identified in the *Byram Industries* case, which are relevant in this case, are a lack of causal connection and speculation. First, the argument in *Byram Industries* that the Waterworks approval would result in an economic impact on the appellant, which would lead to an environmental effect, is insufficient to demonstrate a direct effect because the connection is too remote. As discussed in *Kostuch*:

See also: *Cardinal River Coals Ltd. v. Environmental Appeals Board and Ben Gadd* (12 November 2004), Action No. 0403-18462 (A.B.Q.B.).

“... [T]he possibility that any given interest will suffice to confer standing diminishes as the causal connection between an Amending Approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the Amending Approval and how much it affects a person’s interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the Amending Approval granted.”⁴¹

[140] The Appellant is making the same argument. Specifically, the Appellant is arguing the Amending Approval will cause an economic impact (loss of business), which will in turn will cause an environmental effect because NORM waste will be disposed of in the Approval Holder’s Landfill instead of going through the Appellant’s decontamination process and being disposed of in a more environmentally responsible manner. The causal connection between the economic impact and the environmental effect in this case is even more remote than in *Byram Industries*. For example, the market area in *Byram Industries* was quite small, as the two facilities were 53 kilometres apart. By comparison, the Appellant claims its market is all of Alberta and British Columbia. As a result, the connection in this case is too remote to form a basis to find the Appellant directly affected by the Amending Approval.

[141] Second, as in *Byram Industries*, the economic impact the Appellant is basing its directly affected claim on is speculative. The Appellant is arguing that the Director’s decision to issue the Amending Approval will harm it economically because the industry will choose the Approval Holder’s services over its services. The Appellant goes so far as to say that this economic impact will be so great that it will go out of business. The Appellant provides no evidence to support this argument. All the Appellant’s submissions on this point are conjecture and speculation. As stated by the Approval Holder, the Appellant’s submissions are “bald assertions,” without any evidentiary foundation.

⁴⁰ *Byram Industries Services Ltd. v. Director, Central Region, Regional Services, Alberta Environment re: Wasteworks Inc.* (28 April 2005), Appeal No. 04-057-D (A.E.A.B.) at paragraph 8.

⁴¹ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 34 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)). This passage is cited with approval in *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[142] The Appellant has described the two components of its business: the decontamination and disposal of NORM waste and consulting with industry regarding the management of NORM waste. In its arguments, the Appellant is assuming industry will choose to dispose of equipment rather than decontaminating it. This is speculation. Some companies may still choose to decontaminate their equipment to reduce the environmental impacts of continually replacing equipment. Industry may also choose to do this to prevent radioactive material from entering a landfill. Further, the Appellant has suggested, without providing any evidence, that industry will choose to dispose of NORM waste in the Landfill because the cost of disposing in the Landfill is less than the cost of the decontamination and disposal services the Appellant provides. Respectfully, without any evidence to support this assertion, the Board cannot assess its validity.

[143] The overall cost of managing NORM waste is likely composed of many factors. One critical factor would be transportation costs. On this point, the Appellant explained most of the radioactive material is found in British Columbia. NORM producers would have to balance the additional cost of shipping this waste to Alberta against the costs of decontamination in British Columbia. Again, the Appellant is only speculating it would lose most of this business to the Approval Holder. To convince the Board, even on a *prima facie* basis, that the Appellant will suffer an economic impact, the Board would need more information about the factors that are relevant in deciding how to manage NORM waste. Based on the information provided, the Board does not accept the Appellant's argument that all or even the majority of NORM waste in Alberta and British Columbia will be disposed of in the Approval Holder's Landfill because of the Amending Approval.

[144] With respect to its consulting business, the Appellant has not provided any evidence regarding what portion of the Appellant's business involves consulting, as compared to decontamination work and radioactive waste disposal. This information would be necessary to understand the economic impact of the Amending Approval on the Appellant. Further, the Board does not accept the Appellant's argument that simply because more options for NORM waste disposal are now available, the Appellant will not be able to continue to operate its consulting business.

