ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – February 13, 2003

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 Notices of Appeal filed by Ron and Gail Maga and Ron Maga Jr., Cameron Wakefield, A. Ted Krug, Stanley Kondratiuk, Roger G. Hodkinson, Neil Hayes, and Anna T. Krug, with respect to Amending Approval No. 10339-01-03 issued to Inland Cement Limited by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Document Production: *Maga et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (13 February 2002), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-ID3 (A.E.A.B.).

PRELIMINARY MEETING BEFORE: William A. Tilleman, Q.C., Chair;
Dr. Steve E. Hrudey; and
Mr. Al Schulz.

PARTIES:

Appellants: Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson, represented by Ms. Jennifer Klimek; Mr. Neil Hayes; and Ms. Anna T. Krug, represented by Mr. Gavin Fitch and Ms. Laura-Marie Berg, Rooney Prentice.

Other Parties: Edmonton Friends of the North Environmental Society, represented by Ms. Jennifer Klimek; and the Edmonton Federation of Community Leagues, represented by Mr. Gavin Fitch and Ms. Laura-Marie Berg, Rooney Prentice.

Director: Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder: Inland Cement Limited (Lehigh Inland Cement Limited), represented by Mr. Dennis Thomas and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Inland Cement Limited (Lehigh Inland Cement Limited) for its cement manufacturing plant in Edmonton, Alberta. The Amending Approval permits Inland to change the fuel supply for part of the plant from natural gas to coal. The Environmental Appeal Board received twenty-nine appeals.

The Board determined that Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, Ms. Anna T. Krug, Dr. Roger G. Hodkinson, Mr. Neil Hayes, the Edmonton Friends of the North Environmental Society, and a group of Community Leagues from the City of Edmonton (EFCL) would be granted standing.

The EFCL filed a motion for the Board to order Inland to produce 12 documents that Inland had in its possession. After reviewing the submissions from all of the parties, the Board determined that the documents requested were relevant and necessary to the issues that were heard by the Board. Therefore, Inland was ordered to produce the documents and provide a witness to speak to the documents at the hearing.

The Hearing was held on December 16, 17, and 18, 2002, and on January 22, 2003, the Minister ordered, inter alia, that a baghouse be installed at Inland's facility in Edmonton.*

* See: *Maga et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.).

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I. BACKGROUND

[1] On May 24, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 10339-01-03 (the "Approval") to Inland Cement Limited ("Inland" or the "Approval Holder") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA" or the "Act") for the construction, operation, and reclamation of a cement manufacturing plant (the "Plant") in Edmonton, Alberta. The Approval allows for the burning of coal instead of natural gas as a fuel source (the "Substitution Fuel Program") at the Plant.

[2] Between June 14, 2002, and July 2, 2002, the Environmental Appeal Board (the "Board") received a total of 29 appeals with respect to the Approval.[1] The Board granted standing to Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stan Kondratiuk, Dr. Roger G. Hodkinson, Mr. Neil Hayes, Ms. Anna T. Krug, the Edmonton Friends of the North Environmental Society ("EFONES"), and the Edmonton Federation of Community Leagues (the "EFCL") (collectively the "Appellants").[2]

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[1] Notices of Appeal were received from Mr. David Doull (02-018), Mr. James Darwish (02-019), Ms. Verona Goodwin (02-020), Ms. Elena P. Napora (02-021), Mr. Don Stuike (02-022), Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr. (02-023), Mr. Cameron Wakefield (02-024), Mr. David J. Parker (02-025), Mr. A. Ted Krug (02-026), Mr. Bill Bocock (02-027), Mr. Michael Nelson (02-028), Mr. Stanley Kondratiuk (02-029), Mr. Greg Ostapowicz (02-030), Mr. Douglas Price (02-031), Ms. Holly MacDonald (02-032), Mr. Stuart Pederson (02-033), Ms. Linda Stratulat (02-034), Mr. Leonard Rud (02-035), Mr. Marcel Wichink (02-036), Dr. Roger G. Hodkinson (02-037), Ms. Lorraine Vetsch (02-038), Ms. Gwen Davies (02-039), Mr. Garry Marler (02-040), a group of Community Leagues from the City of Edmonton (02-041), Mr. Neil Hayes (02-047), Mr. Robert Wilde (02-060), the Edmonton Friends of the North Environmental Society (02-061), Ms. Bonnie Quinn (02-073), and Ms. Anna T. Krug (02-074).

The majority of the Appellants nominated either EFONES or the EFCL to represent them. EFONES represented: Mr. James Darwish, Ms. Verona Goodwin, Ms. Elena P. Napora, Mr. Don Stuike, Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. David J. Parker, Mr. A. Ted Krug, Mr. Bill Bocock, Mr. Michael Nelson, Mr. Stanley Kondratiuk, Mr. Greg Ostapowicz, Mr. Douglas Price, Ms. Holly MacDonald, Mr. Stuart Pederson, Ms. Linda Stratulat, Mr. Leonard Rud, Mr. Marcel Wichink, Dr. Roger G. Hodkinson, Ms. Lorraine Vetsch, Ms. Gwen Davies, Mr. Garry Marler, and Mr. Robert Wilde. The EFCL represented: the group of Community Leagues from the City of Edmonton, Ms. Bonnie Quinn, and Ms. Anna T. Krug. Mr. Neil Hayes represented himself.

In this decision, unless specifically stated, EFONES will refer to Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, Dr. Roger G. Hodkinson, and the Edmonton Friends of the North Environmental Society. The EFCL will refer to the Community Leagues from the City of Edmonton and Ms. Anna T. Krug.

[2] See: Preliminary Issues: *Doull et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement* (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B).

