ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – June 24, 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 James Kievit, Paul Adams, Marlo Raynolds, Nadine Raynolds, Jeff Eamon and Anne Wilson, Hal Retzer, the Bow Valley Citizens Clean Air Coalition, Tracey Henderson, Amy Taylor, and Gary Parkstrom with respect to Approval No. 1702-01-02 issued by the Director, Approvals, Southern Region, Regional Services, Alberta Environment to Lafarge Canada Inc.

Cite as: Standing Decision: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re*: Lafarge Canada Inc.*

BEFORE: William A. Tilleman, Q.C., Chair.

APPEARANCES:

Appellants: Mr. James Kievit, Dr. Paul Adams, Mr. Marlo Raynolds, Ms. Nadine Raynolds, Mr. Jeff Eamon and Ms. Anne Wilson, Mr. Hal Retzer, the Bow Valley Citizens Clean Air and the Pembina Institute for Appropriate Development, Dr. Tracey Henderson, Ms. Amy Taylor, and Mr. Gary Parkstrom, represented by Ms. Jennifer Klimek.

Approval Holder: Lafarge Canada Ltd. Inc., represented by Mr. Ronald Kruhlak and Mr. Corbin Devlin, McLennan Ross.

Director: Ms. May Mah-Paulson, Director, Approvals, Southern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Lafarge Canada Inc. for its cement manufacturing plant near Exshaw, Alberta. The Amending Approval permits Lafarge to change the fuel supply for part of the plant from natural gas to coal. The Environmental Appeal Board received nine individual appeals and one by a Coalition. The Coalition was formed by members of the Bow Valley Citizens for Clean Air and members of the Pembina Institute for Appropriate Development for the purpose of these appeals.

The parties came to an agreement as to who would have standing to have their appeals proceed before the Board. It was agreed that three of the individuals and the Bow Valley Citizens for Clean Air should be granted standing. The Board reviewed the joint submission of the parties respecting this agreement and the Notices of Appeal and decided it would accept the Notices of Appeal filed by the three individuals, but that it would not accept the Notice of Appeal filed in part by the Bow Valley Citizens for Clean Air. However, the Board decided that the Bow Valley Citizens for Clean Air would be granted party status.

As a result, the Board dismissed the Notice of Appeals of the Coalition and the six remaining individuals.

As part of its standard practice, the Board also considered whether the issues in the Notices of Appeal had been considered by the Natural Resources Conservation Board or the Alberta Energy and Utilities Board, and whether the persons filing the Notices of Appeal had an opportunity to participate in any of these decision making processes. On the basis of the evidence provided by these boards and the parties to this appeal, the Board finds the provisions of the *Environmental Protection and Enhancement Act* regarding the Natural Resources Conservation Board and the Alberta Energy and Utilities Board are not applicable with respect to these appeals.

TABLE OF CONTENTS

I. BACKGROUND

[1] The Director, Southern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 1702-01-02 (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") on October 22, 2001, with respect to its cement manufacturing plant (the "Cement Plant") at Exshaw, Alberta.

[2] The Cement Plant is currently fueled by natural gas. But, in the last few years the price of natural gas has been unstable. This has resulted in economic difficulties at the Cement Plant such that during one period in the last few years, two-thirds of the Cement Plant had to be shut down, and cement had to be imported from outside the province. Apparently, in response to these unstable natural gas prices, the Approval Holder applied to the Director for an amendment (the Approval) to the Original Approval to allow the burning of coal as part of what is referred to as the "Fuel Flexibility Project."

[3] On November 21, 2001, the Environmental Appeal Board (the "Board") received Notices of Appeal from Mr. James Kievit, Dr. Paul Adams, Mr. Marlo Raynolds, Ms. Nadine Raynolds, Mr. Jeff Eamon and Ms. Anne Wilson, Mr. Hal Retzer, the Bow Valley Clean Air Coalition (composed of the Bow Valley Citizens for Clean Air ("BVCCA") and the Pembina Institute for Appropriate Development), Dr. Tracey Henderson, and Ms. Amy Taylor, and on November 22, 2001, it received an appeal from Mr. Gary Parkstrom (collectively the "Appellants"). The Board acknowledged these appeals on November 21 and 23, 2001, and at that time requested a copy of the record as related to this file (the "Record") from the Director.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board ("NRCB") and the Alberta Energy and Utilities Board ("AEUB") and asked whether the matter before the Board had been the subject of a hearing or review under their respective legislation. The NRCB replied in the negative.