[145] Based on its review of the written submissions, the Board is uncertain how the Amending Approval will affect the Appellant's consulting business. The Appellant is still able to provide these services to industry and can explain the different options available to industry to dispose of the NORM waste. It would be the customer's decision as to which option to choose. In the Board's view, the need to educate industry about the management of NORM waste should not be impacted by the existence of the landfill option. The Board agrees with the Approval Holder that, given the additional disposal options, it is quite possible the demand for the Appellant's consulting services will increase. It is also possible that because of its consulting work, industry will agree that the Appellant's decontamination and disposal method is a better environmental choice. This could result in many NORM producers continuing to use the Appellant's services. Without some *prima facie* evidence, rather than mere assertions, to support the Appellant's concerns about its consulting business, the Board considers this concern speculative, and as such, it cannot be the basis for finding the Appellant directly affected.

b. *Gadd*

[146] The Board's decision in *Gadd* deals with the economic effects on Mr. Gadd of an amending approval issued for a coal mine. Mr. Gadd conducted wilderness tours in the area surrounding a coal mine. As a result of the Director's decision to issue the amending approval, certain parts of the area used by Mr. Gadd for his wilderness tours would no longer be accessible. In addition, the untouched nature of the area, an important feature to Mr. Gadd's business, would be impacted. The fact Mr. Gadd's business relied directly on the natural resource impacted by the project established a direct causal connection between the amending approval and the impact. This was sufficient to find that Mr. Gadd was directly affected. The Board also found Mr. Gadd's use of the area was different from other Albertans because he used the area to conduct wilderness tours and his livelihood depended on the natural setting of the area.

[147] The *Gadd* case can be distinguished from the situation involving the Appellant. In this case, the Appellant did not provide any evidence to show how its business relies on natural resources that would be impacted by the proposed project whereas Mr. Gadd made a clear connection between his use of a natural resource and the potential impacts of the proposed

project. The Appellant's economic interest does not rely on the natural resources near the Landfill. The Appellant's economic concerns are based on increased competition. It is not within the Board's jurisdiction to determine the saturation point of a particular industry. It is also not the Board's jurisdiction to determine what disposal method industry should use.

c. Summary

[148] In the Board's view, the Appellant's argument that it is directly affected because of an economic impact fails on two grounds. First, the argument is speculative; the Appellant has not provided sufficient evidence even on a *prima facie* basis to demonstrate it is directly affected. Second, the Appellant's argument does not demonstrate an adequate causal connection between the economic impact it is alleging and the Amending Approval being appealed. The Appellant's argument is that the Amending Approval will cause an economic effect, which in turn will cause an environmental effect. This is too remote a connection to establish that the Appellant is directly affected.

3. Directly Affected - Constituents

[149] In addition to arguing the Appellant is directly affected because of economic impacts, the Appellant argued it is directly affected because one or more of its "constituents" is directly affected. The various constituents the Appellant identified, either directly or by implication, are: Mr. Cuthill, Normtek, the Appellant's employees (which the Board understands includes Mr. Cuthill), and the Appellant's shareholders (which the Board understands includes Mr. Cuthill and a member of a First Nation). The Appellant also argued the test for directly affected should be "relaxed" because the Landfill is surrounded by public land. Finally, the Appellant argued that because of the nature of its business, it should have a special status that makes it directly affected. The Board will consider each of these constituents.

a. Mr. Cuthill

[150] An individual, such as Mr. Cuthill, can be directly affected by using the natural resources in the area of a project, where those natural resources are impacted by the project. The use of these natural resources must not be speculative. It is not enough to say that the individual

has the right to use the natural resources or may use the natural resources in the future. The Appellant's written submissions did not provide sufficient evidence - on the balance of probabilities - that Mr. Cuthill actually uses natural resources that would be impacted by the project. The evidence was too general and speculative to demonstrate Mr. Cuthill was directly affected. The Appellant stated Mr. Cuthill used the public lands in the vicinity of the landfill, but did not state where, for how long, or what natural resources he uses, other than in very general terms such as hunting and fishing. The Appellant also did not describe how the natural resources will be impacted by the project, other than describing a general concern that the natural resources may be exposed to radiation from the Landfill. For the Appellant to demonstrate Mr. Cuthill was directly affected, it would have to identify the specific natural resource he uses and describe how these natural resources could reasonably be expected to be impacted by the project.⁴² It has not done so. More evidence would be required even to make a *prima facie* case for Mr. Cuthill to have standing in his own right.