[3] The Board acknowledged receipt of these appeals and notified the Appellants, the Approval Holder, and the Director (collectively the "Parties") of these appeals. In the same letters, the Board also requested (1) that the Director provide the Board with a copy of the records (the "Record") relating to the Approval, and (2) available dates from the Parties for a preliminary meeting, a mediation meeting, or a hearing. On July 11, 2002, the Board received a copy of the Record, which was forwarded to the Appellants and the Approval Holder on July 22, 2002.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board ("NRCB") 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 NRCB notified the Board that these appeals were not subject to review under its legislation. The AEUB stated that it had not held a public hearing or review into the subject matter of the Appeals.[3]

[5] On August 2, 2002, the Board wrote to the Parties and indicated it would schedule a Preliminary Meeting to deal with various preliminary motions that had been identified by the Parties. At the Preliminary Meeting, held on September 17, 2002, the Board heard arguments on the following matters:

> "1. the standing of the Appellants, including their directly affected status and whether they filed valid statements of concern;
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> 2. the standing of Mr. Doull, including whether the statement of concern filed by Mr. Doull is a valid statement of concern for the purposes of filing a Notice of Appeal and whether Mr. Doull is directly affected;
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> 3. the issues to be dealt with at the hearing of these appeals; and
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> 4. whether to consolidate the appeals."[4]

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[3] See: AEUB's Letter, dated July 17, 2002. The AEUB provided a copy of Industrial Development Permit No. IDP 00-1 and IDP IC 80-1, permitting "...Inland to use natural gas produced in Alberta as fuel in the production of cement in the Province...."

[4] Board's Letter, dated August 27, 2002. The motion with respect to Mr. Doull was raised by the Director and is based on the view that Mr. Doull (and some of the other Appellants for that matter) filed a Statement of Concern in the environmental assessment process under Part 2, Division 1 of EPEA, entitled "Environmental Assessment Process," instead of under Part 2, Division 2 of EPEA, entitled "Approvals, Registrations and Certificates" as required by section 91(1)(a)(i) of EPEA.

[6] On September 5, 2002, EFONES contacted the Board and advised that it, along with the Director, Approval Holder, and the EFCL were close to an agreement to recommend to the Board what issues should be considered at the hearing and who should be granted status as parties. EFONES and Mr. Doull requested an extension to the deadline for filing written submissions. The Board granted these requests and written submissions were subsequently received from the Parties.[5]

[7] On September 17, 2002, the Board convened the Preliminary Meeting.[6] On October 2, 2002, the Board wrote to the Parties, advising of its decision regarding standing of the Appellants and the issues to be heard at the hearing and provided its decision on October 11, 2002.[7]

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[5] In granting this extension, the Board was concerned about potential prejudice to Mr. Hayes. As a result, Board staff contacted the Director and Inland, who advised that they were not going to object to Mr. Hayes' standing. As a result of these representations, Mr. Hayes did not object to the extension. See: Board's letter, dated September 5, 2002.

[6] On September 16, 2002, Board staff received a telephone call from Mr. Neil Hayes, advising that, due to a family emergency, he would be unable to attend the Preliminary Meeting on September 17, 2002. The Board provided Mr. Hayes with a copy of the audio recording of the Preliminary Meeting, and on September 30, 2002, Mr. Hayes provided his rebuttal submission to the Board.

[7] The Board determined that Mr. Neil Hayes, Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, Dr. Roger G. Hodkinson, and Ms. Anna T. Krug would be the Appellants in these appeals. The Board also granted full party status to the Edmonton Friends of the North Environmental Society and the Edmonton Federation of Community Leagues.

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

1. emission limits for particulate matter, sulphur dioxide, nitrogen oxides, heavy metals and radioisotopes;
2. adequacy of existing baseline data;
3. emission monitoring, including the type, location and frequency of monitoring – see Approval Clauses 2.3.1, 3.2.5, 3.2.6, 3.2.10 to 3.2.12, 4.1.20 to 4.1.22, 4.126 to 4.1.29, 4.1.38 to 4.1.44, and 4.1.47 to 4.1.49;
4. appropriateness and validity of modeling methods and results;
5. appropriateness of including certain requirements in the Approval as opposed to making them requirements of the application, specifically:
   a. ambient air monitoring plans – see Approval Clauses 3.2.7 to 3.2.12,
   b. trial burn – see Approval Clauses 3.2.14 to 3.2.19,
   c. fugitive emission reduction plan – see Approval Clauses 3.2.20 to 3.2.25,
   d. use of landfill gas – see Approval Clauses 3.2.26 to 3.2.28, and
   e. information regarding the type and source of coal;
6. use of best available demonstrated technology – see Approval Clauses 4.1.4 to 4.1.8;
7. timeline for installation of a baghouse – see Approval Clauses 4.1.34 to 4.1.37;

[8] On September 25, 2002, the EFCL forwarded a letter they had sent to the Approval Holder requesting a copy of several documents that were referenced in the Approval Holder's Approval application. According to the EFCL, this was the second request for these documents.[8]

[9] In the September 25, 2002 letter, the EFCL also requested documentation on the number of complaints regarding emission events the Approval Holder had received in the past.

[10] The Approval Holder responded to the EFCL's request for documents on September 26, 2002. It agreed to provide the documents as requested in the August 12, 2002 letter as soon as the material had been collected. The Approval Holder further stated a copy of the documents would be made and "...couriered to Mr. Fitch, provided that he undertake to pay for the cost of photocopying the documents."[9]

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8. number of trips – see Approval Clauses 4.1.31to 4.1.33;
9. local residents trip notification system;
10. adequacy of health impact assessment – see Approval Clauses 4.1.51 to 4.1.54;
11. appropriateness of health impact assessment update – see Approval Clauses 4.1.51 to 4.1.54;
12. ongoing consultation with local residents and local residents liaison committee;
13. need for the conversion to coal as a fuel source;
14. control of greenhouse gas emissions; and
15. use of tires as kiln fuel limited to Approval Clause 4.1.17.

See: Preliminary Issues: *Doull et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement* (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B).

[8] See: Letter from the EFCL to Approval Holder, dated September 25, 2002. In this letter, they refer to their previous letter sent to the Approval Holder on August 12, 2002. The EFCL had requested the Approval Holder provide copies of the following documents:

> "Bhatty J., 1995, PCA Research and Development Bulletin RD109T, Role of Minor Elements in Cement Manufacture, Prepared for the Portland Cement Association
>
> Chadbourne J. 1990, Behaviouir (*sic*) of toxic metals in cement kilns, Prepared for the Portland Cement Association, Emerging Technologies in Resource and Emission Reduction in the Cement Industry, Dallas Texas, September 19-20, 1990
>
> Sprung S. 1988, Trace Metals Concentration Build-up and measures for reduction, English translation ZKG International, No 7/88 pp 251-257
>
> Sprung S. and W. Rechenberg 1994, Levels of Heavy Metals in Clinker and Cement, English translation ZKG International, No 7/1994, Volume 47, Volume 83 of CEMENT
>
> Xeller H. 2000, 3rd Advanced HTC Cement Production Seminar 2000, Heavy Metals, January 4, 2000, Prepared for the Heidelberger Zement Group Technology Centre."

