ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting – January 28, 2003
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 an appeal filed by Ian Skinner with respect to Amending Approval No. 19284-01-01 issued to Inland Aggregates Limited and Amending Approval No. 19283-01-01 issued to Lafarge Canada Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Skinner* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Aggregates Limited* and *Lafarge Canada Inc.* (13 February 2003), Appeal Nos. 02-086 and 02-087-D (A.E.A.B.).

PRELIMINARY MEETING BEFORE: William A. Tilleman, Q.C., Chair,
Mr. Ron V. Peiluck, and
Dr. Alan J. Kennedy.

APPEARANCES:

Appellant:	Mr. Ian Skinner.
Director:	Mr. Park Powell, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.
Approval Holders:	Inland Aggregates Limited, represented by Ms. Marie H. Buchinski, Bennett Jones LLP; and Lafarge Canada Inc., represented by Mr. Brendan Vickery, Lafarge Canada Inc.
Board Staff:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Valerie Higgins, Registrar of Appeals.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Inland Aggregates Limited authorizing the opening up, operation, and reclamation of a pit on portions of sections 19, 20, 29, and 30-54-26-W4M and an Amending Approval to Lafarge Canada Inc., authorizing the opening up, operation, and reclamation of a pit on portions of section 16, E 17 and SW 21-54-26-W4M, in Sturgeon County, Alberta. The Amending Approvals allowed Inland and Lafarge to mine through a buffer zone between these two adjacent pits.

The Board received two Notices of Appeal from Mr. Ian Skinner, appealing the Amending Approvals.

A preliminary meeting was held at the Board office to determine whether Mr. Skinner was directly affected, if a Stay should be granted, and whether the appeals were frivolous or without merit.

Mr. Skinner withdrew his Stay application as the removal of the buffer zone as authorized under the Amending Approvals was completed.

The Board determined that Mr. Skinner failed to demonstrate to the Board that he would be directly affected by the removal of the buffer zone. The Amending Approvals were with respect to a very small portion of the total affected area, and as Mr. Skinner was located approximately six miles from the pits, it was unlikely that his groundwater would be affected. Further, given the fact that the buffer zone has now been removed, the appeals are moot.

Therefore, the Board dismissed the appeals.

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I. BACKGROUND

[1] On October 21, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 19284-01-01 (the "Inland Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act" or "EPEA") to Inland Aggregates Limited ("Inland") authorizing the opening up, operation, and reclamation of a pit on portions of sections 19, 20, 29, and 30-54-26-W4M in Sturgeon County, Alberta. On the same date, the Director also issued Amending Approval No. 19283-01-01 (the "Lafarge Approval") to Lafarge Canada Inc. ("Lafarge") authorizing the opening up, operation, and reclamation of a pit on portions of section 16, E 17 and SW 21-54-26-W4M, also in Sturgeon County, Alberta. The Inland Approval and the Lafarge Approval (collectively the "Approvals") allow Inland and Lafarge (collectively the "Approval Holders") to mine though a buffer zone that separates the two pits (the "Pits").

[2] On November 28, 2002, the Environmental Appeal Board (the "Board") received two Notices of Appeal from Mr. Ian Skinner (the "Appellant") appealing the Approvals.

[3] On November 29, 2002, the Board wrote to the Appellant, the Approval Holders, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal. In the same letter the Board also requested that the Director provide the records (the "Record") relating to the appeals and requested that the Parties provide their available dates for a mediation meeting 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 review or hearing under their respective legislation. Both Boards responded in the negative.

[5] On December 12, 2002, the Appellant submitted a request for a Stay to prevent work from proceeding under the Approvals.

[6] On December 13, 2002, the Director submitted a motion to dismiss the Notices of Appeal for being frivolous and without merit, and he further stated that the Appellant is not directly affected by the Approvals.

