ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting: March 25, 2002
Date of Decision: April 16, 2002

IN THE MATTER OF sections 91, 94 and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF Notices of Appeal filed by James Kievit, Paul Adams, and Jeff Eamon, 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: Preliminary Motions: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.*

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 ten appeals challenging this Amending Approval. Three of these appeals were accepted and the remaining seven were dismissed.

During the course of processing the remaining three appeals, the Board asked for submissions on what issues identified in the Notices of Appeal should be included in the hearing of the appeals. After reviewing these submissions, the Board decided to hold a preliminary meeting to decide what issues would be addressed at the hearing.

The Board decided that the following issues would be included in the hearing of these appeals:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28;
5. human health impact assessment/vegetation assessment study – Approval Clauses 4.1.30 and 4.1.37;
6. any potential antagonistic environmental effects of burning tires and coal;
7. the environmental effects of burning coal on the viewscape (limited to noise, visible pollutants, blue haze, and odour); and
8. the environmental effects of burning coal on the natural surroundings.

The Board notes that greenhouse gases are not an appropriate issue for the hearing of these appeals.

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

APPEARANCES:

Appellants:	Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon, represented by Ms. Jennifer Klimek.
Director:	Ms. May Mah-Paulson, Director, Approvals, Southern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Charlene Graham, Alberta Justice.
Approval Holder:	Lafarge Canada Ltd. Inc., represented by Mr. Ronald Kruhlak and Mr. Corbin Devlin, McLennan Ross.
Other Parties:	Stoney Tribal Council (Stoney Nakoda First Nation), represented by Mr. Tibor Osvath, Rae and Company.

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I. BACKGROUND

[1] The purpose of this decision is to decide which issues included in the Notices of Appeal properly before the Board will be considered at the hearing of these appeals. The Board will also consider the intervenor requests and the timing of the submissions in preparation for the hearing.

[2] This decision deals with Amending Approval No. 1702-01-02 (the "Approval") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA")[1] issued by the Director, Approvals, Southern Region, Regional Services, Alberta Environment (the "Director") on October 22, 2001, to Lafarge Canada Inc. (the "Approval Holder" or "Lafarge") with respect to its cement manufacturing plant at Exshaw, Alberta (the "Plant") near the entrance to Banff National Park.

[3] The Plant was originally constructed 96 years ago, in 1906. In May 1997, the Plant was granted an approval (the "Original Approval")[2] under EPEA. The plant is currently fueled by natural gas. In the last few years the price of natural gas has been unstable. This has resulted in economic difficulties at the Plant such that during one period in the last few years, two-thirds of the Plant had to be shut down and cement had to be imported from outside the province.[3] 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 what is referred to as the "Fuel Flexibility Project". The Fuel Flexibility Project allows the Approval Holder to make modifications to permit the burning of coal as a fuel source in part of the Plant.

A. Procedural History

[4] On November 21 and 22, 2001, the Environmental Appeal Board (the "Board") received ten Notices of Appeal expressing concerns with the Fuel Flexibility Project.[4] The

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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.

2 The Amending Approval amends the Original Approval (Approval No.1702-01-00). The Board notes that it did not receive any appeals in relation to the Original Approval.

3 Oral Submission of the Approval Holder, dated March 25, 2002.

4 The Notices of Appeal were received 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 Citizens for Clean Air and Pembina Institute for Appropriate Development, Dr. Tracey Henderson, Ms. Amy Taylor, and Mr. Gary Parkstrom.

Board acknowledged these appeals on November 21 and 23, 2001, and requested a copy of the records (the "Record") from the Director. The Board also asked if there were any other persons who may have an interest in these appeals.

[5] The Board subsequently determined, based on an agreement reached by the Parties to this appeal, that it would accept the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon (collectively the "Appellants").[5]

[6] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board ("AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The Natural Resources Conservation Board responded in the negative. The AEUB advised that it had issued an Industrial Development Permit to the Approval Holder.[6]

[7] On December 10, 2001, the Board received a copy of the Record, which was distributed to those involved in the appeals on December 11, 2001.

[8] On December 21, 2001, the Director notified the Board that the Municipal District of Bighorn and the Stoney Nakoda First Nation[7] 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.

[9] On January 3, 2002, the Board was advised that the Parties were close to an agreement with respect to a number of preliminary matters, including the issues to be considered in these appeals.[8] The Board subsequently requested a written status report respecting this agreement by January 31, 2002. On January 31, 2002, the Board received a letter from the Appellants advising that they were close to an agreement with the Director and Approval Holder on the preliminary matters.

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5 The Board's decision to accept the Notices of Appeals of Mr. Kievit, Dr. Adams, and Mr. Eamon is the subject of a separate decision.

6 The Board will consider the effect of the AEUB's Industrial Development Permit on these appeals in a separate decision.

7 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.

8 See: Letter from the Approval Holder dated January 3, 2002.

[10] On February 11, 2002, the Board received a letter from the Approval Holder stating that the Parties had reached an agreement with respect to a number of preliminary matters, including which Notices of Appeal should be accepted by the Board. However, this agreement did not appear to include the issues that should be considered by the Board at the hearing of these appeals.

[11] On February 15, 2002, the Board wrote the Parties and asked them to provide a letter outlining their agreement. On February 20, 2002, the Appellants wrote to the Board stating that the Bow Valley Citizens for Clean Air's "... Notice of Appeal succinctly summarizes the issues in this appeal and should be the reference point for this appeal. If that is not acceptable, I would appreciate an opportunity to address the above issue." It was not clear to the Board whether the Parties had reached an agreement in this regard.

[12] On March 4, 2002, the Board advised the Parties that the hearing was scheduled for April 24 and 25, 2002, and provided a copy of the Board's Notice of Public Hearing.[9] The Notice of Public Hearing advised that if any person wished to make representations before the Board, they should submit a request in writing by March 20, 2002. On March 4, 2002, the Board provided a copy of the Board's Notice of Public Hearing to the Municipal District of Bighorn and the Stoney Nakoda First Nation.

[13] On March 5, 2002, the Board wrote to the Parties on several outstanding issues.[10]

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[9] The Board's Notice of Public Hearing was published in the *Okotoks Western Wheel* and the *Canmore Leader*.

[10] The Board stated:

"Section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 provides:

'(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:

(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;

(b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);

(c) whether the Director has complied with section 68(4)(a);

[14] The Parties subsequently provided the submissions requested by the Board. A key matter addressed by the Parties was the fact that the Approval before the Board was in fact an amendment of the Original Approval issued in May 1997. The Appellants' response submission, dated March 13, 2002, stated that "...there appears to be a disagreement on the Director's jurisdiction, it is an issue before the Board and full argument should be heard on it."[11] On March 18, 2002, the Board received a further response from the Appellants.[12] The Board reviewed the written submissions respecting the issues and, in a letter dated March 18, 2002, noted that the Appellants presented "...the view that an appeal of an amendment to an approval can include a review of the '...entire scope of the approved operation....'" The Board went on to note that the opposing Parties argued that there is no "...jurisdiction to 'open up' the entire approval." As a result, the Board requested comments from the Parties on the Appellants' request to have full arguments heard on the degree to which the Original Approval can be considered.

B. Interventions

[15] On March 19, 2002, the Board received an intervenor request from the Municipal District of Bighorn. The Municipal District indicated that the Plant is located in the municipality and that its residents are affected by the Approval. The Municipal District identified the "...efforts and process implemented by the Exshaw Community Environment Committee ... in

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> (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
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> (e) any other criteria specified in the regulations.
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> (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
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> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.'
>
> Therefore, in order to ensure that we are able to proceed to a hearing as planned for April 24 and 25, 2002 the Board is requesting submissions from the parties with respect to which matters included in notices of appeal properly before it (Adams, Eamon, and Kievit) will be included in the hearing of the appeals. The Board would like to receive submissions on this question...." (Emphasis removed.)

[11] This disagreement related to the degree to which an appeal of an amending approval (the Approval) could consider the Original Approval.

[12] The Board now understands that this response was provided as a result of a typographical error in the Board letter of March 14, 2002. Please see the Board's letter of March 22, 2002, for an explanation of this matter.

monitoring of air quality and other related environmental issues...." The Municipal District indicated that they wished to present evidence regarding the Exshaw Community Environmental Committee.

[16] On March 19, 2002, the Board also received an intervenor request from the Stoney Nakoda First Nation. The Stoney Nakoda First Nation indicated that in their view "...neither Alberta Environment nor the Alberta Environmental Appeal Board (the 'Board') had or have the jurisdiction to issue, amend or approve ... [the Approval] in so far as the ... Approval may impact upon the Stoney Nakoda [First] Nation, without, at a minimum, the approval of the Stoney Nakoda [First] Nation." However, the Stoney Nakoda First Nation went on to say that since "... their interests are directly affected and impacted by the ... Approval and the appeal of the said ... Approval that is before the Board, please be advised that ... [they wish] to intervene and present both written and oral submissions, as well as reserving the right to cross-examine any witnesses...."[13]

[17] On March 20, 2002, the Board wrote to the Parties and requested comments on the participation of the Stoney Nakoda First Nation and the Municipal District of Bighorn prior to the Board making a decision regarding their interventions. (These comments were subsequently received on March 26, 2002.)

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[13] The Stoney Nakoda First Nation stated that they wished to address the following issues:

"1. Failure of the Approval Holder, Lafarge Canada Inc., to consult, or adequately consult with the Stoney Nakoda [First] Nation and ... [the Federal Crown in regard to the Approval].

2. Failure of the Approval Holder and Environment Alberta to obtain the consent and approval for the ... Approval from the Stoney Nakoda [First] Nation and ... [the Federal Crown].

3. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess health and environmental impacts of the ... Approval on the members of the Stoney Nakoda [First] Nation.

4. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess the impact of the Amending Approval on vegetation and wildlife located on both Reserve Lands and Traditional Lands, including Stoney Nakoda [First] Nation's agriculture and livestock.

