

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Final Written Submissions: June 26, 2002

Date of Decision: July 12, 2002

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

-and-

IN THE MATTER OF an appeal filed by Ms. Linda J. Court with
respect to Approval No. 150612-00-00 issued by the Director, Bow
Region, Regional Services, Alberta Environment to Lafarge
Canada Inc.

Cite as: Intervenor Decision: *Court v. Director, Bow Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc.*

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to Lafarge Canada Inc. for the opening up, operation, and reclamation of a pit in the Municipal District of Rocky View, Alberta.

On November 21, 2001, the Environmental Appeal Board received a Notice of Appeal from Ms. Linda J. Court appealing the Approval. After the issues were decided, hearing dates were scheduled. The hearing was advertised in local newspapers, and as a result, the Board received 19 requests for intervenor status.

The Board reviewed the requests and the submissions from the parties and decided that the Calgary Health Region will have full party status at the hearing. The remaining individuals, companies, and organizations that filed intervenor requests are granted limited intervenor status and can provide written submissions only.

**DECISION BY WRITTEN
SUBMISSION ONLY:**

Dr. M. Anne Naeth,
Dr. John Ogilvie, and
Fredrick C. Fisher, Q.C.

PARTIES:

Appellant: Ms. Linda J. Court, represented by Mr. Bradley Gilmour, Bennett Jones LLP.

Director: Ms. May Mah-Paulson, Director, Bow Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Approval Holder: Lafarge Canada Inc., represented by Mr. Richard E. Bereti and Mr. Paul Cassidy, Blake, Cassels & Graydon LLP (Vancouver).

Intervenors: Alberta Sand and Gravel Association; Burnco Rock Products Ltd.; Mr. Brian Evans; Mr. A.G. Soutzo; Alberta Roadbuilders and Heavy Construction Association; Ms. Joan and Mr. Gerald Marshall, represented by W. James Hope-Ross; Ms. Shirley and Mr. Rick Schmold; Ms. Kerry and Mr. Ulrike Kerrison; Mr. S. Andrews; Mr. Graham Sewell; Mr. Robert Neil; Ms. Wendy and Mr. Randy Hoflin; Ms. Pat and Mr. Dave Barron; Ms. Bev and Mr. Terry Grantham; Ms. Pat and Mr. George Hawkins; Ms. Barbara Burton; Ms. Carmen Miller; Mr. Willis Olson; and the Calgary Health Region, represented by Dr. Timothy Lambert.

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I. BACKGROUND

[1] On October 2, 2001, the Director, Bow Region, Regional Services, Alberta Environment (the “Director”) issued Approval No. 150612-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA” or the “Act”)¹ to Lafarge Canada Inc. (the “Approval Holder”) authorizing the opening up, operation, and reclamation of a sand and gravel pit (the “Lafarge Operation”) on N 7-22-28-W4M and NE 12-22-29-W4M, in the Municipal District of Rocky View, Alberta.

[2] On November 21, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Ms. Linda J. Court (the “Appellant”) appealing the Approval. The Appellant had previously filed a Statement of Concern with the Director and was found, for the Director’s purposes, to be directly affected. The Board acknowledged the Notice of Appeal and requested a copy of the documents related to this appeal (the “Record”)² from the Director and requested that all Parties³ provide the Board with available dates for a mediation meeting and settlement conference or a hearing.

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

[4] Between January 8, 2002, and January 22, 2002, the Board received and acknowledged receipt of letters from several persons interested in this appeal.⁴ The Board advised them that if a resolution was not reached at the Mediation Meeting and Settlement Conference and the matter proceeded to a hearing, they would be notified. The Board

¹ 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.

² On December 11, 2001, the Board received a copy of the Record, and on December 12, 2001, a copy was provided to the Appellant and the Approval Holder.

³ The “Parties” in this decision refers to the Appellant, the Approval Holder and the Director.

⁴ Mr. Graham Sewell, Ms. Ruth and Mr. Willis Olson, Ms. Bev and Mr. Terry Grantham, Mr. Ulrike (Ricky) Kerrison, Ms. C.L. (Kerry) Kerrison, Mr. Morley Walbaum, Ms. Wendy Hoflin, Mr. Rob Neil, Mr. Sol Andrews, Mr. John Davidson, Mr. Martin and Ms. Lillian Dyck, Mr. D.W. Barron, Mr. Pat Stier, Ms. Barbara Burton and Residents of Cottonwood Estates.

subsequently received additional letters from other interested persons.⁵ All of these interested and concerned persons were advised that should the matter proceed to a hearing, a Notice of Hearing would be published in the newspaper, and they would have an opportunity to apply to the Board for intervenor status.

