

ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Date of Decision – May 10, 2002

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

-and-

**IN THE MATTER OF** an appeal filed by the Lake Wabamun  
Enhancement and Protection Association with respect to  
Amending Approval No. 9830-01-10 issued by the Director,  
Northern East Slopes Region, Environmental Service, Alberta  
Environment to TransAlta Utilities Corporation for the Sundance  
Thermal Electric Power Plant.

Cite as: *Lake Wabamun Enhancement and Protection Association v. Director, Northern  
East Slopes Region, Environmental Service, Alberta Environment re: TransAlta  
Utilities Corporation.*

**PRELIMINARY MEETING  
VIA WRITTEN SUBMISSION  
ONLY BEFORE:**

Dr. Steve E. Hrudehy

**PARTIES:**

Appellants: Lake Wabamun Enhancement and Protection Association, represented by Mr. Locke Boros and Ms. Linda Duncan.

Director: Mr. Darryl Seehagel Director, Northern East Slopes Region, Environmental Service, Alberta Environment, and Mr. Steve Cook, represented by Mr. William McDonald, Alberta Justice, Environmental Law Section.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak, McLennan Ross.

## EXECUTIVE SUMMARY

Alberta Environment issued Amending Approval 9830-01-10 under the *Environmental Protection and Enhancement Act* to TransAlta Utilities Corporation for the Sundance Power Plant, in the County of Parkland, Alberta.

The Board received a Notice of Appeal from the Lake Wabamun Enhancement and Protection Association (LWEPA) appealing the Amending Approval.

A mediation meeting and settlement conference was held which failed to resolve the appeal and after several abeyances LWEPA requested that their appeal proceed. The Board subsequently received a request from Alberta Environment to dismiss the appeal because the issues raised in the Notice of Appeal do not relate to the Amending Approval that is being appealed. LWEPA states concerns with inadequate provisions for regulating water and objects to Alberta Environment's failure to incorporate provisions into the Amending Approval for the Sundance Power Plant (9830-01-10) for regulating water, similar to section 4.3.27 of the Approval for TransAlta's Wabamun Lake Power Plant (10323-02-00). Section 4.3.27 of the Approval for the Wabamun Lake Power Plant requires TransAlta to apply to increase the capacity of the Wabamun Lake Water Treatment Plant. (The Board previously heard appeals relating the Wabamun Lake Power Plant that dealt with section 4.3.27 and the Board currently has before it appeals relating to the Wabamun Lake Water Treatment Plant.)

The Board decided to conduct a preliminary meeting via written submissions to address the motion by Alberta Environment to dismiss the appeal. Written submissions were received from all parties and the Board concluded that the Notice of Appeal is either moot, without merit or not properly before the Board as there would be no effect achieved by adding a requirement to the Amending Approval that is the subject of this appeal to oblige TransAlta to apply for increased capacity of the Wabamun Lake Water Treatment Plant given that TransAlta has already applied for and received such an approval under the *Environmental Protection and Enhancement Act* and a licence under the *Water Act*.

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## **I. BACKGROUND**

[1] On April 27, 2001, the Director, Northern East Slopes Region, Environmental Service, Alberta Environment (the “Director”), issued Amending Approval No. 9830-01-10 (the “Amending Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”)<sup>1</sup> to TransAlta Utilities Corporation (the “Approval Holder”) for the Sundance Thermal Electric Power Plant.

[2] On May 23, 2001 the Environmental Appeal Board (the “Board”) received a Notice of Appeal from the Lake Wabamun Enhancement and Protection Association (the “Appellant” or “LWEPA”), appealing the Amending Approval.

[3] By letter of May 24, 2001, the Board acknowledged receipt of the Notice of Appeal, and requested that the Director provide a copy of the Record (the “Record”) to the Board. The Board also requested that all Parties provide available dates for a mediation meeting/settlement conference or hearing to the Board.

[4] According to standard procedure, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under either of their Board’s legislation. The NRCB responded in the negative and the AEUB advised on November 30, 2001 that the Approval Holder made an application under the AEUB’s legislation and that an approval was routinely granted. The AEUB further advised, that as a result, the application had not been advertised and no public hearing was held.

[5] On May 31, 2001, the Board received a letter from the Approval Holder advising that they “...may be advancing a preliminary application to contest the validity of the appeal.” However, they advised that they would be willing to participate in a mediation meeting and settlement conference on a without prejudice basis.