b. Normtek

[151] Normtek can be directly affected if, as part of its business, it physically uses natural resources in the area of a project and those natural resources are impacted by the projects. An example of this would be if Normtek had a well drilled into a geological formation it was using for disposal, and the proposed project was to build a landfill on top of the well (with the well being properly abandoned), such that Normtek was deprived of the use of the well. Normtek has not advanced such an argument, and therefore the Appellant has not demonstrated it is directly affected.

c. Employees

[152] The Appellant argues it should be found to be directly affected because its employees are directly affected by the Director's decision to issue the Amending Approval. The

⁴² For example, in *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (10 October 1998), Appeal No. 98-023-D (A.E.A.B.), Mr. Bildson was found to be directly affected because he personally used Caw Ridge next to Smoky River Coal's mine "...for his own pleasure, family pleasure, and for his family run 'eco-tourism' business." (At paragraph 17.) This was notwithstanding that his home was in Grande Prairie, a significant distance away from the mine. Specifically, Mr. Bildson's testimony was that "he drinks the water downstream of the mine." (At paragraph 24.)

Appellant argues its employees will be directly affected in their personal lives and in their role as employees. The Appellant argues that its employees undertake recreational activities in the area of the Landfill and will therefore be impacted by any radiation that comes from the Landfill.

[153] The Board does not accept these arguments as establishing the Appellant is directly affected. First, the Appellant has failed to provide sufficient evidence to demonstrate the employees are directly affected in this way. As with Mr. Cuthill, the arguments made regarding the Appellant's employees – in their personal capacity – are too general to demonstrate the employees are directly affected. Second, the Board will not accept a Notice of Appeal where an employer is acting in a representative capacity for its employees without clear authorization from the employees. The Appellant has not provided any evidence of such authorization. For the employees to have valid appeals in their personal capacities, each of the employees would have to file their own Notice of Appeal.

[154] The Appellant also argues that its employees are directly affected in their capacity as employees. This argument fails on two grounds. First, the Appellant's arguments regarding the impact on its employees are speculative. According to the Appellant, its employees will be impacted when they go to the Landfill to dispose of NORM waste. However, according to the Approval Holder, the Appellant is not currently a customer of its Landfill. Therefore, the suggestion the employees will be impacted when attending the Landfill is speculative. Second, the Appellant's arguments are too remote. The Appellant argues its employees work in the area of the Landfill, and stay in communities around the Landfill where they drink water and eat in local restaurants. The evidence provided is not specific enough, and the uses described are too remote to establish the employees are directly affected by the disposal of NORM waste at the landfill.

[155] The Board notes the comments of the Director, which suggest there may be the foundation for a direct effect on the Appellant. The Director suggests: (1) those working in around the Landfill or entering the Landfill may be affected, (2) individuals who hunt and fish or use the land around the Landfill for recreation may be affected, and (3) individuals offloading NORM waste at the Landfill or undertaking decontamination work at the landfill may be affected. While the Board accepts these are possible ways in which individuals may be affected

by the Landfill. However, for the Appellant to be directly affected, specific evidence needs to be provided that the Appellant, its employees, or its shareholder will actually use these resources to be found to be directly affected. Beyond general assertions, no such evidence was provided.

d. Shareholders

[156] The Appellant argues it should be found to be directly affected because its shareholders are directly affected by the Director's decision to issue the Amending Approval. The Appellant argues its shareholders will be directly affected in their personal lives and in their role as shareholders. The Appellant argues its shareholders undertake recreational activities in the area of the Landfill and will therefore be impacted by any radiation coming from the Landfill. First, the Appellant has failed to provide sufficient evidence to demonstrate its shareholders are directly affected in this way. As with Mr. Cuthill, the arguments made regarding the Appellant's shareholders are too general to demonstrate the shareholders are directly affected. Second, the Board will not accept a Notice of Appeal where a corporation is acting in a representative capacity for its shareholder without clear authorization from the shareholders. The Appellant has not provided evidence of such authorization. For the shareholders to file an appeal in their personal capacities, each of the shareholders would have to file their own Notice of Appeal.