5. Failure of the Approval Holder and Environment Alberta to properly consider, study and assess the impact of the ... Approval on Stoney Nakoda [First] Nation's traditional land use on both Reserve Lands and Traditional Lands.

6. Failure of Environment Alberta to ensure that a copy of the Approval Holder's annual summary and report be provided to Stoney Nakoda [First] Nation ... [and the Federal Crown.]"

[18] On March 20, 2002, the Board received submissions from the Parties in response to the concern that "...full arguments should be heard ..." on the question of the extent to which the Original Approval can be opened up. In her submission, the Director expressed concern that unless "...the Board process achieves finality, responses and counter-responses can continue to be received."

C. Preliminary Meeting

[19] In response to this concern and cross-submissions of the Parties, the Board decided to call a Preliminary Meeting "...to hear submissions on the issues to be dealt with at the hearing, the timing of the Affidavits and written submissions, and any other preliminary matters." The Board went on to say that it "...would principally like to hear arguments from the parties with respect to the inclusion of greenhouse gases as an issue and to what extent the original approval can be considered at the hearing of these appeals."[14] Following consultation with the Parties, in the Board's letter of March 22, 2002, the Board scheduled the Preliminary Meeting for March 25, 2002, in the Board's offices in Edmonton. The letter detailed the procedure for the Preliminary Meeting and indicated that the Municipal District of Bighorn and the Stoney Nakoda First Nation were invited to attend if they chose. On March 22, 2002, the Board received a letter from the Stoney Nakoda First Nation advising that they would attend the Preliminary Meeting.[15]

II. SUBMISSION OF THE PARTIES

[20] Based on the Preliminary Meeting submissions, it is clear that the Parties are not far apart on what issues should be considered at the hearing. To illustrate, the Parties are in agreement[16] that the following issues should be included in the hearing of these appeals:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28; and

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[14] See the Board's letter of March 22, 2002.

[15] On March 25, 2002, the Board convened the Preliminary Meeting. In attendance were the Appellants, the Approval Holder, the Director, and the Stoney Nakoda First Nation.

[16] See Appendix 1. (Comparison of Issues on which the Parties Agree.)

5. human health impact assessment/vegetation assessment study – Approval Clause 4.1.30 and 4.1.37.

The Board notes that the Appellants have not advanced the issue regarding the ESP Performance Enhancement Action Plan (Approval Clause 4.1.33) that was identified by the Director and the Approval Holder.

[21] Beyond these five issues, the Parties' positions and their views of the basic principles to be applied are similar with respect to the outstanding issues. These issues[17] are:

1. burning of tires (Approval Clause 4.1.16);
2. viewscape and natural surroundings; and
3. greenhouse gases.

III. BOARD'S ANALYSIS

[22] This decision answers four matters: (1) the issues to be addressed at the hearing; (2) the intervenor requests; (3) the scheduling for filing submissions; and (4) miscellaneous matters.

A. Issues

[23] Section 95 of EPEA permits the Board to determine the issues to be addressed at the hearing. Section 95 provides:

> "(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:
>
> (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;
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> (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);

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17 See Appendix 2. (Comparison of Issues on which the Parties Do Not Agee.)

(c) whether the Director has complied with section 68(4)(a);

(d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;

(e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

[24] There are three issues on which the Parties are unable to agree: (1) burning tires; (2) viewscape and natural surroundings; and (3) greenhouse gases. The dispute between the Parties in relation to the burning of tires and the viewscape and natural surroundings relates to the scope of the review.

1. Scope of Review

[25] As stated above, when the Board reviewed the written submissions of the Parties with respect to the issues, the Board noted, in a letter dated March 18, 2002, that the Appellants presented "...the view that an appeal of an amendment to an approval can include a review of the '...entire scope of the approved operation....'" The Board notes that the other Parties argued that the appeal of an amendment to an approval does not give the Director "...jurisdiction to 'open up' the entire approval."

[26] But, by the Preliminary Hearing, the Parties had refined their views and were in substantial agreement as to the jurisdiction of the Director and the Board to review an amendment to Lafarge's approval (the Approval).

Section 2(b)

[27] The Appellants, the Director, and the Approval Holder all began their analysis with section 2(b) of EPEA. This provision of EPEA provides that:

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

[28] In interpreting section 2(b), the Appellants argued that "...the integration of environmental protection and economic decisions in the earliest stages of planning..." supports the view that the scope of review should be very broad, and that the Director should use an amendment to an approval as an opportunity to make early planning decisions. The Director and the Approval Holder, on the other hand, argued that "...the integration of environmental protection and economic decisions in the earliest stages of planning..." supports the view that the scope of review should be narrow, and that in order to support environmental and economic certainty, planning should be focused on the development of the Original Approval.

The Walker Case

[29] The next step of all the Parties was an analysis of the previous decision of the Board in *Walker*.[18] *Walker* involved a number of appeals regarding a canola oil refinery near Lloydminster, Alberta by United Oil Seed Products ("UOP"). UOP operated an existing canola crushing plant on the site, and the canola crushing plant's original approval (issued under the predecessor legislation to EPEA) was amended (by way of an amending approval issued under EPEA) to permit the construction and operation of the canola oil refinery adjacent to the crushing plant. The appellants in this case argued that the canola crushing plant (authorized under the original approval) and the canola oil refinery (authorized under the amending approval) "...should be treated as one operating unit and the subject matter of this appeal."[19] The appellants argued "...that the existing plant site for both the crushing plant and the new refinery was not appropriate."[20]

[30] In *Walker,* the Board considered at some length the fact that the original approval for the canola crushing plant was issued under the predecessor legislation to EPEA and how this interacted with the amending approval for the canola oil refinery. The discussion regarding the predecessor legislation is not relevant with respect to the matter currently before the Board, but

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[18] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

[19] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 2.

[20] *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 2.

what is relevant is the finding by the Board regarding the interaction between an original approval and an amending approval:

> "Where ongoing facilities seek additions or changes to operations and do so through amendments to old licences, the test is not to rule out the environmental effects of all pre-Act facilities, as a matter of law, simply because there is a pre-Act facility involved. This is potentially unfair because there *may* be a link between the existing facility and the new facility sought by the amendment. In other words, the existing facility may indeed have environmental effects that are tied synergistically or antagonistically to the new facility. Depending on which side of the appeal a party finds itself, it will want to argue this synergism or antagonism of environmental effects.
>
> Where transitional matters arise between old and new facilities, the resolution must come by way of a factual determination of *how* the existing plant's activities are directly linked to the new approval -- from an environmental effects perspective."[21] (Emphasis in the original.)

The Board then went on to say:

> "That said, the Board wishes to be clear that unless the legislation specifically requires it (and the Act does not), the Board will not make a decision that unfairly affects the existing status or accrued rights of persons who hold pre-Act licences."[22]

The Board also stated that:

> "If, for example, the appellants raise a *prima facie* case that pre-existing emissions from ongoing activities compound the emissions given by a new approval, the Board would hear all of the evidence because it is relevant to the environmental acceptability of the *new* approval."[23]

[31] The Board ultimately dismissed the appeals in *Walker* on the basis that the appellants were concerned with the existing canola crushing plant not the new canola oil refinery. The Board stated "...the Board's proper approach is to focus on the existing crushing plant only to the extent that it helps determine the environmental acceptability of the new refinery."[24]

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21 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

22 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 8

23 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

24 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 8.

Position of the Appellants

[32] In the Appellants' oral submissions, they reviewed several of the points made in *Walker* and tried to argue that they fell within the test outlined in *Walker* to allow a broader reading to their Notices of Appeal.

[33] *Walker* decided that you should not rule out the effects of the existing facility "...because there *may* be a link between the existing facility and the new facility...."[25] The Appellants responded that: "In this case there is clearly a link between the existing facility and the amended one. It is the same facility. It is going to be emitting substances."[26] The Appellants went on to say that in *Walker,* the plants in question were two separate entities that were not connected physically. They argue that in this case, however, the amendment is being imposed on an old plant and it will effectively become a new physical thing because of the amendment.[27]

[34] In *Walker* the Board also decided that the extent that the existing approval can be considered must be made on the link between the existing approval and the amending approval. The Board said and we confirm that if "...the appellants raise a *prima facie* case that pre-existing emissions from ongoing activities compound the emissions given by a new approval, the Board would hear all of the evidence because it is relevant to the environmental acceptability of the *new* approval."[28] Based on this, the Appellants in this appeal argued: "And that's what we're looking at here is the emissions given by the amendment. That is the complaint the Appellants have. What will this amended facility emit? What are the impacts of those emissions on the environment?"[29]

[35] With respect to the statement in *Walker* that "...the Board will not make a decision that unfairly affects the existing status or accrued rights of persons who hold pre-Act licences...",[30] the Appellants argue that: "What we are asking the Board is not to go back and

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25 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

26 Appellants' Oral Submission, dated March 25, 2002.

27 Appellants' Oral Submission, dated March 25, 2002.

28 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005 at page 7.

29 Appellants' Oral Submission, dated March 25, 2002.

30 *Walker and Haugen et al.* v. *Director of Standards and Approvals* (May 17, 1994), E.A.B. Appeal No. 93-005.

check or determine pre-Act rights unless those rights are affected by the amendment. You cannot go back and change the approval without the amendment before you, but our submission is that once they bring in an amendment, they do open up that approval and there may be more stringent requirements on them because of the amendment."[31]

Position of the Approval Holder

[36] In response to Appellant's arguments, the Approval Holder stated:

> "I could adopt Ms. Klimek's [(counsel for the Appellants)] framework because I think that makes sense. And as I understood from what she described, she described a framework, well first you have to look at coal and if there is an environmental effect, then that entitles them to address the environmental effect on that issue and consider how the Director addressed it. If they have reasons to suggest that it was addressed incorrectly, those are reasonable issues to take before the Board. But the threshold in embarking on this is looking at coal and if there is an environmental effect related to using coal as that fuel source. I see that as sort of our answer....
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> If it is coal-identified impact, yes, and the Director didn't consider it, and they can, I guess, raise evidence to suggest that that may have been incorrect, if they are able to persuade the parties.
>
> But that doesn't leave it wide open that anything that may have an environmental effect is necessarily open to review, which perhaps gets us into other areas...."