[5] Pursuant to section 11 of the Environmental Appeal Board Regulation, A.R. 114/93 (the “Regulation”), the Board conducted a Mediation Meeting and Settlement Conference in Calgary, Alberta, on January 23, 2002, with Mr. Ron Peiluck, Board Member, presiding as the mediator. Following discussions, no resolution could be reached, and the Board advised the parties that a hearing date would be set. Several exchanges of letters and submissions followed.⁶

[6] The Board released a decision regarding the issues to be heard at the hearing on April 22, 2002.⁷ It determined the issues that will be heard at the hearing are:

1. The effect that dust and other air pollutants from the Lafarge Operation may have directly on the Appellant.
2. The effect that noise from the Lafarge Operation may have directly on the Appellant.
3. The cumulative effects that dust and other air pollutants and noise from the Lafarge Operation, and as specifically regulated by the Approval, may have directly on the Appellant.

⁵ Mr. Roger Shields and Ms. Carmen Miller provided letters subsequent to the Mediation Meeting.

⁶ On January 31, 2002, the Board acknowledged letters dated January 29, 2002, from all the Parties, and at that time set out a schedule for written submissions to be provided to the Board to decide the issues for the appeal.

On February 4, 2002, the Appellant provided the Board with her Initial Submission on issues and identified seven issues that should be addressed at the hearing. In response, both the Director and the Approval Holder provided their Response Submissions and argued that the issues presented by the Appellant were too general in nature and did not explain how the Appellant was directly affected. The Board acknowledged these submissions on February 8, 2002.

On February 15, 2002, the Board acknowledged receipt of the Rebuttal Submission from the Appellant. In this letter, the Board advised the Parties that it had decided to deal with the directly affected status of the Appellant prior to deciding the issues to be considered at the hearing of the appeal, and set out a schedule for written submissions on the directly affected issue.

On February 22, 2002, the Board acknowledged receipt of the Appellant’s Initial Submission on her directly affected status. On March 4, 2002, the Board acknowledged receipt of the Response Submissions from the Approval Holder and the Director. The Board received the Appellant’s Rebuttal Submission on March 11, 2002.

The Board wrote to the Parties on March 21, 2002, informing them that the Board would make its decision regarding directly affected status of the Appellant at the hearing. The Board also stated that it would make the decision regarding the issues to be heard at the hearing and then provide a schedule for the exchange of affidavits and for providing submissions and exhibits.

⁷ *Court v. Director, Bow Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc.* (April 22, 2002), E.A.B. Appeal No. 01-096-ID.

[7] The hearing date was set for July 24 and 25, 2002. Notice of the hearing was published in the local newspapers, and those wanting to intervene were to submit their requests to the Board by June 14, 2002.⁸ The Board received 19 requests for intervenor status from Ms. Carmen E. Miller, Ms. Barbara J. Burton, Ms. Bev and Mr. Terry Grantham, Mr. Robert Neil, Mr. Sol Andrews, Mr. Graham Sewell, Ms. Wendy and Mr. Randy Hoflin, Ms. Kerry and Mr. Ulrike Kerrison, Mr. Willis Olson, Mr. D.W. Barron, and G.E. Hawkins (collectively the “Residents”);⁹ the Calgary Health Region; the Alberta Roadbuilders and Heavy Construction Association; the Alberta Sand and Gravel Association; Ms. Shirley and Mr. Rick Schmold; Ms. Joan and Mr. Gerald Marshall; Mr. Brian Evans; Mr. A.G. Soutzo; and Burnco Rock Products Ltd. (“Burnco”).¹⁰

[8] The Board reviewed the submissions for intervenor status from the Parties. The Board notified the Parties and those seeking intervenor status on July 5, 2002, that the Calgary Health Region would be granted full party status and that all of the others who requested intervenor status would be permitted to file written submissions only. The Board indicated its reasons for this decision would follow. These are the Board’s reasons.