[157] The Appellant also argues that its shareholders are directly affected in their capacity as shareholders. This argument also fails. Shareholders have no "physical" role in the operation of a corporation. Unlike employees, shareholders do not do work on behalf of the corporation. Shareholders have two roles with respect to a corporation. The first is to vote for the directors of the corporation, who carry out work on behalf of the corporation. The second is the right to participate in the profits of the corporation. Neither of these roles creates the foundation for a shareholder to be directly affected in that capacity.

[158] Finally, the Appellant also argues that because one of its shareholders has First Nations status, the Appellant itself should have standing. The Board recognizes an individual with First Nations status has certain rights such as the right to use traditional land. However, these rights do not change whether the Appellant's shareholders can be directly affected in the context of the Notice of Appeal filed by the Appellant. Respectfully, for the purposes of the

directly affected test in this case, the First Nations shareholder is no different from the other shareholders.

e. Public Lands

[159] The Appellant argues the test for directly affected should be “relaxed” because the Landfill is surrounded by public land. The Appellant notes the observation by the Director that its head office is in Calgary and its operating facility is located in Fort St. John, British Columbia, and that neither of these locations are near the Approval Holder’s Landfill. The Board also understands that Mr. Cuthill lives in the Calgary area. In response, the Appellant argues that an individual or corporation does not have to live, or be located next to a project to be directly affected by that project. The Board accepts the Appellant’s argument on this point. Where a person lives, or where a corporation has its facilities, is one factor the Board considers, but it is not the only way an individual or corporation can be directly affected.

[160] The Appellant argues that having the right to use land, such as the public land around the Landfill, is sufficient to grant standing. Respectfully, the Legislature has limited who may have standing in front of the Board. Merely having a right to access land is not sufficient to demonstrate the holder of that right is directly affected for the purposes of an appeal to the Board. If the Appellant’s reasoning was correct, every Albertan who has the right to access public lands would have to be granted standing whether they use the lands or not. This is clearly not what the Legislature intended.

[161] The Board looks at the use of the natural resource in the area of the project. If a person uses the resources once in a lifetime, it is not sufficient to be found directly affected, nor is the possibility a person may use the resource in the future. Actual use is required, and arguments regarding this use must be supported by evidence, not just generic statements. This issue was considered in the *Bildson* case.

[162] In that case, Mr. Bildson filed an appeal objecting to the Director’s decision to issue approvals allowing the expansion of a coal mine. The Director argued Mr. Bildson was not directly affected by the coal mine on the basis that his residence was too far from the project. The Director also argued that even though Mr. Bildson had a trap line in the area, the trap line

was also too far from the project for Mr. Bildson to be directly affected. However, Mr. Bildson responded that he made regular use of the area downstream of the coal mine "...for his own pleasure, family pleasure, and for his family run 'eco-tourism' business."⁴³ Further, the testimony before the Board was that, when camping on public land as part of the business, Mr. Bildson and his family "... drinks the water downstream of the mine."⁴⁴ On this basis, the Board found Mr. Bildson directly affected. With respect to Mr. Cuthill, the Appellant's employees, and the Appellant's shareholders, evidence similar to that presented by Mr. Bildson is required in order to demonstrate they are directly affected.

f. Special Status

[163] Finally, the Appellant argues that because of the special nature of its work, it has some sort of duty to educate the industry as to how NORM should be managed. The Appellant argues because of this "duty," it should automatically get standing. The Board recognizes the experience the Appellant may have in dealing with this type of waste and its understanding of the legislated requirements for ensuring its safe disposal. However, the fact that the Appellant was the sole operator of this business in the Province or that it has experience in dealing with this waste, does not automatically give it standing before the Board, nor does it exempt the Appellant from the requirement to be directly affected in order to have a valid appeal.