In essence, what the Approval Holder said was that the environmental effects caused by the burning of coal are proper issues that can be appealed, whereas environmental effects that are not caused by coal are not proper issues that can be appealed. This is a sound legal argument.

Position of the Director

[37] The Director concurred with the basic framework established by the Appellants stating:

> "In that case [*Walker*], it was an application for a new plant on the site, a refinery. The appellants in that case were complaining about the odours that originated from the existing oilseed crushing operation. They tried to utilize the fact that a new process was going to be placed on that site, it was going to be covered by the same approval, as an opportunity to review the operation of the existing facility. The Board stated that to the extent that there could be a correlation between the new process, the new activities, and those that the appellants were complaining of, the Board had the jurisdiction to look at it. But it was not an opportunity to review that that was the circumstances at the time that the approval, that the

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31 Appellants' Oral Submission, dated March 25, 2002.

amendment, was issued."

[38] The Board agrees. The Board does not intend to go back and change a prior approval that was subject to its own Statement of Concern, Notice of Appeal, and Judicial Review process. In the Board's view, such an approach would not be in keeping with the need for administrative certainty and fairness in licencing in accordance with section 2 of EPEA. Further, in the Board's view, approval holders should be encouraged to bring forth improvements and upgrades to their facilities without having to wait for a ten-year approval to expire. If the Board were to give an interpretation to the appeal provision that resulted in the *entire* approval being opened up and changed every time there was an *amendment* to the approval, this would act as a significant disincentive to such necessary improvements and upgrades. In the Board's view, when an approval is amended, the issues that are appropriately included in an appeal of the amending approval are those environmental effects that directly or indirectly result from the amendment. And these issues would go to the *amendment* being confirmed, reversed, or varied.

2. Tires

[39] Applying this test to the question of burning tires, the Board is of the view that any potential antagonistic environmental effects of burning tires and coal is an appropriate issue to be included in the hearing of the appeals. We say this because coal is an issue that was not contemplated in the Original Approval. If fact, the Board notes that in applications before the AEUB, the Approval Holder said:

> "Lafarge has worked very hard to make sure our operations are in accordance with all environmental legislation and further, acceptance by our neighbors in the Bow Valley. Using an alternative fuel to gas, such as coal, would dramatically affect our ability to do this. ...
>
> Solid fuel would have to be stored on site, as opposed to natural gas which is 'just in time'. Coal storage on site would create environmental issues with regards to the black dust created, and run-off from the coal pile. The visual impact of a large coal pile would also be considered negative from an environmental point of view. The plant is located immediately adjacent to the town of Exshaw, and the coal pile would likely be located within approximately 50M from the Exshaw School and Church.

> Obviously, any decision to move to an alternate fuel would require an extensive consultation process with the stakeholders in the Bow Valley."[32]

3. Viewscape and Natural Surroundings

[40] Applying the same test, the Board is of the view that the environmental effects from burning *coal* on the viewscape and the environmental effects of burning coal on the natural surrounding are appropriate issues to be included in the hearing of these appeals.

[41] With respect to this issue, the Board would like to provide some direction on "viewscape." We are concerned that the word "viewscape" as used by the Parties has uncertain boundaries. It is the Board's decision that for these appeals, viewscape is intended to mean "noise, visible pollutants, blue haze and odour" as described in the Notices of Appeal. As a result, the issue of viewscape is to be limited to noise, visible pollutants, blue haze, and odour directly impacted by the plant.

4. Greenhouse Gases

[42] The dispute between the Parties with respect to including greenhouse gases as an issue centers on the fact that greenhouse gases are not expressly raised in the three Notices of Appeal accepted by the Board. The Appellants argued that greenhouse gases should be included as an issue because the Notices of Appeal clearly deal with air quality, and greenhouse gases are an air quality impact that will result from the burning of coal. The Appellants noted also that greenhouse gases were identified in many of the Statements of Concern as an issue and thus, it should come as no surprise to the Director and the Approval Holder if it is an issue included in the hearing of these appeals.

[43] An opposing view was presented by the Approval Holder and the Director, who argued that there is a need for administrative finality and that it would be unfair and prejudicial to include greenhouse gases at *this* point in time. In support of their position, the Approval Holder pointed to our previous decision in *Bailey*:[33]

> "In the Board's view, the purpose of a Notice of Appeal is to identify to the Board, and to the other parties, the issues or concerns that the Appellant has with

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32 Letter from the Approval Holder to the AEUB, dated May 8, 1998.

33 Re: *TransAlta Utilities Corp.* (2002), 41 C.E.L.R. (N.S.) 102 (A.E.A.B.), (*sub nom. Bailey et al. #2* v. *Director, Northern East Slopes Region, Environmental Services, Alberta Environment*, re: *TransAlta Utilities Corporation*), E.A.B. Appeal No. 00-074, 077, 078, and 01-001-005-R, paragraph 44.

> the decision under appeal. It is clear from section 87(2) [(now section 95(2))] of the Act [(EPEA)] that the Notice of Appeal scopes the issues that can be included in the hearing of the appeal. This section of the Act provides that the Board may '...determine which matters included in the notice of appeal properly before it will be included in the hearing of the appeal....' It is the Board's view that if a party wishes to advance a concern or issue in the hearing of an appeal, that concern or issue must be raised in the Notice of Appeal in at least very broad terms."

[44] Applying *Bailey,* we decide that and the inclusion of greenhouse gases in these appeals would be inappropriate and unfair because it was not included and argued in the Notices of Appeal. The Board confirms the principle of the need for administrative finality. In support of our decision, the Board notes that the Notices of Appeal that were filed were very detailed, well written, and technically sophisticated, and all the Parties are represented by competent and experienced counsel. As noted by the Appellants, the issue of greenhouse gases was included in many of the Statements of Concern. As a result, the inclusion of the issue of greenhouse gases was reasonably ascertainable on the part of the Appellants. Finally and significantly, the Board notes that the Parties reached an agreement as to *which* Notices of Appeal would be prosecuted and those matters will essentially be heard. As a result, greenhouse gases will not be included as an issue.

B. Intervenor Requests

[45] As stated, the Board has received two intervenor requests. The first is from the Municipal District of Bighorn and the second is from the Stoney Nakoda First Nation.

[46] Rule 14 of the Board's Rules of Practice provides that:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
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> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering arguments or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervenor 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 intervenor will not repeat or duplicate the evidence presented by other parties."

1. Municipal District of Bighorn

[47] On March 19, 2002, in response to the Board's Notice of Public Hearing, the Board received an intervenor request from the Municipal District of Bighorn.[34] As stated, the Plant is located within the Municipal District boundary and the Municipal District wishes to present evidence regarding the Exshaw Community Environmental Committee. So it should.

[48] Taking these comments into account, vis á vis the Municipal District, the Board concludes from what we know and in accordance with Rule 14, that the Municipal District: (1) will be presenting evidence that is directly relevant to the matters included within the appeals before the Board; (2) being a local government, has by definition, a tangible interest in the subject matter of these appeals; (3) will not unnecessarily delay the appeal; and (4) will not repeat or duplicate the evidence to be presented. Therefore, we grant the Municipal District full standing as an intervenor to address the issues identified by the Board as being included in the hearing of these appeals. In granting the Municipal District full standing, the Board confirms that it would like to hear specific evidence from the Exshaw Community Environmental Committee, which is chaired by the Municipal District, as it relates to the issues to be heard in these appeals.[35]

2. Stoney Nakoda First Nation

[49] On March 19, 2002, the Board received an intervenor request from the Stoney Nakoda First Nation. The Stoney Nakoda First Nation expressed the view that neither the Director nor the Board have jurisdiction in this matter as it affects the interests of the Stoney Nakoda First Nation. The Stoney Nakoda First Nation indicated that it is Her Majesty the Queen in Right of Canada that has jurisdiction. Notwithstanding, the Stoney Nakoda First Nation requested to intervene in these appeals to protect their interests, and they identified their right to use, occupy and control "Reserve Lands" and their rights to "Traditional Lands", both of which

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[34] In response to the application by the Municipal District to intervene, both the Director and the Approval Holder advise that they have no objections.

[35] The one issue that does concern the Board is that the Municipal District has not taken a position with respect to these appeals. As Rule 14 indicates, the Board normally expects a party to clearly identify whether they support or oppose the project. Therefore, during the Municipal District's presentation, the Board will expect them to indicate whether they support or oppose the Approval before the Board, indicate which portions of the Approval they support and which portions of the Approval the oppose, or provide a satisfactory explanation as to why the are not prepared to take a position. Until it is advised otherwise, for the purpose of establishing the procedure for the hearing, the Board will infer that the Municipal District supports the Approval.

are near the Plant. Their intervention request went on to identify six "issues" that they wished to address in their submissions.[36] The latter four issues are environmental issues that are included within the issues to be considered at the hearing of these appeals.

[50] The first two issues – the duty to consult and the requirement to obtain consent – are not strictly environmental issues, at least not included within the issues to be considered at the hearing of these appeals. Therefore, with respect to these two issues, shortly before the hearing, the Board provided copies of our decision in *Chipewyan Prairie First Nation*,[37] a copy of which is attached as Appendix 3 to this decision. In *Chipewyan Prairie First Nation,* the Board considered its jurisdiction to consider the duty to consult in some detail. The Board concluded in that case that the Court may be the more appropriate forum to address these types of issues and the Board adjourned the *Chipewyan Prairie First Nation* case for a 30-day period to permit the Chipewyan Prairie First Nation to take the matter to Court. During the course of this Preliminary Meeting, the Chairman offered the Stoney Nakoda First Nation the same opportunity to adjourn this matter and take the duty to consult and other federal jurisdictional arguments the Court. However, the Stoney Nakoda First Nation declined and indicated that they wished to proceed with this matter. To be sure, Stoney Nakoda First Nation intervened to protect their interests. Counsel for the Stoney Nakoda First Nation stated:

> "Well, I know that the Stoney Nakoda Nation is aware that this Board will do everything that it can and I feel that that is primarily the main reason why the Stoney Nakoda Nation is, or has authorized me to appear here, is that they are aware that this Board will try to do the best that it possibly can. If the Stoney Nakoda First Nation feel that that wasn't the case, then we may very well be in front of the courts already dealing with this issue."