II. SUBMISSIONS

A. Approval Holder

[9] The Approval Holder stated that it “...takes no position regarding the intervenors participation in the Appeal.”¹¹ The Approval Holder had no comments “at this time” (emphasis in original) on the participation of the Calgary Health Region, and stated that it might have further comments when it knew what position the Calgary Health Region would be taking.¹²

⁸ Notice of the Hearing was published in the Calgary Herald, the Okotoks Western Wheel, and the Rocky View Times. The Notice indicated that any person, other than the Parties, who wanted to make a representation to the Board was to submit their request to the Board by June 14, 2002.

⁹ The Board notes other parties who filed a request to intervene are also residents in the area, but this group will be referred to as the Residents for ease of distinguishing the different groups of intervenors. This group of individuals opposes the Lafarge Operation.

¹⁰ The Alberta Road Builders and Heavy Construction Association, the Alberta Sand and Gravel Association, Ms. Shirley and Mr. Rick Schmold, Ms. Joan and Mr. Gerald Marshall, Mr. Brian Evans, A.G. Soutzo, and Burnco support the Lafarge Operation.

¹¹ See: Letter from Approval Holder, dated June 25, 2002.

¹² See: Letter from Approval Holder, dated June 26, 2002.

B. Appellant

[10] The Appellant summarized the concerns of the intervenors and stated that the "...letters generally indicate that parties were not aware of the significance of the potential health risks associated with the Lafarge approval."¹³ The Appellant also argued that the Approval Holder's application was incomplete at the time the notice of application was issued. Thus, the Appellant submitted that:

"...there is a serious question of whether or not these parties were provided with their statutory right to file statements of concern and subsequently notices of appeal where it is now clear that the application was seriously deficient...."¹⁴

¹³ See: Appellant's Submission, dated June 24, 2002. The Appellant was referring to the letters sent by the Residents. In the Appellant's submission, it stated:

1. Carmen Miller, June 8, 2002 letter, second paragraph – 'Until Ms. Court provided the toxicology report stating the opinion of Dr. Donald Davies, an environmental expert from Cantox Environmental Inc., I was unaware of 'particulate matter' and its significance to public health.'
2. W. Olson, June 9, 2002, second paragraph – 'I was not aware of health issues surrounding this project and gravel pits in general. The application made no reference to any impact on peoples' health and I only found out about this issue when I received a copy of the letter issued by the Calgary Health Region.'
3. Burton letter, June 10, 2002, second paragraph – 'it has now come to my attention that my valid concerns for the environment and the ecology of both the river and the adjoining lands and the increased dust factor have been attested to and reports signed by Dr. Timothy Lambert, & Dr. Donald Davies.'
4. Grantham letter, June 12, 2002, second paragraph – 'We did not realize the Lafarge project would be of such magnitude as to negatively effect our health, both mentally and physically, for the unforeseeable future. As such, we wish to be heard at this appeal.'
5. Hoflin letter, June 12, 2002, third paragraph – 'At the August 30th meeting, Bruce Patterson advised us that there were not any standards or guidelines for noise or air quality. It wasn't until Linda Court launched her appeal that we saw the letter from the Calgary Health Region did we realize that the situation was serious and that we should and could pursue this further. We had relied too much on the information given to us at the August 30th meeting and felt we had no recourse. My husband and I would like the opportunity to be able to speak at this hearing and voice our concerns about this project.'
6. Robert Neil letter, June 13, 2002, paragraph two – 'I have always been concerned about the amount of dust from the Rolling Mix and other pits but until I saw the letter from the Calgary Health Region did not realize the potential impact to my family and I.'
7. S. Andrews letter, June 13, 2002, second paragraph – 'I am a resident of Bowview Estates and will be directly impacted by this gravel pit. I was not aware of the air quality health issues surrounding this project or gravel pits in general.'" (Emphasis in original.)

¹⁴ See: Appellant's Submission, dated June 24, 2002.

[11] The Appellants submitted that the Calgary Health Region should be allowed to appear before the Board as it can provide an opinion concerning health risks based on the air dispersion model.

[12] The Appellant submitted the Alberta Road Builders and Heavy Construction Association and the Alberta Sand and Gravel Association should not be granted intervenor status as "...they have not identified in their submission how they will materially assist the Board in deciding the issues at hand..."¹⁵

[13] The Appellant stated that it was "...not opposed to Burnco participating in this hearing provided Burnco is required to file its submission and affidavit evidence well in advance of the hearing, and provided we are given the opportunity to cross-examine Burnco's representatives."¹⁶ The Appellant did state that, as indicated in the issues decision released by the Board, the approvals of the adjoining facilities, including Burnco, were not at issue, but Burnco should be given an opportunity to respond to the air emission modeling produced by the Director and Lafarge.