4. Irrelevant Arguments

[164] Much of the Appellant's written submissions consisted of argument relating to the validity of the Director's decision. These arguments may be relevant in a hearing on the merits of the appeal; however, they are not relevant for the purposes of determining if the Appellant is directly affected. At this point in the Board's process, the Board is only determining a preliminary matter, namely whether the Appellant is directly affected by the decision to issue the Amending Approval.

⁴³ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (10 October 1998), Appeal No. 98-023-D (A.E.A.B.) at paragraph 17.

⁴⁴ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (10 October 1998), Appeal No. 98-023-D (A.E.A.B.) at paragraph 24.

[165] The Appellant provided argument on several issues that were more appropriate for consideration at a hearing on the merits of the appeal, including:

1. whether the Minister and Director contravened EPEA by not developing formal policies, procedures, and regulations concerning radioactive material or whether best practices were followed;
2. whether the Approval Holder misled or downplayed the long-term hazards of high activity radioactive waste;
3. the acceptable limits for waste to be accepted at the Landfill;
4. who the Director should have consulted to determine the potential impacts of his decision; and
5. the classification of the waste as low-level waste.

None of these matters relate to the issue of whether the Appellant is directly affected.

5. Nature of the Impact

[166] The Appellant argued that, because the material being considered in this case is radioactive, a special standard should apply. First, the Appellant argues that because of the nature of radiation, the test for finding a person directly affected should be lowered. The Board rejects this view. For the Appellant to be directly affected, they need to demonstrate on a *prima facie* basis either they will be impacted by radiation coming from the Landfill or that their use of a natural resource will be impacted by the radiation coming from the Landfill. As discussed, the Appellant has not provided sufficient evidence; the Appellant has merely engaged in speculation.

[167] Second, the Appellant argued, if the environmental impacts only become apparent in the distant future, it need only show potential harm to future generations to have standing. In most appeals, the appellant is concerned with how the proposed project will affect the environment in the future. In other words, in nearly all appeals the alleged harm is prospective. The difference, in this case, is the anticipated timeframe for such harm. The Board understands the Appellant is arguing the harm, if any, will occur thousands of years from now instead of within a lifetime, but the fact remains, when the Board is assessing a person's directly affected status, it has to consider whether the harm anticipated by the appellant is mere conjecture or is reasonably possible.

[168] Given the harm the Appellant argued will occur in hundreds or thousands of years, the Appellant is assuming knowledge and technology related to the disposal and handling of NORM will remain static. If the Appellant speculates the damage will occur so far in the future, it is expected that technology will change during this time. These changes will allow these environmental impacts to be dealt with more effectively. The Board cannot accept unsubstantiated claims as a basis for finding that the Appellant is directly affected.

IV. STAY APPLICATION

[169] The second preliminary motion before the Board is a request by the Appellant for a stay of the Amending Approval. Section 97(2) of EPEA states that a party can request a stay.⁴⁵ A “party” is defined in section 1(f)(i) in the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 to include “the person who files a notice of appeal that results in an appeal.”

[170] This appeal is being dismissed because the Appellant lacks standing. Since the Appellant does not have a valid appeal before the Board, it is not a party to an appeal, and therefore the stay application cannot be considered.

V. DECISION

[171] Pursuant to section 95 of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal (EAB 16-024) filed by Mr. Cody Cuthill on behalf of Normtek Radiation Services Ltd. as neither Mr. Cuthill nor Normtek Radiation Services Ltd. are directly affected by the decision of the Director to issue Amending Approval No. 00048516-01-04 to Secure Energy Services Inc.

Dated on March 2, 2018 at Edmonton, Alberta.

- original signed -

Mr. Alex MacWilliam
Board Chair

⁴⁵ Section 97(2) of EPEA provides: “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.”