[51] In response to the Stoney Nakoda First Nation's application to intervene, the Director advised the Board that while she had no concerns with their intervention, she was concerned with the first two issues identified in their application. In the Director's view, Alberta Environment engaged in extensive consultation with the Stoney Nakoda First Nation. The

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36 See: Footnote 13.

37 Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc.* (March 22, 2002), E.A.B. Appeal No. 01-110-ID.

Approval Holder also advised of extensive consultation efforts with the Stoney Nakoda First Nation.[38]

[52] Taking these comments into account, the Board concludes, in accordance with Rule 14, that the Stoney Nakoda First Nation: (1) will be presenting evidence that is directly relevant to the matters included within the appeals before the Board; (2) has or may have a tangible interest in the subject matter of this appeal; (3) will not unnecessarily delay the appeal because they only focus on the issue to be addressed; and (4) will not repeat or duplicate the evidence to be presented. Therefore, it is appropriate to grant the Stoney Nakoda First Nation full standing as an intervenor to address the issues identified by the Board as being included in the hearing of these appeals.

C. Scheduling

[53] At the request of the Board, the Parties discussed the matter of the schedule for providing affidavits and submissions in preparation of the hearing. The Parties reached an agreement in this regard, which the Board affirms:

1. the Appellants shall file their affidavits and submission by 4:30 pm on April 5, 2002;
2. the Intervenors (the Municipal District of Bighorn and the Stoney Nakoda First Nation) shall file their affidavits and submissions by 4:30 pm on April 8, 2002;
3. the Approval Holder shall file its affidavits and submission by 4:30 pm on April 12, 2002;
4. the Director shall file her affidavits and submission by 4:30 pm on April 15, 2002; and
5. the Appellants shall file their rebuttal affidavits and submission by 4:30 pm on April 19, 2002.

D. Miscellaneous Matters

[54] During the course of the Preliminary Meeting, the Stoney Nakoda First Nation advised the Board that, in support of their contention that it is the federal crown that has

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[38] The Approval Holder also noted that had they chosen to, the Stoney Nakoda First Nation could likely have filed an appeal and that their failure to do so should militate against allowing them to intervene. Further, the Approval Holder suggested that if the Stoney Nakoda First Nation is permitted to intervene, then their participation should be limited to presenting evidence and making submissions.

jurisdiction in this matter, they had filed a petition in June 2001 with the Federal Minister of Environment pursuant to section 48 of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA").[39] Section 48 of CEAA permits the Minister undertake an environmental

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[39] Section 48 of CEAA provides:

"(1) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of Parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out in Canada and the Minister is of the opinion that the project may cause significant adverse environmental effects on

(a) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the Indian Act,

(b) federal lands other than those mentioned in paragraph (a),

(c) lands that are described in a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that are prescribed,

(d) lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed, or

(e) lands in respect of which Indians have interests,

the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project on those lands.

(2) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of Parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out on

(a) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the Indian Act,

(b) lands that are described in a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that are prescribed, or

(c) lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed,

and the Minister is of the opinion that the project may cause significant adverse environmental effects outside those lands, the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project outside those lands.

(3) The Minister shall not refer a project to a mediator or a review panel pursuant to subsection (1) or (2) where the Minister and the governments of all interested provinces, and

(a) in respect of federal lands referred to in paragraph (1)(b), the federal authority having the administration of those lands,

(b) in respect of lands referred to in paragraph (1)(a) or (2)(a), the council of the band for whose use and benefit the reserve has been set apart,

(c) in respect of lands referred to in paragraph (1)(c) or (e) or (2)(b), the party to the agreement or claim representing the aboriginal people or that party's successor, or

(d) in respect of lands that have been set aside for the use and benefit of Indians pursuant to legislation referred to in paragraph (1)(d) or (2)(c), the governing body established by that legislation,

have agreed on another manner of conducting an assessment of the environmental effects of the project on or outside those lands, as the case may be.

(4) The Minister shall consider whether to make a reference pursuant to subsection (1) or (2)

(a) on the request of the government of any interested province or the federal authority

assessment notwithstanding that there are no formal triggers under CEAA. (Both the Director and Lafarge advised that there are no section 5 triggers under CEAA.)[40] The Stoney Nakoda

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having the administration of federal lands referred to in paragraph (1)(b); or

(b) on receipt of a petition that is

(i) signed by one or more persons each of whom has an interest in lands on which the project may cause significant adverse environmental effects, and

(ii) accompanied by a concise statement of the evidence supporting the contention of the petitioner that the project may cause significant adverse environmental effects in respect of which a reference may be made pursuant to subsection (1) or (2).

(5) At least ten days before a reference is made pursuant to subsection (1) or (2), the Minister shall give notice of the intention to do so to

(a) the proponent of the project;

(b) the governments of all interested provinces;

(c) any person who signed a petition considered by the Minister pursuant to subsection (4); and

(d) the federal authority, in the case of a reference to be made pursuant to paragraph (1)(b).

(6) For the purposes of this section, 'lands in respect of which Indians have interests' means

(a) land areas that are subject to a land claim accepted by the Government of Canada for negotiation under its comprehensive land claims policy and that

(i) in the case of land areas situated in the Yukon Territory, the Northwest Territories or Nunavut, have been withdrawn from disposal under the Territorial Lands Act for the purposes of land claim settlement, or

(ii) in the case of land areas situated in a province, have been agreed on for selection by the Government of Canada and the government of the province; and

(b) land areas that belong to Her Majesty or in respect of which Her Majesty has the right to dispose and that have been identified and agreed on by Her Majesty and an Indian band for transfer to settle claims based on

(i) an outstanding lawful obligation of Her Majesty towards an Indian band pursuant to the specific claims policy of the Government of Canada, or

(ii) treaty land entitlement.

(7) For the purposes of this section, a reference to any lands, land areas or reserves includes a reference to all waters on and air above those lands, areas or reserves."

[40] Section 5 of CEAA provides:

"(1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried

First Nation advised that although nine months have passed, they have yet to receive a response from the Federal Environment Minister.

[55] Of course, the CEAA issue is potentially relevant to the Board because sections 95(2)(b) and 95(5)(b)(ii) of EPEA provide:

> "(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 ...
>
> (b) whether the Government has participated in a public review in respect of the matter under the Canadian Environmental Assessment Act (Canada) ....
>
> (5) The Board
>
> (b) shall dismiss a notice of appeal if in the Board's opinion ....
>
> (ii) the Government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal."

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out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

(2) Notwithstanding any other provision of this Act,

(a) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and

(b) the federal authority that, directly or through a Minister of the Crown in right of Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project

(i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,

(ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project,

(iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and

(iv) where applicable, shall perform the duties of the responsible authority in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(a) and 37(1)(a)."

This is potentially a jurisdictional question. The general intent of these sections of EPEA is to permit only one public hearing with respect to a project.

[56] However, based on the information provided by the Parties, we conclude that no CEAA review has been undertaken, and as a result, there is no jurisdictional impediment to the Board to hear these appeals. In other words, the Board will not delay its proceeding to await a decision by the Federal Government that may never come. However, the Board requests that if any of the Parties become aware of any steps being taken under CEAA to undertake a review, they are to advise the Board immediately.[41]

IV. DECISION

A. Issues to be Addressed at the Hearing

[57] For the reasons stated above, pursuant to section 95(2), the Board will hear the following issues as they relate to the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon:

1. SO_2 emissions – Approval Clauses 4.1.13 and 4.1.35;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28;
5. human health impact assessment/vegetation assessment study – Approval Clause 4.1.30 and 4.1.37;
6. any potential antagonistic environmental effects of burning tires and coal;
7. the environmental effects of burning coal on the viewscape (limited to noise, visible pollutants, blue haze, and odour); and
8. the environmental effects of burning coal on the natural surroundings.

[58] Greenhouse gases are *not* an appropriate issue for the hearing of these appeals.

[59] Pursuant to section 95(4), representations on other matters will not be permitted.

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[41] The Board notes that this is the same request that it made of the Parties in its letter of February 15, 2002, in response to the Stoney Nakoda First Nation's first contact with the Board requesting information.

B. Intervenor Status

[60] The Municipal District of Bighorn and the Stoney Nakoda First Nation are granted full intervenor status to address the issues identified by the Board.

C. Scheduling

[61] The Parties shall submit their affidavits and submissions in accordance with the agreement reached by the Parties at the Preliminary Meeting.

D. Miscellaneous

[62] The Board requests that if any of the Parties become aware of any steps being taken under CEAA to undertake a review, they are to advise the Board immediately.

Dated on April 16, 2002, at Edmonton, Alberta.