[14] Regarding the remaining individuals¹⁷ who applied for intervenor status, the Appellants stated that they "...have not indicated in their submissions how their participation will materially assist the Board in deciding the appeal, or what evidence they can provide that is directly relevant to the appeal."¹⁸ The Appellant further argued that no new information has come available since notice of the application that would affect the position of Ms. Shirley and Mr. Rick Schmold, Ms. Joan and Mr. Gerald Marshall, Mr. A.G. Soutzo, and Mr. Brian Evans.

C. Director

[15] The Director had no concerns regarding the intervention of Ms. Shirley and Mr. Rick Schmold, Ms. Joan and Mr. Gerald Marshall, Mr. A.G. Soutzo, Mr. Brian Evans, Burnco, the Alberta Roadbuilders and Heavy Construction Association, and the Alberta Sand and Gravel

¹⁵ See: Appellant's Submission, dated June 24, 2002.

¹⁶ See: Appellant's Submission, dated June 24, 2002.

¹⁷ The Appellant was referring to Ms. Shirley and Mr. Rick Schmold, Ms. Joan and Mr. Gerald Marshall, Mr. A.G. Soutzo, and Mr. Brian Evans.

¹⁸ See: Appellant's Submission, dated June 24, 2002.

Association. The Director stated, "...it is clear that they have a tangible interest in the subject matter of the appeal and will have their unique position to put forward."¹⁹

[16] However, for the remaining intervention requests, the Director argued that:

"...their evidence will repeat or duplicate the evidence presented by the Appellant. As such, the Director submits that these parties should not be granted intervenor status or in the alternative, their intervention be limited to making written submission to the Board."²⁰

III. DISCUSSION AND ANALYSIS

[17] Under section 95 of the Act, the Board can determine who will make representations before it. Section 95(6) states:

"Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[18] Pursuant to sections 7 and 9 of the Regulation, the Board must determine whether a person filing a request to make submissions should be allowed to do so at the hearing. Section 7 of the Regulation states:

"7(2) A published notice referred to in subsection (1)(a)(ii) or (b)(ii) must contain the following:

- (a) the date, time and place of the hearing, in a case where an oral hearing is to be held;
- (b) a summary of the subject matter of the notice of appeal;
- (c) a statement that any person who is not a party to the appeal and wishes to make representations on the subject matter of the notice of appeal must submit a request in writing to the Board;
- (d) the deadline for submitting a request in writing under clause (c);
- (e) the mailing address of the Board;
- (f) the location and time at which filed material with the Board will be available for examination by interested persons."

[19] Section 9 of the Regulation states:

¹⁹ See: Director's Submission, dated June 24, 2002.

²⁰ See: Director's Submission, dated June 24, 2002.

- “(1) A request in writing referred to in section 7(2)(c) shall
- (a) contain the name, address and telephone number of the person submitting the request,
 - (b) indicate whether the person submitting the request intends to be represented by a lawyer or other agent and, if so the name of the lawyer or other agent,
 - (c) contain a summary of the nature of the person’s interest in the subject matter of the notice of appeal, and
 - (d) be signed by the person submitting the request.
- (2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[20] The Regulation also states that the Board can determine who will be a party to an appeal. Section 1(f)(iii) of the Regulation states:

“In this Regulation... ‘party’ means any other person the Board decides should be a party to the appeal.”

[21] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

[22] None of the Parties had any concerns with the participation of the Calgary Health Region. The Board recognizes the concurrent jurisdiction regarding human health between the Director and the Calgary Health Region. Section 2(a) of the Act states:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing ...the protection of the environment is essential to the integrity of ecosystems and *human health* and to the well-being of society.” (Emphasis added.)

[23] Section 11 of the Act refers to the cooperative approach that must be taken between environment and health. It states:

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

[24] The Board notes the Calgary Health Region and the Director have been in consultation with each other on the matters in this appeal. This cooperative approach can only benefit all of the citizens of Alberta.

[25] Because of this cooperative approach, and the potential valuable evidence the Calgary Health Region could provide, the Board grants the Calgary Health Region full party status. The Board believes the evidence the Calgary Health Region can provide will materially assist the Board and the evidence should not duplicate that of the other Parties. The Calgary Health Region has a keen interest in the matter of this appeal, as the issue is the health of its residents. Although the Calgary Health Region did not stipulate whether it was supporting or opposing the appeal, the Board recognizes that the Calgary Health Region generally does not support applications. The Calgary Health Region’s purpose in appearing before the Board is to provide information to the Board to assist in protecting human health.