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<sup>1</sup> The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002.

[6] The Board responded to the Approval Holder's letter on June 1, 2001, reminding all parties that mediations always take place without prejudice to the ability of the parties or the Board to address jurisdictional questions later in the proceeding.

[7] On June 4, 2001, the Board received the Record from the Director. In his letter of June 4, 2001, the Director advised

“The Director is objecting to the Environmental Appeal Board hearing this appeal for the following reasons. This amendment dealt exclusively with the operation of the Sundance powerplant and modifications to its air emissions control equipment. This amendment did not deal with or have any impact upon water quantity as it arises from the Sundance powerplant.”

The Director went on to advise of his agreement to attend a mediation meeting and settlement conference, prior to the Board determining its jurisdiction in this issue.

[8] In consultation with all Parties, the Board scheduled the mediation meeting and settlement conference for June 21, 2001, at the Board's office in Edmonton. An advertisement was also placed in the *Edmonton Journal* on June 12, 2001 and in the *Wabamun Community Voice* on June 19, 2001 advising of the mediation meeting and settlement conference.

[9] Pursuant to section 11 of the Environmental Appeal Board Regulation, A.R. 114/93, the Board conducted a mediation meeting in Edmonton, Alberta. The Board appointed Ms. Marilyn Kansky as the mediator on behalf of the Board.

[10] In conducting the mediation meeting, Ms. Kansky reviewed the appeal and mediation process and explained the purpose of the mediation meeting. She then circulated copies of the Participants' Agreement to Mediate. All parties signed the Agreement and discussions ensued.

[11] At the mediation meeting/settlement conference the Parties agreed to hold the appeal in abeyance in order to continue discussions. The Board requested the Parties provide status reports to the Board by September 1, 2001.

[12] On August 30, 2001, the Board received a letter from the Approval Holder requesting a further 60-day extension until the conclusion of the licensing applications with respect to the expansion of the Wabamun Lake Water Treatment Plant.

[13] On August 31, 2001 the Board received a letter from the Director requesting a further extension of 30 days. The letter stated:

“This appeal was placed in abeyance pending decisions arising from the Lake Wabamun Water Treatment Plant approval. This particular facility requires approvals under both *Environmental Protection and Enhancement Act* and the *Water Act*. The Approval under the *Environmental Protection and Enhancement Act* was issued on July 30, 2001. The approval with respect to the *Water Act* is presently being circulated in draft format.”

[14] The Board responded to both letters on September 7, 2001, granting the extension until October 10, 2001.

[15] On October 9, 2001, the Board received a letter from the Director advising that the Approval for the Wabamun Lake Water Treatment Plant under the *Environmental Protection and Enhancement Act* had been issued, however the approval under the *Water Act*, R.S.A. 2000, c.W-3,<sup>2</sup> was still under review and as such the Director requested the file be placed into further abeyance.

[16] On October 11, 2001, the Board granted the abeyance until October 24, 2001, provided no objections were received from the other parties to the appeal.

[17] On October 17, 2001, the Board received a telephone call from the Appellant, requesting that the appeal proceed. The Board, by letter of October 22, 2001, acknowledged the Appellant’s telephone call and requested available dates from all parties for a hearing.

[18] On October 25, 2001, the Board received a letter addressed to the Appellant from the Approval Holder. The letter stated:

“I understand that the draft water license [with respect to the Wabamun Lake Water Treatment Plant] should be available for distribution shortly and I am hopeful that that document, combined with the conditions in Approval No. 18528-00-03 may address your concerns and alleviate the need to proceed with your appeal of the Sundance Approval No. 01-049.”

[19] On October 29, 2001, the Board received a letter from the Approval Holder advising that they had several issues with respect to the appeal proceeding before the license under the *Water Act* was issued with respect to the Wabamun Lake Water Treatment Plant. The

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<sup>2</sup> The *Water Act*, R.S.A. 2000, c. W-3 replaced the *Water Act*, S.A. 1996, c. W-3.5 on January 1, 2002.

Approval Holder provided dates for a hearing but advised that it may be appropriate to hold the appeal in abeyance for a further 30 days.