William A. Tilleman, Q.C.
Chair

APPENDIX 1 - Comparison of Issues on which the Parties Agree		
APPELLANTS	**DIRECTOR**	**APPROVAL HOLDER**
SO2 Emissions Did the Director err in the conditions imposed on the proponent with respect to SO2 emissions? Did the Director err in not imposing conditions on Lafarge to use the best available demonstrated technology in the conversion? The Appellants argue that there is an issue regarding the implementation requirements.	**Stack Emission Limits (Approval Clause 4.1.13)** The Appellants are concerned that: (1) the modeling predicted exceedances of SO2, (2) there are different sulphur recovery from the oil and gas industry, (3) there are different limits for Kiln 4 and 5, (4) that the effective date for reduced opacity and particulate matter are unacceptable, and (5) that the approval should require technology so that there are no predicted exceedances of Alberta Ambient Guidelines. The Director does not appear to object the inclusion of these issues. **SO2 Reduction Plan (Approval Clause 4.1.35)** The Appellants have concerns with: (1) the timing of the SO2 reduction plan, (2) the application of best available demonstrated technology, (3) the 25% reduction figure, (4) the requirement to implement the plan, and (5) the goal, which should be no exceedances prior to conversion to coal. The Director objects to the inclusion of the concern regarding the implementation of the reduction plan. The Director argues that 4.1.36 requires the implementation of the reduction plan.	**Limits (Approval Clause 4.1.13)** Should the particulate limits be the same for Kilns 4 and 5? Should the SO2 limits be the same whether the facility burns natural gas or coal? **Sulphur Reduction Proposal (Approval Clause 4.1.35)** Is the sulphur reduction proposal reasonable? Is the June 2005 reduction program reasonable?
Mercury and Heavy Metals Did the Director err in not imposing more rigorous conditions for mercury, heavy metals and polyaromatic hydrocarbons? Did the Director err in not imposing conditions on Lafarge to use the best available demonstrated technology in the conversion	**Mercury** The Appellants have concerns that: (1) there is no requirement to mitigate mercury, (2) there is no mercury reduction plan required, and (3) there is no requirement to utilize best available demonstrated technology to minimize emissions. The Director does not appear to object to the inclusion of these issues.	**Mercury** Should the approval holder be required to design a mercury reduction plan?
Particulates Did the Director err in not imposing more stringent conditions with respect to the emission of particulate matter? It is the appellant's submission that Lafarge should have been required to take the necessary steps to further reduce the amount of particulate matter emitted from the plant.	**Particulates** The Appellants want further mitigation. The Director does not appear to object to the inclusion of this issue.	

Monitoring and Reporting Did the Director impose appropriate monitoring requirements on Lafarge? It is the appellants' submission that the Director's monitoring requirements are inadequate and will not properly assess the impact of the plant. In particular, the continuous ambient monitoring should continue for the life of the plant. The passive monitoring is inappropriate for the nature of the emissions from the plant and the location of such monitoring is inadequate. Furthermore the approval only requires Lafarge to submit a plan for passive monitoring, it does not require the to implement it. The Appellants argue that there is an issue regarding the implementation requirements	**Monitoring and Reporting (Approval Clause 4.1.24)** The Appellants have concerns with: (1) the elements monitored, (2) the frequency of monitoring, (3) the location of the monitoring devices, (4) the duration and type of monitoring, and (5) the requirement that the Approval Holder participate in the organization, establishment and operation of an Air Quality Monitoring Zone for the Upper Bow Valley or participate if one arises. The Director does not appear to object to the inclusion of these issues. **Passive Ambient Air Monitoring Program Proposal (Approval Clause 4.1.28)** The Appellants have concerns: (1) with the passive vs. continuous monitoring requirements, (2) that the requirement to carry out the proposal and to carry out mitigation, and (3) that the areas to be monitored should be expanded. The Director objects to the inclusion of the concern regarding the requirement to carry out the proposal and the mitigation. The Director argues that Approval Clause 4.1.29 requires the air-monitoring proposal to be carried out.	**Ambient Air Monitoring and Reporting (Approval Clause 4.1.24)** Is the ambient monitoring and reporting program requested by the Director reasonable? **Passive Ambient Air Monitoring Program Proposal (Approval Clause 4.1.28)** Should this program incorporate monitoring in Quaite Valley Campground and Jewel Pass?

Human Health Impact Assessment/Vegetation Assessment Report Should the Director have made the human health assessment, the vegetation study and the monitoring requirements with respect to the current and future operations as part of the application process rather than conditions of the approval? If the inclusion of these requirements is appropriate, did he err in not making it a condition of the approval that any impact found in these assessment be mitigated? The Appellants argue that there is an issue regarding the implementation requirements	**Human Health Impact Assessment (Approval Clause 4.1.30)** The Appellants have concerns with: (1) the scope of the Human Health Impact Assessment, and (2) the timing of provisions of the Human Health Impact Assessment. The Director objects to the inclusion of the concern regarding the implementation the Human Health Impact Assessment. The Director argues that Approval Clause 4.1.31 requires the implementation of the Human Health Impact Assessment. **SO2 Impacts on Vegetation Assessment Report (Approval Claus 4.1.37)** The Appellants have concerns with: (1) the timing of the Vegetation Assessment, and (2) no requirement for mitigation or follow-up. The Director does not appear to object to the inclusion of these issues.	**Human Health Impact Assessment (Approval Clause 4.1.30)** Should the Human Health Impact Assessment be conducted prior to using coal as a fuel source? Should the Approval Holder be required to further mitigate emissions should the Human Health Impact Assessment identify the Lafarge as the source of the problem? **SO2 Impacts on Vegetation Assessment Report (Approval Clause 4.1.37)** Is Lafarge required to mitigate the problems that have been identified as its responsibility?
ESP Performance Enhancement Action Plan No comments provided.	**ESP Performance Enhancement Action Plant (Approval Clause 4.1.33)** The Appellants have concerns with: (1) the timing and scope of the ESP Performance Enhancement Plan, and (2) the requirement regarding the implementation of the plan. The Director objects to the inclusion of the concern regarding the implementation of the ESP Performance Management Plan. The Director argues that 4.1.34 requires the implementation of the ESP Performance Enhancement Plan.	**ESP Performance Enhancement Action Plan (Approval Clause 4.1.33)** Should the approval holder submit and implement a plan to upgrade the ESP before the using coal as an alternate fuel source?

Information included in this table is taken from the submissions of the parties dated March 8, 2002 and March 18, 2002.

APPENDIX 2 - Comparison of Issues on which the Parties Do Not Agree		
APPELLANTS	**DIRECTOR**	**APPROVAL HOLDER**
Scope of Review What is the Director's jurisdiction when reviewing the application to make major modifications to a plant i.e. can he re-consider the entire scope of the approved operation and imposed conditions that deal with existing and ongoing environmental impacts? The appellants submit that the Director should have required Lafarge to install the necessary equipment to eliminate exceedances of the Guidelines prior to allowing it to burn coal. The Appellants "...disagree with the position that since this application is not for a green field project, the Director could only look at the impact of the conversion to coal. I disagree with this position as the Act and Regulation give the Director authority to look at the environmental impact of the plant as modified by the amendment." The Appellants state "...in making an application for the amendment certain studies were done which indicate that there are existing problems with the current operation. It is our view that when an application for an amendment that allows major modifications disclose problems with the plant, the Director must, and should, deal with those problems before approving the amendment. ... If our submission is correct, then the issue of tires, viewscape and general concerns should be addressed by the Board."	**Scope of Review** The Director stated that this "...amendment was initiated through an application by Lafarge to the Director for an approval amendment to allow the use of coal as a fuel option. This amendment only relates to that application. The Director only considered and amended the approval as it related to the use [of] coal as a fuel source. The Director did not re-consider the entire scope of the approved operation. It is the Director's submission that only those amendments arising from the Lafarge application should be before the Board." The Director argues "...the Director does not have the jurisdiction to 'open up' the entire approval. The Director can only address the issues that arise from the amendment application. Given that the Director has this restriction, it is submitted that the 'broader issue' proposed by ... [the Appellants] should not be before the Board." The Director further advises "...this issue has not been previously raised in the Notices of Appeal filed by the three Appellants. The ground of appeal which the Appellants put forward generally relate to specific clauses in the Amending Approval. There was no request in the Notice of Appeal to 'open up' the entire approval."	**Scope of Review** The Approval Holder advises "...for the hearing in the present matter, the Appellants may be entitled to present evidence related to impacts of both the Original Approval and the Amending Approval if they demonstrated a *prima facie* case that impacts from ongoing activities compound impacts from the Amending Approval. But for the issue to be included in the hearing before the Board, the issue must relate to the Amending Approval not the Original Approval." "It is on this basis that Lafarge objects to the Appellants' issues on plant operations and conditions which are not impacted in any different way with respect to this amendment to use coal as an alternative fuel source. This would include dispensing with issues with respect to viewscape, burning fuel for tires, and the nature of surrounding areas."

Natural Areas/Viewscape Did the Director err in not considering the nature of the surrounding area (i.e. protected areas) and recreational users in the area when he determined that much of the area is uninhabited? Did the Director err in not imposing conditions with respect to noise, visible pollutants, blue haze, odour and greenhouse gas emissions?	**Viewscape/General Issues** The Appellants have concerns: (1) that the amendment does not address the cause, (2) with the existence of the plume, (3) with noise, (4) with odour, and (5) with the economic impact on tourism. The Director objects to the inclusion of the viewscape and general issues. The Director argues: "A number of these issues pre-date this amendment and have been an ongoing concern to valley residents in regards to Lafarge's and others operations in the Bow Valley. It is the Director's submission that these issues should be limited to how the use of coal as a fuel option in the in the Lafarge cement plant will affect the items raised.	**Viewscape/General Impacts** "...as this amending application only contemplates the use of an alternative fuel sources, the comments under this heading should relate only to those concerns specifically impacted by the use of coal as a fuel source rather than natural gas."
Tires Did the Director err in continuing to allow Lafarge to burn tires for fuel?"	**Tires (Approval Clause 4.1.16)** The Director objects to the inclusion of this issue stating that this "...was only one 'clerical' amendment and that relates to the section numbers and organization of the clauses of the 'Use of Tires as Fuel'. That authorized activity was in the original approval. ... There has been no change in the regulatory requirements for Lafarge to meet in regards to the usage of tires as fuel. Therefore, it is submitted that this is not an issue that should be before the Board."	**Tires** "This amending approval did not consider the applicability of this fuel source as it was decided in a previous approval which was not appealed."
Greenhouse Gases Did the Director err in not imposing conditions with respect to noise, visible pollutants, blue haze, odour and greenhouse gas emissions?	**Greenhouse Gases** "The issue of Greenhouse Gas Emissions was not set out in any of the Notices of Appeal recognized by the Board. None of those Appellants requested that the Director/Board consider this issue or that the Approval should address [this] issue. It is submitted that this issue should not be considered in this appeal. It is unfair to all parties to this appeal to have major 'new' issues added to the appeal at this late stage of the process."	**Greenhouse Gases** "This is not an issue which the Department currently has any formulated policy or guidelines. Accordingly, it is inappropriate to embark on establishing conditions for this subject matter at this time."