[9] Letter from the EFCL, dated September 26, 2002.

[11] In respect to documents indicating the number of complaints received by the Approval Holder, it stated the information is not readily available, and it would require a "...significant amount of human and financial resources..." to gather the data. The Approval Holder further submitted that the "...documentation request is not relevant to the issues in this appeal, [therefore] Lehigh Inland is not prepared to voluntarily comply with Mr. Fitch's request."[10]

[12] On September 27, 2002, EFONES contacted the Board, indicating that they would also appreciate receiving a copy of the documents requested in the August 12, 2002 letter. They further submitted that they "...should not have to pay for the photocopying as these should have been part of the application and therefore the proponent should bear the costs."[11]

[13] EFONES also submitted that the information regarding previous complaints to the Approval Holder is relevant because the Director, under section 6(2)(h) of the *Approvals and Registrations Procedure Regulation*, Alta. Reg. 113/93 (the "Approvals Regulation"), should have reviewed the complaints and therefore, the Board, which holds a *de novo* hearing, should have the information available to it.[12]

[14] EFONES made reference to litigation that is pending in the Court of Queen's Bench involving the Approval Holder.[13] According to EFONES, the Approval Holder listed a number of documents in its Affidavit of Records related to incident reports and complaints. EFONES argued that it appeared the documents have already been compiled and should be relatively easy to reproduce.[14]

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10 Letter from the EFCL, dated September 26, 2002.

11 Letter from EFONES, dated September 27, 2002.

12 See: Letter from EFONES, dated September 27, 2002. Section 6(2)(h) of the Approvals Regulation states:
"A review may address the following matters, without limitation: ...
(h) the past performance of the applicant in ensuring environmental protection in respect of the activity."

13 The case referred to by EFONES is *Polytubes (West) Inc. et al.* v. *Inland Cement Limited et al.*, Action No. 1113 10024 (Alta. Q.B.).

14 See: Letter from EFONES, dated September 27, 2002.

[15] On October 3, 2002, the Approval Holder provided the six documents that were requested by the EFCL in their August 12, 2002 letter to EFONES and the EFCL.[15] Included with these documents was a statement for $44.30, expenses for photocopying the documents.

[16] On October 9, 2002, the Board received a formal request from the EFCL to compel the production of documents in the Approval Holder's control. In response to this request, the Board wrote to the Parties and established a procedure to receive written submissions on the issue of document production.[16]

[17] On November 5, 2002, the Board notified the Parties that the EFCL's motion was granted, and the Approval Holder was ordered to provide a copy of the documents to the Board and to provide a witness to speak to these documents at the Hearing. These are the Board's reasons for that decision.

II. SUMMARY OF ARGUMENTS

A. The EFCL

[18] In their request for the production of documents, the EFCL stated that they had received from the Approval Holder a copy of the documents as requested in the August 12, 2002 letter. However, they stated unequivocally that they had not given any undertaking to pay for the costs of photocopying the documents. They further concurred with EFONES when they stated that the Appellants should not have to pay for photocopying of documents that should have been part of the application materials. They continued:

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[15] See: Letter from Approval Holder to EFONES and the EFCL, dated October 3, 2002. The documents provided were:

"1. Application to Amend Approval #10339-01-00 on cd;

2. 'Role of Minor Elements in Cement Manufacture and Use' by Javed I. Bhatty, PCA Research and Development Bulletin RD109T;

3. 'Behavior of Toxic Metals in Cement Kilns' by John Chadbourne;

4. 'Trace Elements – Concentration Build-up and Measures for Reduction' by S. Sprung;

5. 'Levels of Heavy Metals in Clinker and Cement' by S. Sprung and W. Rechenberg;

6. '3rd Advanced HTC Cement Production Seminar 2000, Environment, Heavy Metals' by Horst Xeller...."

[16] See: Board's Letter, dated October 11, 2002.

> "...if an approval holder is going to rely on articles which an Appellant cannot, exercising reasonable diligence, find on his own, we see no reason why the Appellant should be saddled with the costs of the approval holder photocopying the articles. Effectively, the documents in question are Inland's documents, in the sense that a third party was unable to find them in the public domain. If Inland is going to refer to its own documents in support of its application, an Appellant should not have to pay to receive copies of those documents."[17]

[19] With respect to the reports documenting complaints and incidents, the EFCL argued that the documents are readily available and should not require significant human or financial resources to compile. Therefore, as the Approval Holder was unwilling to provide the documents voluntarily, the EFCL requested that the Board compel the Approval Holder to produce the following documents:

"1. Binder entitled Reportable Incidents 1997
2. Binder entitled Reportable Incidents January to August 1998
3. Binder entitled Reportable Incidents September to December 1998
4. Binder entitled Reportable Incidents 1999
5. Binder entitled Reportable Incidents January to June 2000
6. Binder entitled Reportable Incidents July to December 2000
7. Binder entitled 1997 Monthly Environmental Reports
8. Binder entitled 1998 Monthly Environmental Reports
9. Binder entitled 1999 & 2000 Monthly Environmental Reports
10. Letter re 1998 Annual Summary & Environmental Report
11. Letter re 1999 Annual Summary & Environmental Report
12. Letter re 2000 Annual Summary & Environmental Report."[18]

[20] The EFCL submitted that the documents requested are relevant to the issues in these appeals and are required for "...the full investigation of the matters into which the Board will be inquiring."[19] They argued that the documents would provide information on reported incidents during the past five years, and this information is relevant to the issue of the adequacy

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17 EFCL's Submission, dated October 9, 2002, at page 2.

18 EFCL's Submission, dated October 9, 2002, at pages 2 to 3.

19 EFCL's Submission, dated October 9, 2002, at page 4.

of the existing baseline data that "...either was considered by the Director in issuing the approval or should have been considered by the Director in issuing his approval."[20]

[21] The EFCL further argued that the documents are relevant to issues 6, 7, 8, and 9[21] as they pertain to the Director's decision to allow the continued use of the ESP on the existing kiln stack. They argued past performance is relevant as to whether ESP is the best available technology. They further stated that the number of trips in the past is relevant to the proposed notification system.