[5] On December 10, 2001, the Board received a copy of the Record, which was provided to the Parties on December 11, 2001.

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[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.

[6] On December 20, 2001, the AEUB wrote to the Board and advised that the AEUB "…has not held a public hearing or review into the subject matter of these Environmental Appeal Board applications." However, the AEUB advised that it had issued Industrial Development Permit No. IDP 90-5 (the "Permit"), allowing the Approval Holder to use gas produced in Alberta as fuel in its Cement Plant for a renewable term of five years. The AEUB extended the Permit for another five-year term on September 10, 1998. The AEUB indicated that the Permit "…was granted routinely and no public hearing was held."

[7] On December 21, 2001, the Director notified the Board that the Municipal District of Bighorn and the Stoney Nakoda First Nation[2] might have an interest in the appeals. On January 9, 2002, the Board wrote to the Municipal District of Bighorn and the Stoney Nakoda First Nation, advising them of the appeals.[3]

[8] On January 4, 2002, the Board wrote to the AEUB asking for a copy of the Permit and any other relevant documents. On January 11, 2002, the AEUB provided the Board with:

(1) Industrial Development Permit No. IDP 90-5;

(2) Application No. 891034 (the application for the Permit);

(3) Application No. 911853 (the application for the first renewal of the Permit); and

(4) Application No. 1024980 (the application for the second renewal of the Permit).

The AEUB also indicated that the Permit repealed and replaced Industrial Development Permit No. CC78-1, which was issued on September 22, 1978.

[9] On January 15, 2002, the Board acknowledged receipt of the Permit and provided a copy to all Parties to these appeals.

[10] In a letter dated January 31, 2002, the Appellants advised the Board that the Parties were close to an agreement regarding standing. On February 11, 2002, the Board received a letter from the Approval Holder stating that the Parties had reached an agreement as to who would have standing to proceed with their appeals. The Approval Holder stated:

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[2] The Stoney Nakoda First Nation have also identified themselves in other correspondence with the Board as the Stoney Tribal Council and the Stoney First Nation.

[3] The Municipal District of Bighorn and the Stoney Nakoda First Nation were subsequently granted intervenor status in these appeals.

"1. All parties agree that the following individuals and organizations have standing to proceed with their appeals before the Environmental Appeal Board:

(a) Paul Adams (individual)

(b) Jeff Eamon (individual)

(c) Jim Kievit (individual)

(d) Tracy Henderson on behalf of the Bow Valley Citizens for Clean Air;

2. The balance of the Appellants will not be seeking standing nor do the Department or Approval Holder challenge their standing. Those remaining appeals will not be advanced."[4]

[11] After reviewing the joint submission of the Parties and following its review of the Notices of Appeal, the Board notified the Parties on February 15, 2002, that Mr. Paul Adams, Mr. Jeff Eamon, and Mr. Jim Kievit were directly affected and would therefore have standing to proceed with their appeals. The Board also notified the Parties that even though the BVCCA was granted party status, the Board decided to dismiss their Notice of Appeal.[5] In the February 15, 2002 letter, the Board also confirmed that the remaining Appellants would not be advancing their appeals and advised that, on this basis, the Board was considering dismissing the remaining appeals. The Board also advised that the hearing would be held in Edmonton on April 24 and 25, 2002.

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4 See: Letter from Approval Holder, dated February 11, 2002.

5 In its letter of February 15, 2002, the Board wrote to the Parties and advised:

"Based on the Board's reviewing of the joint submission of the parties and following the Board's examination of the Notices of Appeal, the Board has decided that Mr. Paul Adams, Mr. Jeff Eamon, and Mr. Jim Kievit are directly affected and therefore have standing to proceed with their appeals.

Based on the joint submission of the parties and following its review of the Notices of Appeal, the Board has decided to grant the Bow Valley Citizens for Clean Air as represented by Dr. Tracey Henderson party status in accordance with section 1(f)(iii) of the Environmental Appeal Board Regulation, A.R. 114/93. In making this decision, the Board is not necessarily stating that the Bow Valley Citizens for Clean Air is directly affected. In deciding to grant the Bow Valley Citizens for Clean Air party status, the Board has also decided to dismiss their Notice of Appeal. …

The Board confirms its understanding that the remaining Appellants will not be advancing their appeals. As such, it is the Board's intent to dismiss the remaining appeals, pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, as they are otherwise not properly before the Board. If any party has a concern with this please contact the Board by **February 20, 2002**." [Emphasis in original.]