[20] On October 30, 2001, the Board received a letter from the Director requesting that the appeal be dismissed. The letter stated:

“The Director notes that the issue presented by the Lake Wabamun Environmental Protection Association relates to water levels in Lake Wabamun. As the subject matter of the approval that is under appeal has minimal, if any impact on water levels within Lake Wabamun, it is the submission of the Director that the Board should, pursuant to s.87(2) [now section 95(2)] of the legislation undertake a review of the Notice of Appeal and approval and determine what issues are to be heard.

It is the Director’s respectful submission that the issues raised in the Notice of Appeal do not arise out of the approval and therefore, the Notice of Appeal should be dismissed pursuant to s. 87(5) [now section 95(5)].”<sup>3</sup>

The Director went on to advise he would be prepared to enter into further mediation in an attempt to “...resolve any concerns that the Appellant, Lake Wabamun Environmental Protection Association may have.”

[21] The Board acknowledged the letters from the Approval Holder and the Director on November 8, 2001. In its letter of November 8, 2001, the Board advised that it had decided to address the preliminary issue raised by the Director, and alluded to by the Approval Holder as it may determine the appeal. As such the Board requested the Parties provide written submissions on preliminary issues, specifically:

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<sup>3</sup> Section 95(2) provides:

“Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following: ...”

Section 95(5) provides:

“The Board

- (a) may dismiss a notice of appeal if
  - (i) it considers the notice of appeal to be frivolous or vexatious or without merit;
  - (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
  - (iii) for any other reason the Board considers that the notice of appeal is not properly before it,
  - (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or ...



- “1. Are the matters included in the Notice of Appeal properly before the Board?
2. In the context of an amending approval, does the Board have the jurisdiction to address other aspects of the approval?”

[22] Written submissions were subsequently received from all Parties to the appeal. However on January 28, 2002, the Board wrote to the Parties and requested additional information on possible mootness of the appeal and scope of the approval. With respect to the mootness of the appeal, the Board requested the Parties respond to the following questions:

- “1. Because TransAlta Utilities Corporation is already bound by condition 4.3.27 of the Wabamun Lake Power Plant Approval (10323-02-00), with regard to the obligations that are set for the Wabamun Lake Water Treatment Plant, what conceivable benefit would be achieved by repeating these requirements on the Amending Approval (9830-01-10) issued to TransAlta Utilities Corporation for the Sundance Power Plant?
2. Why is the appeal not moot, given that the matter that the Appellants are objecting to and the relief that the Appellants are seeking appear to be addressed by the TransAlta applications that Mr. Kruhlak refers to in his submission?”

In reference to the issue on the scope of the Approval, the Board requested the Parties provide comments on the following question:

- “3. If the ‘Director’s decision did not have any impact on water’, why were questions raised about the impact of the project on water and why was clause 5 added to the Amending Approval?”<sup>4</sup>

[23] The Board received initial submissions to its three questions posed on February 7, 2002 from the Director, and February 8, 2002 from the Approval Holder. LWEPA provided a letter on February 7, 2002, however, did not respond to the questions posed by the Board. On February 11, 2002, the Board acknowledged these letters and responded to LWEPA’s cost inquiry. This letter also advised LWEPA that it intended on proceeding with the determination of the three questions posed to the Parties and extended the deadline to allow LWEPA to provide an initial submission and extended the deadline for response submissions. The Board received LWEPA’s initial submission on February 13, 2002.

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<sup>4</sup> Clause 5 of the Approval states:

“Clause 11.4.6 is added as follows: ‘11.2.3 The approval holder shall submit a monthly summary of the operations of the Wabamun Lake Water Treatment Plant. The summary shall include the hours the plant discharged to the lake and the volumetric flow.’”

[24] Response submissions were received from the Director on February 22, 2002 and from the Approval Holder on February 25, 2002. A letter was received from LWEPA requesting a "...meeting between the Director/Alberta Environment, TransAlta and LWEPA to come to a better understanding of the issues and perhaps resolve this appeal." The Board acknowledged receipt of the letters and advised LWEPA that if it wished to convene a meeting to contact the other Parties directly and that in the meantime it would continue with the process as stated. In this regard, LWEPA was given an opportunity to provide its response submission by March 1, 2002; however, no submission was received by the Board.