B. EFONES

[22] In their submission, EFONES submitted that the documents should be produced, as the Director should consider past performance of the applicant pursuant to section 6(2)(h) of the Approvals Regulation. They further argued that the documents are relevant to the issues in these appeals, particularly as they relate to:

> "1. Emission limits for particulate matter, sulphur dioxide, nitrogen oxides, heavy metals and radioisotopes;
>
> 2. Adequacy of existing baseline data;
>
> 3. Emission monitoring, including the type, location and frequency of monitoring;
>
> 4. Use of best available demonstrated technology;
>
> 5. Timeline for installation of baghouse;
>
> 6. Number of trips; and
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> 7. Local residents trip notification system."[22]

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20 EFCL's Submission, dated October 9, 2002, at page 4.

21 The issues referred to are:
Issue 6. use of best available demonstrated technology – see Approval Clauses 4.1.4 to 4.1.8;
Issue 7. timeline for installation of a baghouse – see Approval Clauses 4.1.34 to 4.1.37;
Issue 8. number of trips – see Approval Clauses 4.1.31 to 4.1.33;
Issue 9. local residents trip notification system.

22 EFONES' Submission, dated October 18, 2002, at pages 1 to 2.

[23] EFONES further argued the Approval Holder does have the documents in its possession as sworn in an affidavit filed with the Alberta Court of Queen's Bench.

[24] EFONES listed additional documents in the Approval Holder's possession that were included in the affidavit. The list included those designated by the EFCL plus the following additional documents:

> "1. Binder entitled Stack Violation Reports 1992;
> 2. Binder entitled Stack Violation Reports 1993;
> 3. Binder entitled Stack Violation Reports 1994;
> 4. Binder entitled Stack Violation Reports January to August 1995;
> 5. Binder entitled Stack Violation Reports September to December 1995;...
> 12. Binder entitled 1992 Monthly Environmental Reports;
> 13. Binder entitled 1993 Monthly Environmental Reports;
> 14. Binder entitled 1994 Monthly Environmental Reports;
> 15. Binder entitled 1995 Monthly Environmental Reports;
> 16. Binder entitled 1996 Monthly Environmental Reports;...
> 20. Letter re 1992 Annual Summary & Environmental Report...."[23]

C. Director

[25] In his submission, the Director noted that the request for documents is directed solely at the Approval Holder. However, the Director stated that none of the Appellants had brought these documents to the Director's attention during the application review period. He stated that the "...purpose of the legislation permitting persons who are directly affected to submit statements of concern, is to ensure that the Director in coming to a decision, has all information that those persons feel is relevant, so that the Director's decision completely reflects all of the available material."[24]

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[23] EFONES' Submission, dated October 18, 2002, at pages 2 to 3. These documents will be referred to as the "additional documents" in this decision.

[24] Director's Submission, dated October 23, 2002, at page 1.

[26] The Director admits that the Board can consider new evidence, but (somewhat surprisingly in our opinion) he questioned whether the information would be relevant in determining if the Director's decision was reasonable. The Director submitted that the Board should consider the fact that the Appellants did have the opportunity of submitting the documents, or notifying the Director of their existence, during the decision-making process but did not do so.[25]

D. Approval Holder

[27] The Approval Holder stated that the additional documents listed in EFONES' submission were only named in order to indicate that the documents exist. As they did not make a formal request for the production of these documents, the Approval Holder argued it is not compelled to produce the additional documents listed by EFONES.

[28] With respect to the documents requested by the EFCL, the Approval Holder submitted that the documents are not relevant to the issues in these appeals. It argued that the issues in these appeals relate to the amending approval and not the existing approval, and thus, even if the application had been denied, the existing approval would remain in effect and Inland Cement would continue to operate using natural gas as its fuel source. It argued that the "...issues in this appeal are therefore all within the context of changes that will occur as a result of the fuel change and not as to whether the existing plant ought to be allowed to continue operating."[26] Therefore, the Approval Holder argued the history of reportable incidents was irrelevant.

[29] The Approval Holder submitted that much of the information requested by the EFCL is contained in the application, primarily within the appendices. It concluded its submission by reiterating that the information is irrelevant and is already available to the Appellants, and therefore, the Board ought not compel the Approval Holder to produce the documents as listed in the EFCL's request.

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25 See: Director's Submission, dated October 23, 2002, at page 2.

26 Approval Holder's Submission, dated October 24, 2002, at page 2.

E. Rebuttal Submission – The EFCL

[30] In their rebuttal submission, the EFCL submitted that, because the Approval Holder had not argued to the contrary, the documents are in the power and possession of the Approval Holder and are readily available.

[31] In response to the Approval Holder's arguments that the documents were not relevant, the EFCL argued that if the documents were not relevant, why was the information derived from them included in the application materials? They further stated that the Approval Holder had identified the past performance of the ESP as an issue it had to address in its application.

[32] The EFCL further submitted that the Approval Holder's argument that the documents are irrelevant because it is an amending approval that has been applied for and not an approval is immaterial because the Board has determined the issues that will be heard.

[33] With respect to the argument that the information is contained in the application, the EFCL stated that only a brief summary is included, and therefore, not all of the information requested is contained in the application. They further argued "...the Appellants as parties adverse in interest to Inland are entitled to have produced the documents which apparently are the source of the information contained in the application."[27]

[34] In response to the Director's submission, the EFCL argued that it did not understand how it was the responsibility of the Appellants to bring documents that were in the power and control of a third party to the attention of the Director. They further argued that the entire record was not produced by the Director until after the Notices of Appeal had been filed, and therefore, the Appellants would not have known the documents were not part of the Record.

[35] The EFCL submitted that an appeal before the Board is a hearing *de novo*, and therefore the Board can review documents relevant to the issues in the appeal whether the documents were before the Director or not when he made his decision.

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27 EFCL's Rebuttal Submission, dated October 30, 2002.

III. DISCUSSION

A. The Board's Power to Compel the Production of Documents

[36] The Board's power to compel the production of documents is found in section 95(1) of the Act, which incorporates the provisions of the *Public Inquiries Act*, R.S.A. 2000, c. P-39. Section 95(1) of the Act states that the Board "...has all the powers of a commissioner under the *Public Inquiries Act*." Sections 4 and 5 of the *Public Inquiries Act* state:

> "4. The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.
>
> 5. The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench."

[37] Section 95(1) of the Act grants the Board the same powers as a commissioner of inquiry but does not extend the operation of the *Public Inquiries Act* itself to the Board. The Board does have the power to summon witnesses and require them to give evidence and produce documents, and it has the power to enforce its orders the same as a court of record in civil cases.