[26] The Appellant tried to argue that the Board should accept all of the requests from the Residents because the Director did not have all of the information before he made his decision, and therefore, the intervenors did not have the opportunity to file Statements of Concern or Notices of Appeal to a complete application. The intervenors were aware of the application being made by the Approval Holder. Although they may not have been aware of the full extent of the Lafarge Operation, they had a right to file a Statement of Concern, and

ultimately a Notice of Appeal, and if they chose to, could have withdrawn their Notice of Appeal if they found the Director and the Approval Holder had dealt with their concerns adequately.

[27] Although the Board does recognize the concerns of the Residents and their opposition to the Lafarge Operation, the Board must also look at whether they will be providing any evidence that will be different from the Appellant's arguments. The Residents' requests to intervene referred to the same issues brought forward by the Appellant, and the Board believes the Appellant will adequately present the concerns of the Residents. Therefore, the Board will accept written submissions only from the Residents.

[28] The Alberta Roadbuilders and Heavy Construction Association and the Alberta Sand and Gravel Association have indicated they wish to present "industry concerns." The Board believes the Approval Holder should capably present industry concerns. The Approval Holder has been working in the gravel processing business in this province for a number of years. It should be well versed in the regulations and restrictions on the industries connected with this business and the effects any decision the Director makes could ultimately have on them. The Approval Holder is in a position to present the broader industry perspective and concerns. Therefore, the Board will allow written submissions only from the Alberta Roadbuilders and Heavy Construction Association and the Alberta Sand and Gravel Association.

[29] As Burnco is in the same industry as the Approval Holder, the Board is certain that the Approval Holder will be able to respond to any issues that may be brought forward concerning cumulative effects. In the decision on the issues, the Board explicitly stated

"...the substance of the operations of other facilities in the area [(of which Burnco is one)] is *not* before the Board. They are only relevant to the extent that they form part of the circumstances in which they interact with the Lafarge Operation that is under appeal."²¹

Thus, Burnco's operations are not an issue in this appeal. The extent of the Board's interest in Burnco is limited and is only relevant in that the Approval Holder would have to consider cumulative effects of its own operations to the area. However, the Board will accept written submissions from Burnco, as its operations are a factor in the air emission modeling.

²¹ *Court v. Director, Bow Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc.* (April 22, 2002), E.A.B. Appeal No. 01-096-ID at paragraph 40.

[30] Mr. Brian Evans and Mr. A.G. Soutzo have an interest in the issues in this appeal as they own the land on which the Lafarge Operation is to proceed. The Board accepts they have an interest in the appeal, and as indicated in their requests, support the Lafarge Operation. As owners of the property, the Board is prepared to hear their comments. However, considering the issues to be heard, the Board does not see what new evidence they present that the Approval Holder could not and the Board does not immediately see how their evidence could be of material assistance. Thus, the Board will allow Mr. Brian Evans and Mr. A.G. Soutzo to provide written submissions only.

[31] The Marshalls' and the Schmolds' submissions did not provide the Board with any new evidence or concerns. Their interest in the appeal is similar to those presented by the Approval Holder. The Board believes the Marshalls' and the Schmolds' issues will be addressed in the Approval Holder's submission. However, the Board will allow Ms. Shirley and Mr. Rick Schmold and Ms. Joan and Mr. Gerald Marshall to submit written submissions.

[32] The Board has determined that, other than the Calgary Health Region, none of those requesting intervenor status demonstrated they would be providing new evidence the existing Parties could not present. Therefore, all intervenors, except the Calgary Health Region, can provide written submissions only. The Board will review all of these submissions when making its final decision in this matter. The Calgary Health Region is given full party status.

IV. DECISION

[33] Pursuant to section 95 of EPEA, the Board determines that the Calgary Health Region will have full party status at the hearing. The remaining individuals, companies and organizations that applied for intervenor status are granted limited intervenor standing, and they can participate in the hearing through written submissions only.

Dated on July 12, 2002, at Edmonton, Alberta.

- original signed -

Dr. M. Anne Naeth

- original signed -

Dr. John Ogilvie

- original signed -

Fredrick C. Fisher, Q.C.