## **II. ANALYSIS**

[25] In the Notice of Appeal, the details of the decision which the Appellant objected to was: "Failure of the Director to incorporate provisions into Approval 9830-01-10 for regulating water, similar to Article 4.3.27 of TAU's [(the Approval Holder)] Wabamun Power Plant Approval." The grounds cited for this appeal were: "Concerns with inadequate provisions for regulating water." The relief requested was: "Inclusion of an article, similar in nature to 4.3.27 of Wabamun Power Plant Approval, into Approval 9830-01-10."

[26] Article 4.3.27 of the Wabamun Power Plant Approval No. 10323-02-00 provides:

"The approval holder shall make all necessary applications such that:

- (a) by no later than September 30, 2002, the approval holder shall increase the excess capacity of the Wabamun Lake Water Treatment Plant;
- (b) the approval holder shall submit water quality monitoring results and report on the volume of water returned to Lake Wabamun from the Wabamun Lake Water Treatment Plant on a monthly basis;
- (c) by no later than December 31, 2006, the approval holder shall have pumped sufficient water into the lake to offset the historical debt (51.1 million cubic meters as of December 31, 1999) of TransAlta Utilities Corporation operations, on lake level and ongoing impacts from all TransAlta Utilities Corporation operations, unless the lake level surpasses the elevation of 724.55 m (outlet control weir);
- (d) after December 31, 2006, the approval holder shall operate the Wabamun Lake Water Treatment Plant at sufficient capacity to offset ongoing impacts to the lake level from all TransAlta Utilities Corporation operations, which is forecasted to be 9 million cubic meters annually, or as otherwise authorized in writing by the Director based on the annual report

submitted under the Water Act license 12086, unless the lake level surpasses the elevation of the outlet control weir.”

[27] The uncontested facts presented to the Board in the submissions of the Parties are that the Approval Holder has applied for and received the Approval under EPEA and the Licence under the *Water Act* to increase the capacity of the Wabamun Lake Water Treatment Plant which permits the Approval Holder to increase the capacity of the Wabamun Power Plant as required by Article 4.3.27 of the Wabamun Power Plant Approval (10323-02-00).<sup>5</sup> These facts mean that the decision to which the Appellant has objected to has been rendered moot by subsequent events.

[28] The Board has considered when a decision is moot in previous cases. In *Butte Action Committee*<sup>6</sup> the Board stated:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”

[29] In *Kadutski*,<sup>7</sup> where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board can not possibly grant because it is impossible, not practical, or would have no real effect.”

[30] In this case, there would be no effect achieved by adding a requirement to the Amending Approval that is the subject of this appeal to oblige the Approval Holder to apply for increased capacity of the Wabamun Lake Water Treatment Plant given that the Approval Holder has already applied for and received such an Approval under EPEA and a Licence under the *Water Act*.

[31] The Board also notes that if the Appellant disagrees with the provisions of the Approval and Licence issued for the Wabamun Lake Water Treatment Plant, an appeal of that decision would be the appropriate forum for addressing any such concerns. In this regard, the

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<sup>5</sup> The Wabamun Lake Water Treatment Plant *Environmental Protection and Enhancement Act* Approval 18528-00-03 was issued on July 30, 2001 and the *Water Act* Licence Amendment 00037698-00-02 was issued on March 8, 2002.

<sup>6</sup> *Butte Action Committee and the Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy* (January 9, 2001), E.A.B. Appeal No. 00-029 and 00-060-D at paragraph 28.

<sup>7</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re;

Board notes that the Appellant has already appealed both the EPEA Approval (18528-00-03) and the Licence under the *Water Act*.<sup>8</sup>

### **III. DECISION**

[32] Section 95(5)(a) of EPEA states:

“The Board

- (a) may dismiss a notice of appeal if
  - (i) it considers the notice of appeal to be frivolous or vexatious or without merit ...
  - (iii) for any other reason the Board considers the notice of appeal is not properly before it....”

[33] The Board hereby exercises its discretion under section 95(5) of EPEA and dismisses the Notice of Appeal filed by the Appellant as the appeal is either moot, without merit or not properly before the Board.

Dated on May 10, 2002, in Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudehy

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Ranger Oil Limited (August 28, 2001), E.A.B. Appeal No. 00-055-D at paragraph 36.

<sup>8</sup> See EAB Appeal Nos. 01-080, 082, 084, 085, 134, 02-002 and 003.