[38] Although the Board is given the same powers of enforcement as a court of record on civil cases and the same privileges and immunities as a judge of the Court of Queen's Bench, the power to require the production of documents is not perfectly identical to the civil court system. Therefore, the tests developed by the courts to determine when a person must produce documents during the discovery process will not apply directly to the Board. Among other things, the matters before the Board are *not* in the nature of civil litigation. The matters before the Board are in the nature of a statutory right of appeal, governed by developed principles of administrative law and, in particular, the principles of procedural fairness.

[39] In *Imperial Oil*,[28] the Board reviewed cases dealing with the interpretation of what was then sections 3 and 4 (now sections 4 and 5) of the *Public Inquiries Act* from Alberta and other jurisdictions with similar legislation.[29]

[40] A number of cases from Alberta make reference to sections 3 and 4 (now sections 4 and 5) of the *Public Inquiries Act*, but do not provide an explanation of how the sections should be applied.[30] For example, in the decision of *Calgary General Hospital Board* v. *Williams*,[31] the court does not interpret sections 3 and 4 (now sections 4 and 5) of the *Public Inquiries Act* but merely refers to the sections and confirms that the sections grant the Board the power to summon witnesses and compel the production of documents.

[41] The Board notes that section 4 of the Nova Scotia *Public Inquiries Act* uses similar language to the Alberta *Public Inquiries Act* and as a result, may provide some guidance, even though it is not binding.[32]

[42] In *Imperial Oil* and in this case, the Board finds the discussion by the court in *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*[33] useful. The Nova Scotia Supreme Court had reviewed an arbitrator's decision to order production of documents under section 4 of the Nova Scotia *Public Inquiries Act*.

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28 Document Production Motion: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001) Appeal No. 01-062-ID (A.E.A.B.) ("*Imperial Oil*").

29 The *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 4 and 5 replaced the *Public Inquiries Act*, R.S.A. 1980, c. P-29, s. 3 and 4 on January 1, 2002.

30 See: *Co-operators General Insurance Co.* v. *Alberta (Human Rights Commission)* (1991), 80 Alta. L.R. (2d) 73 (Alta. Q.B); *United Assn. of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488* v. *Alberta (Board of Industrial Relations)*, [1975] A.J. No. 270 (Alta. S.C.T.D.); and *Furniture and Bedding Workers Union, Local 33* v. *Alberta (Board of Industrial Relations)*, [1969] A.J. No. 12 (Alta. S.C.T.D.).

31 *Calgary General Hospital Board* v. *Williams* (1983), 26 Alta. L.R. (2d) 220 (Alta. C.A.).

32 Section 4 of the Nova Scotia *Public Inquiries Act* provides that:

> "The commissioner ... shall have the power of summoning before him ... any persons as witnesses and of requiring them to give evidence on oath orally or in writing ... and to produce such documents and things as the commissioner deems requisite to the full investigation of the matters into which he ... [is] appointed to inquire."

33 *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.).

[43] Justice Nathanson said that the power under section 5 of the Nova Scotia *Public Inquiries Act* allows the arbitrator to enforce the attendance of witnesses and to compel the witnesses to give evidence and produce documents. The Court also stated that the power to enforce the attendance of witnesses does not authorize the arbitrator to order the production of documents by other than witnesses or unless it is in connection with the witnesses testifying.[34] Justice Nathanson said that "...arbitrators do not have inherent jurisdiction to order production of documents..." and "...any such authority must be derived from the governing statutes."[35]

[44] Justice Nathanson also considered whether the documents in question were relevant. In doing do, he referred to Sopinka et al., *The Law of Evidence in Canada* (1992) and stated that "...the relevance of the documents sought to be produced is the relationship, connection or nexus between the documents and the matter being arbitrated."[36]

[45] In *Nova Scotia (Attorney General)* v. *Police Review Board (N.S.)*,[37] the Supreme Court of Nova Scotia referred to the relevance of evidence under section 4 of the Nova Scotia *Public Inquiries Act.* Justice Oland stated that the Board's authority to receive evidence is not without limits and that the Commissioners have the power to order the production of documents as they "...deem requisite to the full investigation of the matters which he or they are appointed to inquire." Justice Oland continued by stating that when the Police Review Board failed to consider and determine whether the testimony sought related to the investigation before it, it failed to meet the requirements of section 4 and was without jurisdiction to issue the subpoena.[38]

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34 *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.). On the issue of whether the arbitrator could order the production of documents, the Court stated at page 366:

> "Section 16(7) provides that the Labour Relations Board has the powers of a commissioner under the Public Inquiries Act, including the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce documents. This provision applies only to witnesses summoned to testify. In my opinion, it grants a power equivalent to the power to issue '*subpoenas duces tecum*' and does not grant the power to order production of documents by other than witnesses or on occasions not connected with the giving of evidence."

35 *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 360.

36 *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365.

37 *Nova Scotia (Attorney General)* v. *Police Review Board (N.S*) (1999), 178 N.S.R. (2d) 59 (N.S.S.C.).

38 *Nova Scotia (Attorney General)* v. *Police Review Board (N.S.)* (1999), 178 N.S.R. (2d) 59 (N.S.S.C) at

[46] Based on the courts interpretation of the *Public Inquiries Act*, the Board identified a number of principles that must be considered in order for the Board to compel the production of any documents. As stated in *Imperial Oil Limited*,[39] these principles are:

> "1. The documents being produced must be produced to the Board in order to help us resolve our appeal. The Board does not have the jurisdiction to order a party to merely produce documents to another party.
>
> 2. The Board's power is in the form of a *subpoena duces tecus*. The Board may only subpoena a witness and compel the witness to produce documents. The Board may not order the production of documents alone or without a witness. The evidence should be presented to the Board in the context of a witness testifying before the Board.
>
> 3. Any documents that the Board compels to be produced must be in the possession of the witness, if available, or the next best witness, and the Board requires him or her to attend and testify.
>
> 4. Any documents that the Board compels to be produced must be '...required for the full investigation of the matters into which ... [the Board is] appointed to inquire.' The documents that the Board compels to be produced must be necessary for the Board to consider the subject matter of the appeal before it.
>
> 5. The documents must be relevant to the matters before the Board. They must be related to, connected with, or have a nexus with the appeal before the Board."[40]

[47] Applying these principles to the appeals now before us, the order of the Board requires that:

> 1. The documents that the Board orders produced shall be produced to the Board.
>
> 2. The Approval Holder shall provide at least one witness at the Hearing, and this witness shall be the best person available and in the best position to speak to the documents that are produced.