[12] In a letter dated February 20, 2002, the Appellants advised the Board of their concern with the Board's decision that the Notice of Appeal of the BVCCA (and the Pembina Institute – E.A.B. Appeal No. 01-103) should be dismissed.[6]

[13] On March 5, 2002, the Board wrote to the Parties to address three issues:

(1) the status of the BVCCA;

(2) the setting of the issues to be considered at the hearing; and,

(3) whether this matter has been previously addressed by the AEUB.

[14] In the March 5, 2002 letter, the Board confirmed its decision to dismiss the appeal of the BVCCA. The letter stated that full reasons for the Board's decision would be provided later but that, in short, the issues raised by the group could be addressed through the appeals filed by Mr. Adams and Mr. Eamon.[7]

[15] The March 5, 2002 letter also set out the Board's initial review of evidence on the issue of whether the AEUB held any public hearing or review of the matter before the Board and whether the persons filing the Notices of Appeal had an opportunity to participate in the AEUB's decision making process. The Board indicated that sections 95(2)(a) and 95(5)(b)(i)[8] of the Act

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6 The February 20, 2002 letter from Ms. Klimek advised that she

"…[does] have a concern with the Bow Valley Citizens for Clean Air's ('BVCCA') notice of appeal being dismissed as they have been granted party status. Having said that, Mr. Kruhlak and I have agreed that the BVCCA's Notice of Appeal succinctly summarizes the issues in this appeal and should be the reference point for the appeal. If that is not acceptable, I would appreciate an opportunity to address the above issues."

7 In its March 5, 2002 letter to the parties, the Board advised that it

"…has reviewed Ms. Klimek's concern confirms its decision to dismiss the appeal of the Bow Valley Citizens for Clean Air (01-103). Full reasons for the Board's decision in this regard will be provided shortly, but in summary, the Board is of the view that the Appellants, and in particular the Bow Valley Citizens for Clean Air, have suffered no prejudice by this decision. First, the Bow Valley Citizens for Clean Air have been granted the status of party for the purpose of these appeals, and is therefore entitled to participate in support of the remaining three appeals (Adams, Eamon and Kievit). Second, the Board has reviewed the Notices of Appeal filed by Mr. Paul Adams and Mr. Jeff Eamon, and it appears that these Notices of Appeal incorporate the substance of the Notice of Appeal of the Bow Valley Citizens for Clean Air by reference. Therefore, while the Notice of Appeal of the Bow Valley Citizens for Clean Air will not proceed, the issues raised in this Notice of Appeal can be addressed through the appeals filed by Mr. Adams and Mr. Eamon."

8 Section 95(2)(a) of the Act provides:

"95(2) 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

appeared to be inapplicable in this case. However, the Board requested that, prior to making a final determination respecting the applicability of these sections, it would like to receive submissions of the Parties as to:

> "…whether the persons submitting the Notices of Appeal received notice of or participated in or had the opportunity to participate in a hearing or review under an Act administered by the [A]EUB at which all of the matters included in the notice of appeal were adequately dealt with."

[16] By letter dated March 8, 2002, the Director advised the Board that in regard to the issue of whether the AEUB had dealt with the issues, "…the Director takes the position that s. 95(2)(a) and 95(5)(b)(i) are inapplicable in this case."

[17] By letter dated March 11, 2002, the Appellants advised the Board that they "…agree with the Board's initial assessment on the Energy and Utility Board's involvement in this project and that it is not a bar to this hearing."

[18] By letter dated March 11, 2002, the Approval Holder advised the Board that it also agreed with the Board's initial determination, adding that it "…does not appear that the Appellants had an opportunity to participate in a review with respect to the use of coal as an alternative fuel source in the review process administered by the [A]EUB."

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included in the hearing of the appeal, and in making that determination the Board may consider the following:

(a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review…."

Section 95(5)(b)(i) of the Act provides:

"The Board … (b) shall dismiss a notice of appeal if in the Board's opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with …."

II. DISCUSSION

A. Status of the Appellants

[19] In hearings involving multiple notices of appeals, the Board will examine the notices of appeal to determine if the issues can be presented jointly. Section 3 of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the "Regulation"), states:

> "Where the Board receives more than one notice of appeal in respect of a decision, it may combine the notices of appeal for the purposes of dealing with them under this Regulation."

[20] Where the rules of natural justice permit, the Board combines appeals to avoid redundancy and expense, and to promote efficient and effective hearings for all parties. Where, as here, the Board is of the view that the Appellants will suffer no prejudice, the Board combines appeals to streamline the appeal process.