Information included in this table is taken from the submissions of the parties dated March 8, 2002 and March 18, 2002.

VII. Appendix 3 - *Chipewyan Prairie First Nation* Case

Appeal No. 01-110-ID

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Procedural Decision

Date of Decision – March 22, 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 the Chipewyan Prairie First Nation with respect to Approval 153497-00-00 issued on December 7, 2001, under the *Environmental Protection and Enhancement Act* by the Director, Bow Region, Regional Services, Alberta Environment, to Enbridge Pipelines (Athabasca) Inc.

Cite as: Preliminary Motions re: *Chipewyan Prairie First Nation* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Enbridge Pipelines (Athabasca) Inc.*

EXECUTIVE SUMMARY

The Board received a Notice of Appeal from the Chipewyan Prairie First Nation (CPFN) with respect to an Approval issued under the *Environmental Protection and Enhancement Act* to Enbridge Pipelines (Athabasca) Inc. for the construction and reclamation of a pipeline near Christina Lake, Alberta. CPFN asked for a Stay of the Approval pending the resolution of their appeal.

Alberta Environment argued that the Board does not have the jurisdiction or expertise to decide constitutional issues relating to: the validity of the alleged aboriginal and treaty rights of CPFN; the alleged infringement of those rights; and the alleged duty of Alberta Environment to consult with CPFN. On this basis, Alberta Environment argues that the appeal should be dismissed.

The Board asked for submissions from the Parties on the questions:

> "1. What steps, if any, have the CPFN taken, since it first knew of the request for the Approval that is the subject of this appeal, to enforce the rights to which it now asks the Board to give effect?
>
> 2. Given the nature of the rights the CPFN seeks to enforce, and the likelihood of controversy between the parties over the existence, extent and consequences of those rights, why is the Board the appropriate forum to deal with these issues as opposed to the ordinary courts, which possesses among other powers, the power to grant appropriate interim relief?"

Following its review of these submissions, the Board has decided to adjourn the request for a Stay for 30 days to allow CPFN to commence an action in Court to enforce the rights that they are claiming, should they wish to do so. As part of such an action, CPFN can seek an order against Alberta Environment to restrain the granting of permission to proceed with the pipeline project. If such an injunction is granted, the Board will immediately review it and consider the request for a Stay in light of the terms of such an injunction. CPFN may instead seek a mandatory injunction requiring that the consultation measures they are requesting be carried out. Again, the Board will be guided by the decision of the Court, whatever it may be.

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

WRITTEN SUBMISSIONS:

Appellants: Chipewyan Prairie First Nation, represented by Mr. Jeffrey Rath and Ms. Allisun Rana, Rath & Company.

Director: Ms. May Mah-Paulson, Director, Bow Region, Regional Services, Alberta Environment, represented by Ms. Heather Veale and Ms. Gloria Hammermeister, Alberta Justice.

Approval Holder: Enbridge Pipelines (Athabasca) Inc., represented by Mr. Stephen Lee, Borden Ladner Gervais.

Intervenor: PanCanadian Energy Corporation, represented by Mr. Brian O'Ferrall, Bennett Jones.

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I. BACKGROUND

[1] On December 7, 2001, the Director, Bow Region, Regional Services, Alberta Environment (the "Director") issued Approval 153497-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA")[1] to Enbridge Pipelines (Athabasca) Inc. (the "Approval Holder") authorizing the construction and reclamation of a pipeline, being the Christina Lake Pipeline Project, near Christina Lake, Alberta.

[2] The Environmental Appeal Board (the "Board") received a Notice of Appeal and an Application for a Stay dated December 21, 2001, from the Chipewyan Prairie First Nation (the "Appellants" or "CPFN"). The Appellants provided further information regarding the Notice of Appeal on December 27, 2001.

[3] The Board acknowledged the Notice of Appeal and the Application for a Stay on December 27 and 31, 2001, respectively, and requested that the Director provide the records (the "Records") related to the appeal. The Parties to this appeal were requested to provide the Board with available dates for a mediation meeting and settlement conference or hearing.

[4] 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. The Natural Resources Conservation Board responded in the negative. The Alberta Energy and Utilities Board wrote to the Board on January 17, 2002, and advised "...on July 3, 2001, the Board routinely issued a pipeline approval to Enbridge Pipelines (Athabasca) Inc. for the Christina Lake Pipeline Project. The Board held no public hearing or review into this matter."

[5] In their notice of appeal, the Appellants requested that the Board grant a Stay of the Approval until the appeal is heard. The Board, by way of a letter dated December 31, 2001, requested that the Appellants provide a submission with respect to their Application for a Stay. The Board's letter advised that:

> "Should the Board decide that the CPFN has presented sufficient argument for the Board to consider issuing a Stay, Enbridge Pipelines and Alberta Environment

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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. 1993, c. E-13.3 on January 1, 2002.

> [(the Director)] will be given an opportunity to respond to CPFN's submission prior to the Board making its final decision respecting the Stay. You should also note that before the Board will grant a Stay, it must be satisfied that the CPFN has standing (i.e. is directly affected) in this appeal."

[6] On January 11, 2002, the Board acknowledged receipt of the Appellants' submission with respect to the Application for a Stay.

[7] On January 14, 2002, the Board received a letter from PanCanadian Energy ("PanCanadian") requesting intervenor status in this appeal. The Board acknowledged receipt of the letter from PanCanadian and advised it would consider their request.

[8] On January 14, 2002, the Board received the Record from the Director. In the accompanying letter the Director advised that:

> "The Director respectfully submits that the CPFN's notice of appeal also raises complex factual and legal issues that are not properly before the Board since they are outside the scope of the Board's jurisdiction and expertise to decide. Specifically, it is the Director's position, that the Board does not have the jurisdiction or expertise to decide constitutional issues regarding the validity of the alleged aboriginal and treaty rights of the CPFN, alleged infringement of those rights and the alleged duty to consult with the CPFN."[2]

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[2] The Director's letter also advised:

> "It is the Director's position that EAB Appeal No. 01-110 should be dismissed pursuant to section 95(5)(a)(ii) and/or (iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (EPEA). In this regard, the Director respectfully requests that a preliminary meeting be scheduled to determine whether EAB Appeal No. 01-110 should be dismissed. ...
>
> The Director respectfully submits that the Chipewyan Prairie First Nation (CPFN) has not filed a valid notice of appeal for the following reasons set out below.
>
> Section 91(1)(a)(i) of EPEA provides that an appeal may be filed by a person who previously submitted a statement of concern in accordance with section 73 of the Act and is directly affected by the Director's decision. Section 73(2) of the Act stipulates that a statement of concern must be submitted to the Director within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice.
>
> The Notice of Application for the above-noted project was published in the Fort McMurray Today and Edmonton Journal on Friday, September 7, 2001. The final date for submitting statements of concern was October 8, 2001. CPFN submitted a letter to the Director on November 6, 2001, approximately one month after the thirty day period established by section 73(2) of the Act had expired. The Director rejected the letter as a statement of concern.
>
> Section 73(1) of the Act also requires that a person filing a statement of concern must be directly affected. To date, it appears that the CPFN has not provided specific information to establish that they are in fact directly affected by the Director's decision."

Section 95(5) of EPEA provides:

> "The Board (a) may dismiss a notice of appeal if ...

[9] On January 21, 2002, the Board acknowledged receipt of the Record and a copy was subsequently provided to the Appellant, the Approval Holder and PanCanadian. In the same letter, the Board advised the Parties to this appeal that "...with respect to the Stay request filed by the Chipewyan Prairie First Nation (CPFN), the CPFN has presented sufficient information to warrant further consideration of their Stay request." The Board advised the Parties that a preliminary meeting to deal with the Stay and other preliminary issues would be held.

[10] On January 22, 2002, the Appellants advised the Board that construction on the pipeline was ongoing and requested that the consideration of the Application for a Stay be conducted on an expedited basis.

[11] On January 25, 2002, the Approval Holder asked the Board to "...include a consideration of Alberta Justice's motion to dismiss EAB appeal No. 01-110....". In this same letter, the Approval Holder advised that a preliminary meeting in this matter would "...result in more efficient use of parties' time and resources, avoid unnecessary expenses and afford the Board the opportunity to hear parties' submissions on all preliminary issues and how such issues may interrelate."

[12] On January 29, 2002, the Appellants advised the Board that the Preliminary Meeting date of February 15, 2002 that was being discussed by the Parties would be "...highly prejudicial to the constitutional rights of the CPFN."

[13] In response, on January 29, 2002, the Board wrote to the parties and posed two questions to the Appellants:

> "1. What steps, if any, have the CPFN taken, since it first knew of the request for the Approval that is the subject of this appeal, to enforce the rights to which it now asks the Board to give effect?
>
> 2. Given the nature of the rights the CPFN seeks to enforce, and the likelihood of controversy between the parties over the existence, extent and consequences of those rights, why is the Board the appropriate forum to deal with these issues as opposed to the ordinary courts, which

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(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...."

possesses among other powers, the power to grant appropriate interim relief?"

The Board requested that the Appellants and the other Parties to this appeal respond to these questions and provide their comments to the Board by January 31, 2002. The Board subsequently received a telephone call from the Appellants and, in a letter dated January 30, 2002, the Board extended the submission deadline to February 1, 2002.

[14] On February 1, 2002, the Board received submissions from the Appellants, the Director, the Approval Holder, and PanCanadian responding to the questions posed in the Board's letter of January 29, 2002.