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pages 69 to 70.

[39] See: Document Production Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

[40] See: Document Production Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.) at paragraph 65. (Footnotes omitted.)

[48] Before the Board can order the production of the documents, it must determine whether the documents are potentially relevant and necessary to the appeal and issues before the Board.

B. Potentially Relevant and Necessary

[49] In *Imperial Oil*, the Board determined that the Court's analysis in *Frenette*[41] is the starting point in assessing the issue of relevance. Therefore, in the Board's view, the test for potential relevance, as it relates to the exercise of its powers under the *Public Inquiries Act,* should take into account that the documents that a party is asking the Board to compel must "be related to, connected with, or have a nexus with the appeal before the Board"[42] and must be "...required for the full investigation of the matters into which ... [the Board is] appointed to inquire."[43]

[50] In law, a party has the right to know the case against them and the right to defend themselves.[44] Since its inception in 1993, the Board has ensured that the person affected by a decision of the Director, as well as the other parties to an appeal, has a complete copy of the Director's record. In the Board's view, these are fundamental principles of natural justice and procedural fairness. The Board notes that while the complete scope of the right to obtain the record of a decision-maker appears not to have been completely settled by the courts, there are some discussions that the right, depending on the nature of the decision, may be equivalent to that of *Stinchcombe*.[45]

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41 *Frenette* v. *Metropolitan Life Ins. Co.*, [1992] 1 S.C.R. 647. The Court, at page 692, determined that:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.... If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there is a compelling reason why he should not make it, e.g. the document is privileged."

42 See: *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365.

43 *Public Inquiries Act*, R.S.A. 2000, c. P-39, section 4.

44 *The Board of Education* v. *Rice*, [1911] A.C. 179 H.L. See also *Consolidated Bathhurst Packaging Inc.* v. *I.W.A. Local 2-69*, [1990] 1 S.C.R. 282.

45 *R.*. v. *Stinchcombe*, [1991] 3 S.C.R. 326. See also *Kullman* v. *Calgary (City) Police Commission*, [1995]

[51] As the Board has stated, in determining whether to order the production of documents, the proper test is as prescribed by section 4 of the *Public Inquiries Act*: "Are the documents potentially relevant and necessary to the issues that the Board is considering in the context of the appeal?"

C. Discussion

[52] In deciding if a document is relevant, the Board must remain cognizant of the issues in these appeals and decide if the documents are relevant and necessary to determine one or more of the specified issues.[46] As is discussed further below, in reviewing these issues and the documents requested, the Board concludes that the documents requested by the EFCL are specifically related to these issues in the following way:

A.J. No. 307 (Alta. Q.B.).

[46] The Board determined that the following issues will be included in the Hearing of these appeals:

1. emission limits for particulate matter, sulphur dioxide, nitrogen oxides, heavy metals and radioisotopes;
2. adequacy of existing baseline data;
3. emission monitoring, including the type, location and frequency of monitoring – see Approval Clauses 2.3.1, 3.2.5, 3.2.6, 3.2.10 to 3.2.12, 4.1.20 to 4.1.22, 4.126 to 4.1.29, 4.1.38 to 4.1.44, and 4.1.47 to 4.1.49;
4. appropriateness and validity of modeling methods and results;
5. appropriateness of including certain requirements in the Approval as opposed to making them requirements of the application, specifically:
   a. ambient air monitoring plans – see Approval Clauses 3.2.7 to 3.2.12,
   b. trial burn – see Approval Clauses 3.2.14 to 3.2.19,
   c. fugitive emission reduction plan – see Approval Clauses 3.2.20 to 3.2.25,
   d. use of landfill gas – see Approval Clauses 3.2.26 to 3.2.28, and
   e. information regarding the type and source of coal;
6. use of best available demonstrated technology – see Approval Clauses 4.1.4 to 4.1.8;
7. timeline for installation of a baghouse – see Approval Clauses 4.1.34 to 4.1.37;
8. number of trips – see Approval Clauses 4.1.31to 4.1.33;
9. local residents trip notification system;
10. adequacy of health impact assessment – see Approval Clauses 4.1.51 to 4.1.54;
11. appropriateness of health impact assessment update – see Approval Clauses 4.1.51 to 4.1.54;
12. ongoing consultation with local residents and local residents liaison committee;
13. need for the conversion to coal as a fuel source;
14. control of greenhouse gas emissions; and
15. use of tires as kiln fuel limited to Approval Clause 4.1.17.

See: Preliminary Issues: *Doull et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement* (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B).

1. emission limits for particulate matter, sulphur dioxide, nitrogen oxides, heavy metals and radioisotopes;
The documents requested by EFCL relate to this issue, as the reportable incidents would provide an indication of current emission rates for particulate matter. The environmental reports would provide the Board with an indication of emission levels of the other substances.
2. adequacy of existing baseline data;
The documents requested by EFCL relate to this issue, as the environmental reports would provide some information on the existing conditions and the environmental impacts.
3. emission monitoring, including the type, location and frequency of monitoring;
The documents requested by EFCL relate to this issue, as the reportable incidents would provide an indication of current emission rates for particulate matter and how these substances are monitored.
4. appropriateness and validity of modeling methods and results;
The documents requested by EFCL relate to this issue, as the reportable incidents would provide an indication of current trends in emissions and whether the modeling results reflect present conditions. This can then be used to determine if the forecast for future emissions is reasonable. The environmental reports would provide the Board with an indication of emission levels of the other substances.
5. appropriateness of including certain requirements in the Approval as opposed to making them requirements of the application, specifically: a. ambient air monitoring plans, b. trial burn, c. fugitive emission reduction plan, d. use of landfill gas, and e. information regarding the type and source of coal;
The documents requested by EFCL relate to this issue, particularly the environmental reports. These reports would provide an indication of whether it was reasonable for the Director to allow the switch to coal as a fuel source without prior plans in place for air monitoring and air emissions.
6. use of best available demonstrated technology;
The documents requested by EFCL relate to this issue, as the reportable incidents and the environmental reports would provide the Board with an indication of emission levels and whether the present technology is the best technology for the facility. The EFCL, in their letter dated October 9, 2002, stated that "...past performance of the ESP (as disclosed in incident and complaint reports) is surely relevant to the question whether the ESP is the best available demonstrated technology."
7. timeline for installation of a baghouse;
The documents requested by EFCL relate to this issue, as the reportable incidents and the environmental reports would provide the Board with an indication of the frequency of incidents,