[21] Again, in the current case, the BVCCA was granted party status and was therefore entitled to participate in support of the remaining three appeals.[9] The Board reviewed the Notices of Appeal filed by Mr. Adams and Mr. Eamon and found that these Notices of Appeal appeared to incorporate by reference the substance of the Notice of Appeal of the BVCCA.[10] The Board reiterates its position that, while the Notice of Appeal of the BVCCA would not proceed, the issues raised in its Notice of Appeal were addressed through the appeals filed by Mr. Adams and Mr. Eamon.[11]

[22] The Board believed that the three remaining appellants were in a position to efficiently make their submissions at the hearing. Indeed, in their Notices of Appeal, Mr. Kievit, Mr. Adams, and Mr. Eamon stated that the Bow Valley Clean Air Coalition would represent

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[9] Standing has been granted to Mr. Kievit, Mr. Eamon and Mr. Adams. See Board's Letter, dated February 15, 2002.

[10] In their Notices of Appeal, Mr. Eamon and Mr Adams refer to the issues brought forward by the Bow Valley Clean Air Coalition ("BVCAC") with respect to Ambient Monitoring and Reporting and Human Health Impact Assessment. Dr. Adams' Notice of Appeal makes reference to the BVCAC submission with respect to Limits, Use of Tires for Fuel, Passive Ambient Air Monitoring Program Proposal, Performance Enhancement Plan, SO2 Reduction Proposal, and SO2 Impacts on Vegetation Assessment Report. Mr. Eamon makes a general reference to the submission by BVCAC in his Notice of Appeal by stating: "Please refer to BVCAC submission for further detail [*sic*] of our concerns."

[11] See: Board's Letter, dated March 4, 2002.

them before the Board. Pursuant to section 5(1)(d) of the Regulation, appellants are permitted to have another person, an "agent," represent the appellant in the appeal. In many situations this can be very helpful, particularly if this assists in presenting the issues in an organized and efficient manner.

[23] For these reasons, the Board confirmed its decision to dismiss the appeal of the BVCCA.

[24] The Board notes that while it did not dismiss the BVCCA's Notice of Appeal on the basis that the group was not directly affected pursuant to section 95(5)(a)(ii) of the Act, the Board has said in previous cases that what is of greater assistance to the Board in conducting these appeals is the personal connection between individual appellants and the approval being appealed.[12]

B. Has the matter been dealt with by the AEUB?

[25] In determining whether the Board has jurisdiction to hear an appeal, the Board must consider whether the issues in the Notices of Appeal have been considered by the NRCB or the AEUB. Sections 95(2)(a) of the Act provides:

> "95(2) 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:
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> (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review…."

Section 95(5)(b)(i) of the Act provides:

> "The Board … (b) shall dismiss a notice of appeal if in the Board's opinion

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[12] Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 53, (*sub nom, Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*) E.A.B. Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID ("Bailey"). See also, *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re: *Ouellette Packers (2000) Ltd* (January 28, 2002), E.A.B. Appeal No. 01-076.

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with …."

[26] In its March 5, 2002 letter to the Parties, the Board detailed its initial review of the evidence as to whether sections 95(2)(a) and 95(5)(b)(i) applied.[13] The Board also made an initial finding that:

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[13] On March 5, 2002, the Board wrote:

" On November 21, 2001 and again on November 23, 2001, the Board wrote to the NRCB and [A]EUB and asked whether the matter before the Board was the subject of a public hearing or review under their respective legislation. In two letters dated November 29, 2001, the NRCB replied in the negative.

On December 20, 2001, the [A]EUB wrote to the Board and advised that the [A]EUB '…has not held a public hearing or review into the subject matter of these Environmental Appeal Board applications.' However, the [A]EUB went on to advise that it has '… issued an Industrial Development Permit, No. IDP 90-5.' The [A]EUB advises that the Industrial Development Permit ('IDP') '…allows Lafarge to use gas produced in Alberta as a fuel in its Exshaw cement manufacturing facility for a renewable term of 5 years.' The [A]EUB advises that the IDP was renewed on September 10, 1998 for another five year term (September 10, 2003). Finally, the [A]EUB indicates that this IDP '…was granted routinely and no public hearing was held.'

On January 4, 2002, the Board wrote to the [A]EUB asking for a copy of the IDP and any other relevant documents. On January 11, 2002, the [A]EUB provided the Board with :

1. Industrial Development Permit No. IDP 90-5;
2. Application No. 891034 (application for IDP 90-5);
3. Application No. 911853 (application for the first renewal); and
4. Application No. 1024980 (application for the second renewal).