[15] On February 4, 2002, the Board received a letter from the Appellants which stated "...we acknowledge that we do not have an official right of reply, [however,] we feel a response is required in order to set the record straight and to ensure that the Board is not misled by a number of points raised in ..." the Director's letter. The Board acknowledged receipt of the letter on February 5, 2002, and advised that further correspondence would be forthcoming.

II. DISCUSSION

A. Framework

[16] The Board has before it an application by the Appellants for a Stay of the Approval for the construction and reclamation of a pipeline called the Christina Lake Pipeline Project. The Appellants want the Stay pending the hearing of the appeal that they have commenced in this matter. If the appeal is validly before the Board, something both the Director and the Approval Holder dispute, the Board has the power to grant a Stay of the Approval. The power to grant a Stay is discretionary, and authorized by section 97 of EPEA which provides:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) 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."

[17] The Appellants are a First Nation located in the vicinity of the pipeline project being built by the Approval Holder for PanCanadian. To construct such a pipeline, it is necessary to obtain an approval from the Director.

[18] EPEA provides for a public notice and consultation process before such approvals are issued. Once an approval is issued, persons who filed Statements of Concern with the Director, but who feel their concerns have not been adequately dealt with, are entitled to file and pursue an appeal before this Board. The Board, upon receiving such an appeal may, in the end result, make a Report and Recommendations to the Minister of the Environment about what should be done.[3] On receipt of such a Report and Recommendations, the Minister may:

> "(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, ...
>
> (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."[4]

[19] The scope of the Board's Report and Recommendations is thus customarily to provide a recommendation for a Ministerial decision in line with the decision that the Director in question could have, or perhaps ought to have, made in the first instance.[5]

[20] The Director, acting under EPEA, is a statutory delegate with a specific and limited scope of authority, and specific responsibilities. Before the Board (and if necessary before the Courts) the Director in question is customarily represented by her own counsel, with separate counsel retained to represent the Minister, or the Crown in a more general sense, when called for.

[21] In this case, the Approval Holder applied to the Director for an approval under EPEA for a pipeline. The Approval Holder submitted a detailed application called a Conservation and Reclamation Application. The Approval Holder published notice of the application in newspapers circulating in the area on September 7, 2001. These notices called for submissions (Statements of Concern) to be made to the Director within a 30-day time frame

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3 See section 99(1) of EPEA which provides:

"In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act ... the Board shall within 30 days after the completion of the hearing of the appeal shall submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

4 See section 100(1) of EPEA.

5 This recognizes that the Board, and thus the Minster, may well have the benefit of additional information and fuller argument than was available to the Director at the time the decision was initially made. (See section 95(2) of EPEA.)

(here by October 8, 2001) by those with concerns. Valid Statements of Concern under EPEA oblige the Director to consider the objector's position. They also create an entitlement to appeal.[6]

[22] Section 73(1)[7] of EPEA requires that the person submitting a Statement of Concern must establish that they are "directly affected," a status that so far has neither been proven nor conceded in this case. In addition, the Approval Holder and the Director both allege that the Appellants failed to meet the 30-day time limit for submitting their Statement of Concern. It was only on November 6, 2001 – almost 30 days after the deadline had passed - that the Appellants wrote to the Director raising objections to the Approval, which had not, at that point, been granted.

[23] The objection as stated in the Appellants' Statement of Concern, and asserted again in these proceedings, is that the Appellants have a constitutional right to be consulted about a project of this nature and, in violation of that right and the Crown's fiduciary duty towards the Appellants, the Crown in Right of Alberta has failed to consult, sufficiently or at all, with the Appellants about the proposed approval.

[24] The Director was of the view that the November 6, 2001 letter, being outside the statutorily provided timeframe, was not validly before her as a Statement of Concern. Nonetheless some correspondence ensued over the Appellants' concerns. Ultimately, however, the Director issued the Approval on December 7, 2001.

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6 Section 91(1)(a) of EPEA provides:

"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)...."

7 Section 73(1) of EPEA provides:

"Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change."

[25] On December 20, 2001, the Appellants submitted their Notice of Appeal. The Notice of Appeal describes the details of the decision objected to in the following terms:

> "The decision does not address the concerns that CPFN related to the decision-maker with regard to the potential impact the project would have on the environment and the ability of the members of the CPFN to exercise their treaty rights to hunt, trap and fish. The decision does not include mitigative measures designed in consultation with CPFN to ensure that their treaty rights are impacted as little as possible as required by law. Further, the decision was made without the Crown fulfilling its constitutional obligation to consult with CPFN."

The Appellants cited in support of their claim, among other cases, the recent decision of the Federal Court of Canada, Trial Division in *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage, and the Thebacha Road Society.*[8]

[26] The respondents in this appeal, so far, are the Director and Enbridge.[9] The Crown, through the Attorney General, has not been notified. The Director's position, put briefly, is that the appeal is ineffective because it is not based on any valid Statement of Concern and because the Appellants have failed to establish their "directly affected" status. However, on a broader note, as stated, the Director goes on to say:

> "The Director respectfully submits that the CPFN's notice of appeal also raises complex factual and legal issues that are not properly before the Board since they are outside the scope of the Board's jurisdiction and expertise to decide. Specifically, it is the Director's position, that the Board does not have the jurisdiction or expertise to decide constitutional issues regarding the validity of the alleged aboriginal and treaty rights of the CPFN, alleged infringement of those rights and the alleged duty to consult with the CPFN."

[27] The Approval Holder raises quite different concerns. It too relies on the lack of status and un-timeliness. However, it goes on to suggest it has evidence that the land in question, which is off-reserve land, has not been used for hunting. The Approval Holder's own consultation with Band Elders, it asserts, suggest their traditional hunting grounds have been confined to an area north of the proposed project.

[28] In addition, the Approval Holder objects that the Appellants are using the appeal for an improper purpose. It alleges that the Appellants are raising the constitutional rights

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8 *Mikisew Cree First Nation* v. *Sheila Copps, Minister of Canadian Heritage, and the Thebacha Road Society,* [2001] FCT 1426, [2001] F.C.J. No. 187, [2002] 1 C.N.L.R. 169.

9 The Board has yet to formally determine the status of PanCanadian.

argument only to slow down the regulatory approval process. This is to increase their bargaining power in an effort to secure a sole source labour supply agreement with the Approval Holder for the project. The Approval Holder objects to the Board's processes being used in such a manner. We caution that the Board is making no finding whatsoever on this point, given the preliminary state of the proceedings.

[29] The right the Appellants are asserting is not a right that springs from EPEA. Rather, it is a claim to a broader and constitutionally entrenched aboriginal and treaty right. It is a right that, if established, would fall under the umbrella of section 35(1) of the *Constitution Act, 1982*. This section provides:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[30] The Appellants further assert that the alleged duty to consult is a part of an existing constitutionally entrenched section 35(1) right or part of a broad fiduciary duty owed by the Provincial Crown to the Appellants.

[31] Before deciding the existence, scope or breach of an alleged duty of consultation, one must first determine the existence and infringement of the asserted aboriginal rights.[10]

[32] The Appellants do not see the processes under EPEA as being the appropriate way for the Crown to fulfill its duties towards them. Instead, they argue the Crown's fiduciary duty calls for a *separate* process. The Appellants argue that consultation by the Crown, with First Nations such as themselves, is an essential prerequisite to granting the Approval. It is not saying that the Director failed to consult as a part of the statutory approval process, but that the statutory approval process and any resulting approval are invalid if it trenches upon the Appellants' broader rights.

[33] The Director relies upon the time limits and other statutory and regulatory procedures that flow from EPEA to support her position that the appeal is untimely and that the Appellants have failed to establish that they are directly affected. The Appellants' answer is that

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[10] See: *Taku River Tlingit First Nation* v. *Tulsequah Chief Mine Project*, [2002] BCCA 59, [2002] B.C.J. No. 155; but see *Ontario (Minister of Municipal Affairs and Housing)* v. *TransCanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, [2000] O.J. No. 1066, [2000] 3 C.N.L.R. 153 (Ont.C.A.). See also: *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] BCCA 147, [2002] B.C.J. No. 378.

the right it claims, to be consulted, is not one arising from the statute at all. It is a right to be separately consulted and not, therefore, to be constrained by the time limits and statutory procedures EPEA imposes. The Appellants do not accept that the Director's consultation under EPEA, or indeed any resulting appeal hearing, will constitute the required consultation. Rather, the Appellants argue that the Approval cannot be given at all until the separate consultation occurs.

[34] So far this has only been a summary review of the Parties' main points. What the Appellants seek through their Application for a Stay is what amounts to an interim injunction prohibiting the pipeline construction from proceeding pending the determination of the appeal. The Appellants seek to accomplish this indirectly by staying the Approval that is necessary for the development to proceed.

[35] The Director's objection requires the Board to assess two questions:

1. Does this Board have the authority to adjudicate all the issues necessary to determine this matter?
2. Assuming the Board has sufficient statutory authority to do so (and all our authority arises solely from statute), is the Board the appropriate forum for resolving these issues?

A finding that the Board *can rule* on such issues (assuming its jurisdiction in the matter is not exclusive) does not mean that it *should rule* on such issues if another forum can provide a fuller or fairer process. These are administrative and constitutional law issues rather than aboriginal rights issues.

B. Can the Board Rule?

[36] The Courts have ruled that some administrative tribunals do have the mandate to rule upon Charter and constitutional questions that arise in the course of their proceedings. They have established the test to determine when a tribunal's statutory authority is sufficient to vest it with the authority to decide a Charter matter.

[37] No administrative tribunal has an independent source of jurisdiction pursuant to section 52(1) of the *Constitution Act, 1982*.[11] The essential question facing a Court is whether the

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[11] Section 52(1) of the *Constitution Act, 1982* provides:

administrative tribunal, through its enabling statute, has been granted the power to determine questions of law. If a tribunal does have the power to consider questions of law, then it follows by the operation of section 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.[12]

[38] The question in this case is *not* directly about the constitutional validity of a provision of EPEA. EPEA can co-exist with the Appellants' position so long as no approvals are granted until the Crown (in the fullest sense and not just the Director) has met whatever its constitutional obligation may be.