the severity of the incidents, whether a baghouse should be installed now, or if the Director's decision to postpone the installment was reasonable. The EFCL stated in their letter of October 9, 2002, that the information would be relevant since "...a baghouse will only be required for the kiln stack if the trip frequency limit ... is exceeded."
8. number of trips; The documents requested by EFCL relate to this issue, as the reportable incidents and the environmental reports would provide the Board with an indication of the frequency of incidents, the severity of the incidents, whether a baghouse should be installed now, or if the Director's limits on trips is reasonable or obtainable. The EFCL stated in their letter of October 9, 2002, that the information would be relevant "... since a baghouse will only be required for the kiln stack if the trip frequency limit ... is exceeded."
9. local residents trip notification system; The documents requested by EFCL relate to this issue, as the reportable incidents and the environmental reports would provide the Board with an indication of the frequency and severity of the incidents. This would provide an indication of the type of notification system that may be required. The EFCL stated that the information in these documents would indicate the reasonableness of its proposal to implement a resident notification system.
10. adequacy of health impact assessment; The documents requested by EFCL relate to this issue, as the environmental reports would provide the Board with an indication of current conditions and raise any potential health impact concerns.
11. appropriateness of health impact assessment update; The documents requested by EFCL relate to this issue, as the environmental reports would provide the Board with an indication of current conditions and raise any potential health impact concerns that should be considered in the health impact assessment update.
12. ongoing consultation with local residents and local residents liaison committee; The Board notes that the documents requested would provide limited information regarding this issue.
13. need for the conversion to coal as a fuel source; The Board notes that the documents requested would provide limited information regarding this issue.
14. control of greenhouse gas emissions; and The documents requested by EFCL relate to this issue, as the environmental reports would provide the Board with an indication of emissions and if any steps have been taken by the Approval Holder to reduce greenhouse gas emissions.
15. use of tires as kiln fuel limited to Approval Clause 4.1.17. The Board notes that the documents requested would provide limited information regarding this issue.

[53] The Board must also consider the public interest element in all of its decisions, one part of which is to ensure document production. Therefore, the Board must assess the requested documents as relevant and necessary from the public interest viewpoint and order them produced as required; this is a component of the Board's public interest mandate in section 2 of the Act.[47]

[54] The issue of burning coal at Inland Cement and the possible emissions are a matter of public concern to all Albertans and, in particular, those living in the surrounding neighbourhoods. Thus, there is a strong public interest element in these appeals, and any documents that the Board orders to be produced must be relevant and necessary from the public interest viewpoint.

[55] All of the Parties agreed that the Board has the power to order the production of documents and a witness to speak to these documents.[48] As all of the documents requested were included in an affidavit filed by the Approval Holder in the Alberta Court of Queen's Bench,[49] and therefore a public document, the matter of privilege does not appear to arise.

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[47] Section 2 of the Act states:

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

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

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;...."

[48] See: EFCL's Submission, dated October 9, 2002; Director's Submission, dated October 23, 2002; Approval Holder's Submission, dated October 24, 2002; and EFONES' Submission, dated October 18, 2002.

[49] See: EFCL's Submission, dated October 30, 2002, with applicable portions of Affidavit attached regarding *Polytubes (West) Inc. and Polytubes (1977) Ltd.* v. *Inland Cement Limited and Lehigh Portland Cement Limited*, Action No. 0003-10024 (Alta. Q.B.).

[56] The issue the Board has to determine is whether the documents requested are relevant and necessary to the issues in these appeals. Though we have set this out in the Table above, we will make a few additional comments.

1. EFCL Document Production

[57] The documents requested by the EFCL are "reportable incident reports" and "environmental reports." Although there is no clear indication of the specific contents of these documents, the titles of the reports indicate that the documents may be relevant to the issues in these appeals. In particular, they would be relevant to the issues relating to emission limits and monitoring, adequacy of the baseline data, and the number of allowable trips. The reports would also be applicable to determining if the best available demonstrated technology is in place or if alternatives should be considered.

[58] One of the issues to be determined by the Board is the number of trips and whether the Director was reasonable in allowing up to 10 trips.[50] Recent history is one manner in which the appropriateness of this number can be assessed. The Board notes it may not be determinative evidence, but it may certainly be helpful and relevant. For example, if the Approval Holder has been surpassing the allowable limits for a number of years or excessively, it would be unreasonable to expect a substantial improvement instantly. This type of information, if presented to the Board, could be beneficial to the Approval Holder as well as the Appellants to determine if the requirements of the Approval were reasonable. If these reports are presented in evidence at the Hearing, the Board will determine the applicable weight they should be given.

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[50] See: Amending Approval 10339-01-03, Clauses 4.1.31 and 4.1.32.

[59] Interrelated to the issue of the number of trips is the public concern with these incidents. If the Approval Holder has been receiving complaints from those living in the surrounding communities, the frequency of these complaints is relevant to the issue of implementing a reliable system for notifying residents of the trips. This type of information can assist in determining the type of notification system that would be reasonable, if any. This information can also provide an insight into whether it was reasonable for the Director to receive air monitoring plans and fugitive emission reduction plans after coal is used as a fuel source instead of implementing the plans prior to the fuel switch.

[60] Under section 6(2) of the Approvals Regulation, the Director can look at past performance of an approval holder to determine if an amendment should be allowed. Section 6 states:

> "(1) The review of an application shall be conducted to determine whether the impact on the environment of the activity, the change to the activity or the amendment, addition or deletion of a term or condition of an approval is in accordance with the Act and the regulations made under the Act.
>
> (2) A review may address the following matters, without limitation:...
>
> (h) the past performance of the applicant in ensuring environmental protection in respect of the activity."

Several judicial decisions have informed the Board that our hearing is *de novo*, and the Director and Approval Holder conceded this.[51] Thus, the Board should look at additional evidence that the Director did not have when he made his decision to issue the Approval.[52] Further, when the Board provides recommendations to the Minister, the Minister has the power to confirm, reverse

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[51] See: *Graham* v. *Alberta (Director, Chemical Assessment and Management, Environmental Protection)* (1997), 23 C.E.L.R. (N.S.) 165 (Alta. C.A.); and *Chem-Security (Alberta) Ltd.* v. *Lesser Slave Lake Indian Regional Council and Environmental Appeal Board (Alberta)*, [1997] A.J. No. 738 (Alta. C.A.).