The Board also indicated that the IDP repealed and replaced Industrial Development Permit No. CC78-1, which was issued on September 22, 1978.

In reviewing the application for the IDP (Application No. 891034), which includes an increase in production, the Board notes that at the time of the application, Lafarge indicated that '…natural gas remains the most suitable energy source.' Lafarge went on to indicate that there were studies being undertaken to look at other fuel sources including coal. The application further states that they are regulated by the *Clean Air Act* and *Clean Water Act* and that the local residents have not been formally informed of increased production. Lafarge indicates, however, that in response to a petition presented to Alberta Environment in 1989, they have been working with the local municipality to address dust emissions from all the industries in the area. (See letters from Lafarge to the [A]EUB dated July 14, 1989, December 15, 1989, and April 17, 1990)

In reviewing the IDP, the Board notes that the IDP authorizes '…the use of natural gas produced in Alberta for the production of cement in Alberta…', and was granted on the basis that in the [A]EUB's opinion the '…permit is in the public interest, having regard to among other considerations, the efficient use without waste of natural gas and the present and future availability of hydrocarbons in Alberta ….' The IDP is issued subject to a number of terms and conditions, including that it may be extended for so long as '…all relevant matters considered, gas remains the more suitable fuel in the public interest…' and that the plant shall be operated '…in a manner that results in (a) the maximum practicable and economically obtainable efficiency in the use of gas of the manufacture of cement, and (b) the maximum practical and economical conservation of gas.'

> "Upon initial review, the evidence before the Board appears to indicate that with respect to the IDP [(the Permit)], there was no public hearing or review. There also does not appear to be any evidence before this Board to indicate that the persons filing the Notices of Appeal had an opportunity to participate in the [A]EUB's decision making process. Further, the evidence before the Board appears to indicate that the principal consideration undertaken by the [A]EUB, although there were some environmental matters considered, was the economical use of natural gas. Finally, there is no evidence before this Board that the matters included in the Notices of Appeal were dealt with by the [A]EUB. Therefore, it would appear that section 95(2)(a) and 95(5)(b)(i) are inapplicable in this case."

[27] In its March 5, 2002 letter, the Board asked that, prior to the Board making a final determination respecting the applicability of these sections, the Parties make submissions as to:

> "…whether the persons submitting Notices of Appeal received notice of or participated in or had the opportunity to participate in a hearing or review under an Act administered by the [A]EUB at which all of the matters included in the notice of appeal were adequately dealt with."

[28] On March 8, 2002, the Board received a letter from the Director taking the position that sections 95(2)(a) and 95(5)(b)(i) are inapplicable.[14]

> In reviewing the application to extend the IDP for the first time (Application No. 911853), the Board notes that Lafarge confirmed that the economics of using natural gas remains in favour of gas. (See letter from Lafarge to [A]EUB dated December 17, 1991) In response to this the IDP was renewed until December 31, 1998.
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> In reviewing the application to extend the IDP for a second time (Application No. 1024980), the Board notes that Lafarge again confirmed that natural gas is still the more suitable fuel. Lafarge also noted that it has '…worked very hard to make sure our operations are in accordance with all environmental legislation, and further, acceptable to our neighbours in the Bow Valley.' Lafarge went on to say that using '…an alternate fuel to gas, such as coal, would dramatically affect our ability to do this.' Finally, Lafarge stated '…any decision to move to an alternate fuel would require an extensive consultation process with the stakeholders in the Bow Valley.' (See letter from Lafarge to the [A]EUB dated May 8, 1998.) In response to this the IDP was renewed until December 31, 2003.
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> As stated, in deciding to either limit or dismiss the appeals pursuant to section 95, the Board must consider whether the persons submitting the notice of appeal received notice of or participated in or had the opportunity to participate in a hearing or review under an Act administered by the [A]EUB at which all of the matters included in the notice of appeal were adequately dealt with."

[14] See: Director's letter, dated March 8, 2002. The Director based her position on the following submissions:

> "The Industrial Development Permit issued to Lafarge is pursuant to the *Oil and Gas Conservation Act*, RSA, 2000 c. O-6. Section 43 is the applicable section which requires that:
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> > *No energy resource produced in Alberta shall be used in Alberta as a raw material or fuel in any industrial or manufacturing operation, unless the Board, on application, has granted a permit authorizing that use for that purpose in accordance with this section.*
> >
> > *Note: Energy resource is defined to include gas, methane, ethane, propane, butane, pentanes plus, condensate or crude oil or any primary derivative of*

[29] On March 11, 2002, the Board received a letter from the Appellants advising the Board that the Appellants "…agree with the Board's initial assessment on the Energy an Utility Board's involvement in this project and that it is not a bar to this hearing."