[39] The Supreme Court of Canada in *Cooper*[13] said the following about an administrative tribunal's authority to consider Charter matters:

> "[45] In three previous cases, *Douglas College*, *supra*, Cuddy Chicks, *supra*, and *Tetreault-Gadoury*, *supra*, this Court has had the opportunity to address the principles underlying an administrative tribunal's jurisdiction to consider the constitutionality of its enabling statute. ... [T]he inquiry must begin with an examination of the mandate given to the particular tribunal by the legislature.
>
> [46] If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute. This principle was clearly enunciated by this Court in *Cuddy Chicks*, *supra*, at pp. 13-14.... There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature. All the parties agree that there is no provision in the Act that expressly confers on the Commission a general power to consider questions of law. There being no such express authority, it becomes necessary to determine whether Parliament has granted it implicit jurisdiction to consider such questions. As stated in *Cuddy Chicks*, *supra*, at p. 14:
>
> > [J]urisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the

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"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

12 See: *Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358; and *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193.

13 *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 at p. 45.

matter before it, namely, the parties, subject matter and remedy sought.

[47] In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature."

[40] The Courts have already considered whether this Board can rule on questions of law that properly arise in its proceedings. The latest statement to that effect is contained in *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Alberta Environmental Appeal Board and McCain Foods (Canada) Ltd.*[14] While EPEA contains no express provision to that effect, the Courts have held it to be implicit in the Board's statutory mandate.[15]

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[14] In *Director, Prairie Region, Environmental Service, Alberta Environment* v. *Environmental Appeal Board and McCain Foods (Canada) Ltd.* (2000), 22 C.E.L.R. (N.S.) 258 (Alta.Q.B.), the Court held at paragraph 20 that:

> "The result of the pragmatic and functional analysis [as set out in Union des employes de service Loc. 298 v. Bibeault [1988] 2 S.C.R. 1048] leads to the conclusion that that the Board does have the jurisdiction to consider and recommend to the Minister whether or not the Director acted within his jurisdiction in including the Condition in the approval. The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signalled its intention for the Board and the Minister to deal with these issues through the strong privitive clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal."

See also: *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.); *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 22 C.E.L.R.(N.S.) 141 (Alta.Q.B.), Medhurst J.; and *Chem-Security (Alberta) Ltd.* v. *Environmental Appeal Board (Alberta)* (1997), 23 C.E.L.R.(N.S.) 165 (Alta.C.A), Berger J.A.

[15] But see: *Paul* v. *Forest Appeals Commission*, [2001] BCCA 411, [2001] B.C.J. No. 1227, [2001] 4 C.N.L.R. 210. In this case Mr. Paul cut three trees, possessed four trees, and claimed he had an aboriginal right to the trees. This cutting and possession was without authorization under the British Columbia Forest Practices Code. The British Columbia Court of Appeal reasoned that a determination of this question by the Forest Appeals Commission was unconstitutional because the Legislature cannot grant authority to determine matters under section 91(24) of the *Constitution Act, 1867*. This case determined that the Legislature of British Columbia had no constitutional capacity to confer upon the British Columbia Forest Appeals Commission (or the District Forest Manager or the Administrative Review Panel) the jurisdiction to decide questions of aboriginal rights and title, including questions of entitlement, infringement and justification, and past extinguishment when deciding appeals about alleged violations of the British Columbia Forest Practices Code. This case was determined on the question of the application of the Division of Powers under the *Constitution Act, 1867* rather than the scope of the quasi-judicial powers of the Forest Appeals Commission.

Section 91(24) of the Constitution Act, 1867 provides:

C. The Duty to Consult

[41] If a duty of consultation exists, the duty is on the Crown itself, not specifically on the particular statutory delegate given the task of issuing approvals under EPEA. This is not to say that the Director can ignore any duty to consult; only that the responsibility for the consultation itself involves the Crown in the fullest sense.[16] This is important in respect to whether the Crown has received proper notice of the issues raised by the Appellants in these proceedings. It is similarly important for the question as to whether we have jurisdiction over the Parties. While this Board advises the Minister, the party before the Board that implements the decision is the Director in her role as a statutory delegate with specific (and thus limited) authority.

[42] As to authority over the subject matter, this Board has full jurisdiction to rule (or at least advise the Minister upon) the validity of the Approval. Our only claim to authority over the underlying question of whether a constitutionally protected aboriginal and treaty right to consultation exists, or has been breached, arises because that right may be a pre-condition to the issuance of a valid approval. If our authority extends to let us rule on this point it does so only for the purpose of establishing the validity of the approval. We have no original jurisdiction over the question and certainly no exclusive jurisdiction to decide the matter. But for its impact on the Approval here, this would be a question to be decided in the Courts.

D. The Approval Holder's Objections

[43] The next question relates to the objections raised by the Approval Holder. The Appellants seek, in essence, an interim injunction, based upon an alleged breach of its right to be

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> "...[It] is the hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - ... 24. Indians and Lands reserved for Indians...."

The Division of Powers refers to the division of authority to make laws between the federal and provincial governments as described in sections 91, 92, and 92A of the *Constitution Act, 1867*.

[16] In this respect, the Director in Alberta is in a different position than the officer involved in *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] BCCA 470, [1999] 4 C.N.L.R. 1. See the Board's review of that case in Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation* Request for Reconsideration: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region,*

consulted. The Approval Holder's answer to this is twofold. First, it disputes that there is any right because, it says, its information, from Elders of the Appellants, is that hunting and trapping has not gone on in this area, but only in the area to the north of the reserve. Second, it argues that these objections are being raised, and thus what is in effect an injunction is being sought, for improper purposes. The Courts deal with such matters by imposing certain requirements before granting the equitable remedy of an injunction. First, there is the requirement to provide sufficient initial proof of the right to justify an interim order pending trial. Second, there is often a requirement for an undertaking in damages. Third, there is the requirement that the party seeking an injunction must come to the Courts with clean hands. Fourth, there is the need to balance the competing interests involved. In noting these matters we make *no* determination that any one of these might be applicable in this case, either on the facts, or because the case may involve constitutionally protected rights.

E. Should the Board Determine this Constitutional Question?

[44] Whatever jurisdiction this Board may possess to rule on the Appellant's position on its right to be consulted by the Crown, it is clear that jurisdiction is not exclusive. The Courts would clearly have jurisdiction over such a question at the instance of the Appellants or the Crown. Unlike the Board, the ordinary Courts are equipped to give a full range of constitutional and equitable remedies.

[45] There are obvious advantages to such constitutionally sensitive and important issues as the Crown's duty of fidelity and a first nation's treaty rights being dealt with by a section 96 Court.[17] No case calls for judicial independence more than a case involving such fundamental rights. The scope of such rights, if established, impose broad duties on the Crown and can restrict or impede major third party interests. The resources, independence, and stature of the ordinary Courts create the most desirable forum for such complex adjudication. This is in no way counterbalanced by the Board's expertise in environmental issues.

Alberta Environment re: *Tri-Link Resources Ltd.*) EAB Appeal No. 99-009.

[17] A section 96 Court is a commonly known as a Superior Court, and includes the Alberta Court of Queen's Bench. Section 96 refers to the provision of the *Constitution Act, 1867* that provides:

> "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

[46] Whether in the Courts or before the Board, the threshold question of the Appellants' treaty and constitutional rights needs to be determined. The Board has no processes equivalent to the Rules of Court to handle such complex questions and proceedings. The Appellants suggest an urgency. However, we note that despite knowing for several months of this pending development, they did not resort to the Court. Should they choose to do so, they could apply for an interim order from the Courts either preserving the status quo or imposing consultation obligations upon the Crown. This Board could and would be guided by any such order in exercising its powers under section 97 of EPEA and more generally.

[47] Even if the Board needs to ultimately decide the constitutional question for its own purposes, the Courts can nonetheless exercise their inherent jurisdiction to assist an inferior tribunal like the Board by dealing with the question of interim relief.[18]

[48] Requiring the Appellants to first assert its claimed constitutional and treaty rights in the ordinary Courts would:

1. Allow the Attorney General to be notified and to be present to represent the full interests of the Crown on this important constitutional question, the effect of which extends well beyond the office of the Director involved in this case.
2. Allow the Approval Holder to present its arguments in opposition to the application on the basis of the common law of injunctions, the scope of which extend beyond the simple power of a Stay given to this Board under, and only for the purposes of proceedings under, EPEA. If it is appropriate, the Courts can grant any injunction subject to terms beyond which this Board has the ability to consider or impose.
3. Leave the Board to carry out its assigned statutory mandate of advising the Minister on what the Director could or should have done without entering

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18 See: *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 at paragraph 57 which states:

"It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in St. Anne Nackawic confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in Moore v. British Columbia (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in St. Anne Nackawic (at p. 723), is a 'real deprivation of ultimate remedy'."

> into an inquiry as to fundamental constitutional and treaty rights customarily and constitutionally the task of a section 96 Court.

[49] *To this end, the Board is adjourning the request for a Stay* to allow the Appellants to commence an action in the Courts to enforce those rights that they are claiming, should they wish to do so. As part of such an action the Appellants can seek orders against the Crown restraining the granting of permission to proceed with this development. If such an injunction is granted, the Board will immediately take cognizance of it and resolve the request for a stay in light of the terms of such an order. The Appellants may instead seek a mandatory injunction, forcing the measure of consultation they seek. Again, the Board will be guided by the decision of the Court, whatever it may be.

III. DECISION

[50] *The Board has decided to hold this request in abeyance for a period of one month.* In the interim, if a Court order is obtained, the matter will be immediately reactivated and dealt with in light of the terms of any such order. The Appellants are directed to advise the Board in any event within 30 days of whatever steps it has taken to assert the rights it seeks to rely upon here as a precondition to the Director's exercise of her statutory authority.

Dated on March 22, 2002, at Edmonton, Alberta.

"original signed by"
William A. Tilleman, Q.C.
Chair