[52] Section 95(2)(d) states:

> "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:
>
> (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...."

or vary the decision of the Director,[53] and therefore, it is prudent upon the Board to hear all relevant information to enable it to present a thorough and balanced report to the Minister.

[61] The "environmental reports" are relevant to the issue of the adequacy of the baseline data, and therefore are squarely within the Board's jurisdiction. The Approval Holder did not dispute the relevancy of the documents, other than to comment that the application was in respect to an amendment of an existing approval and not the renewal of an approval. Therefore, according to the Approval Holder, the issue of past performance is irrelevant as it is a measure of existing technology and not the technology being approved.

[62] While the Board recognizes that these appeals are in response to the *amendments* of an existing approval, the Board needs to know if the alternate fuel source switch to coal, along with its environmental consequences, is still reasonable and practical. Therefore, past environmental performance of the facility, and how it might operate with this fuel switch, is relevant to the issues in these appeals, primarily as it relates to baseline data and use of best available technology. If the facility was operating with minimal disturbance to the environment, the Board could view the present ESP system as appropriate for the facility and the Approval Holder was using best available technology. In the alternative, it may become evident to the Board that better alternatives exist that would reduce emissions further.

[63] The documents requested by the EFCL relate to reports complied by the Approval Holder during the past five years. The information is therefore current and pertains to the issue of whether the Director had sufficient information before him, including baseline data, to issue the Approval.

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[53] Section 100(1) states:

"On receiving the report of the Board, the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that he person whose decision was appealed could make,

(b) make any decision that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[64] As indicated in the affidavit provided with the motion of the EFCL, the documents in question have been prepared for litigation in the Court of Queen's Bench. The Board can only assume the Approval Holder would retain a copy in its own litigation file and therefore, the documents would be readily available. Thus, the Board must reject the argument that it would take considerable time for the Approval Holder to compile the documents.

[65] In other Board decisions, we recognized that one of the roles of the appeal process is to make a better approval.[54] This goal can only be realized if all of the relevant information is reviewed by other parties to an appeal and ultimately the Board.

[66] The Approval Holder must also realize, as we do, that the information produced may actually support its position and that of the Director.

2. EFONES Document Production

[67] In their submission, EFONES listed documents not included in the EFCL submission. However, the submission provided by EFONES was just that – a submission. They did not make a formal request to order the production of the additional documents, and therefore, the Board will not require the Approval Holder to provide the following additional documents:

1. Binder entitled Stack Violation Reports 1992;
2. Binder entitled Stack Violation Reports 1993;
3. Binder entitled Stack Violation Reports 1994;
4. Binder entitled Stack Violation Reports January to August 1995;
5. Binder entitled Stack Violation Reports September to December 1995;

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[54] In the Board decision of Issues Decision: *Carmichael et al.* v. *Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.) at paragraph 44, the Board states:

> "The Board agrees with the Directors when it was stated that the principle of the process is to develop a better approval. However, the Directors must also realize that the term "better" is subjective, and what one person may consider better may not necessarily mean the same thing to another person. The fact that it may be a better approval does negate an individual's right to challenge the approval if they disagree with the Director or if they know of ways to improve the approval. That is why we are here."

See also: *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (22 April 2002), Appeal No. 01-096 (A.E.A.B.) at paragraph 31.

6. Binder entitled 1992 Monthly Environmental Reports;
7. Binder entitled 1993 Monthly Environmental Reports;
8. Binder entitled 1994 Monthly Environmental Reports;
9. Binder entitled 1995 Monthly Environmental Reports;
10. Binder entitled 1996 Monthly Environmental Reports; and
11. Letter re 1992 Annual Summary & Environmental Report.

[68] The Board notes that even if EFONES had filed a formal motion to produce these documents, the Board would not be prepared to grant the request. The recent reports are more relevant to the issues, especially as they relate to baseline data. The more recent reports also provide information on the current operation and old data, although they may be valuable in showing the success of any improvements made at the facility they would have limited value in providing baseline data.

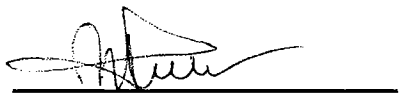
[69] The Board is also concerned with the Approval Holder's request that the other Parties to these appeals pay the costs for photocopying the documents. Parties have a right to request specific documents from parties adverse in interest, and it is the Board's hope that, in the spirit of cooperation, the documents would be provided. In these appeals, EFCL had searched for the documents prior to making the request to the Approval Holder and before filing the document production motion with the Board. The documents were in the possession of the Approval Holder, were accessible and therefore easily compiled. If there was a dispute regarding the production of the documents, parties have the right, as they did in these appeals, to make a motion to the Board to compel the production of the documents. In this case, for reasons stated above, we agree with the Appellants.

IV. DECISION

[70] Pursuant to section 95 of the *Environmental Protection and Enhancement Act*, the Board orders Inland Cement to provide a witness to speak to and produce copies of each of the following documents:

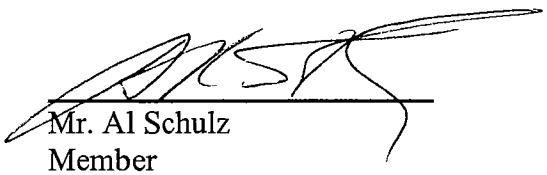
1. Binder entitled Reportable Incidents 1997;
2. Binder entitled Reportable Incidents January to August 1998;
3. Binder entitled Reportable Incidents September to December 1998;
4. Binder entitled Reportable Incidents 1999;
5. Binder entitled Reportable Incidents January to June 2000;
6. Binder entitled Reportable Incidents July to December 2000;
7. Binder entitled 1997 Monthly Environmental Reports;
8. Binder entitled 1998 Monthly Environmental Reports;
9. Binder entitled 1999 & 2000 Monthly Environmental Reports;
10. Letter re 1998 Annual Summary & Environmental Report;
11. Letter re 1999 Annual Summary & Environmental Report; and
12. Letter re 2000 Annual Summary & Environmental Report.

Dated on February 13, 2003, at Edmonton, Alberta.



William A. Tilleman, Q.C.
Chair

Dr. Steve E. Hrudey
Member



Mr. Al Schulz
Member