[30] On March 11, 2002, the Approval Holder also responded by letter that it concurred with the Board's initial determination that section 95(2)(a) and 95(5)(b)(i) were inapplicable in this case.[15]

[31] The letters and documentation provided by the AEUB and the submissions made by the Parties did not appear to provide any evidence before this Board to indicate that there was any public hearing or review. Nor did there appear to be any evidence to indicate that the persons filing the Notices of Appeal had an opportunity to participate in the AEUB's decision-making process. Upon review of the submissions made by the Parties, together with the evidence provided by the AEUB, the Board found that sections 95(2)(a) and 95(5)(b)(i) were inapplicable in this case.

> *them or any of them. The definition does not include coal.* [Emphasis in original.]
>
> It is submitted that if there was a public hearing pursuant to the provisions of the *Oil and Gas Conservation Act* in relation to this permit, it would have been in regards to the use of gas as fuel, not coal as fuel. Any public participation in such a process would relate to that issue solely. The Board would not have considered the environmental effects of use of coal as a fuel i.e. matters which are included in the Notices of Appeal before this Board.
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> The *Coal Conservation Act*, if applicable, has a similar Industrial Development Permit process for the use of coal as a fuel and public hearing process. If Lafarge was required to obtain an Industrial Development Permit under Part 6 of the *Coal Conservation Act* and a public hearing was held (s. 29), theoretically, the Board may have looked at the environmental effects of the use coal as a fuel as part of its public interest review. However, Section 28(1)(2) of that *Act* only requires a permit if 230,000 tonnes per year or more of coal is going to be used as fuel. In this situation, such a permit would not be required. Section 5-1 of Application states Lafarge plane to use approximately 175,000 tonnes per year of coal as fuel." [Emphasis in the original.]

15 In its response dated March 14, 2002, the Approval Holder added that:

> "It does not appear that the Appellants had an opportunity to participate in a review with respect to the use of coal as an alternative fuel source in the review process administered by the [A]EUB.
>
> However, the Appellants would have had full opportunity to raise any concerns as to the use of natural gas and the associated emission impacts of that fuel source. Although Lafarge is prepared to recognize the that the Appellants are entitled to raise their concerns to this Board for review, many of the issues they are raising are not incrementally affected by the use of coal rather than natural gas as a result of the additional abatement equipment being added to the facility."

III. DECISION

A. Status of the Appellants

[32] Section 95(5)(a) of the Act states that:

> "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) 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…"

[33] Pursuant to section 95(5)(a) of the Act and based on the joint submission of the Parties dated February 11, 2002, the Board dismissed the Notices of Appeal filed by Mr. Marlo Raynolds, Ms. Nadine Raynolds, Mr. Hal Retzer, the Bow Valley Citizens Clean Air and the Pembina Institute for Appropriate Development, Dr. Tracey Henderson, Ms. Amy Taylor, and Mr. Gary Parkstrom (E.A.B. Appeals No. 01-099, 01-100, 01-102, 01-104, 01-105, and 01-107).

[34] The Notice of Appeal of Mr. Eamon (E.A.B. Appeal No. 01-101) was filed jointly with Ms. Wilson. Pursuant to section 95(5)(a) of the Act and based on the joint submission of the Parties dated February 11, 2001, the portion of this Notice of Appeal with respect to Ms. Wilson was also dismissed, but the portion of this Notice of Appeal with respect to Mr. Eamon remained.

[35] Based on the issues as presented in the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, Mr. Jeff Eamon, and the Bow Valley Clean Air Coalition, section 3 of the Regulation, and section 95(5)(a) of Act, the Board dismissed the appeal of the Bow Valley Citizens for Clean Air and the Pembina Institute for Appropriate Development (E.A.B. Appeal No. 01-103).

B. Has this matter been dealt with by the AEUB?

[36] Based on the information provided by the AEUB and the submissions of the Parties, the Board found that sections 95(2)(a) and 95(5)(b)(i) were inapplicable in this case.

Dated on June 24, 2002, at Edmonton, Alberta.

"original signed by"

William A. Tilleman, Q.C.
Chair