[7] On December 19, 2002, the Board wrote to the Parties and advised them that the Board had decided to schedule a written submission process in order to deal with Mr. Skinner's requests for a Stay and the Director's motions to dismiss the appeals. In these letters, the Board requested the Parties comment on the following questions:

1. What is the serious concern that Mr. Skinner has that should be heard by the Board?
2. Would Mr. Skinner suffer irreparable harm if the Stay is refused?
3. Would Mr. Skinner suffer greater harm for the refusal of a Stay pending a decision of the Board on the appeal than Inland Aggregates Ltd./Lafarge Canada Inc. would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?[1]

The Board also requested the Parties comment on the directly affected status of the Appellant and the Director's motions to dismiss the appeals as being frivolous and without merit. The Appellant responded to the Board's questions on December 24, 2002, and responses from the Director and Approval Holders were received on January 3, 2003. The Appellant provided a rebuttal submission on January 9, 2003.

[8] After reviewing the submissions and consulting with the Parties, the Board decided to schedule a Preliminary Meeting for January 28, 2003, at the Board's office in Edmonton, Alberta.

II. SUBMISSIONS

A. Appellant

[9] In his written submission, the Appellant argued that allowing the buffer area to be removed by the Approval Holders would negatively affect the groundwater in the area, as mining removes the hydraulic connection, creating cumulative effects and interference with the

[1] Board's Letters, dated December 19, 2002.

groundwater.[2] He also submitted that the interference in surface and groundwater "…eliminates any recharging of springs and surface water discharge to the river bed."[3]

[10] The Approval Holder also submitted that the removal of gravel includes the removal and interference with vast amounts of groundwater, exposing the water to evaporation and contamination. He continued this argument by stating that there is a hydraulic connection between the settling ponds and the aquifer, and therefore there is the potential for groundwater contamination.[4]

[11] The Approval Holder referenced a statement made by Mr. Robert George, a hydrogeologist with Alberta Environment, when he stated:

> "…'there has been very limited investigation of the impacts of groundwater diversion during gravel mining in the past, and no continuous monitoring of groundwater levels in the area. We therefore cannot accurately evaluate the various factors that have caused changes in the water level in the aquifer in the past or predict future aquifer water levels.'"[5]

Therefore, according to the Appellant, groundwater interference has been identified and further effects may be irreversible.

[12] In his rebuttal submission, the Appellant argued that the current Hydrogeological Map Report 74-10 Hydrogeology of the Edmonton Area (Northwest Segment) and report indicate a "…direct hydraulic link between my water source and the source being mined by the gravel/metallic and industrial mineral mining in the area."[6] He further argued that a comprehensible hydrogeological analysis should be completed to determine the extent of the impacts mining has on the groundwater in the area.

[13] The Appellant stated that he has two wells on his property. The first well was affected by industry and was proven unusable for household purposes. Therefore, a second well was drilled sometime between 1994 and 1996.

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2 See: Appellant's Submission, dated December 24, 2002, at page 2.

3 Appellant's Submission, dated December 24, 2002, at page 2.

4 See: Appellant's Rebuttal Submission, dated January 9, 2003, at page 2.

5 Appellant's Submission, dated December 24, 2002, at page 3.

6 Appellant's Rebuttal Submission, dated January 9, 2003, at page 1.

[14] With respect to the issue of being directly affected, the Appellant argued that the term "…does not have time or distance attached to it, and to even suggest it, displays a total disregard to cumulative and time related impacts as the environment has no boundaries."[7] He further argued that he is directly affected for the following reasons:

> "As a resident within the area designated the Calahoo/Villeneuve Area Structure Plan in Sturgeon County; not being given the opportunity to give a statement of concern on these approvals; the temporary road closure of Range Road 264 north of SH633 for the removal of gravel beneath the roadbed that borders these properties on a[n] agreement prior to the Area Structure Plan directly affects prejudicially due to removing the recreational access to the Sturgeon River a navigatibale (*sic*) waterway; loosing the hydraulic connection of the water to the aquifer; the removal of the buffer zone; the water permit to allow pumping out of the aquifer; and potential for groundwater contamination…."[8]

[15] In response to Lafarge's concern that it may lose business if the Stay was granted, the Appellant stated he was "…not surprised that industry would state that lost business from an extremely small portion of land is worth more than someone losing there (*sic*) water, therefore putting profits ahead of human ecology, especially when this buffer zone originally was to be left in its natural state."[9]

[16] Yet, at the Preliminary Meeting, the Appellant stated that "…a 'Stay' is no longer useful in these appeals, based on the fact that the environmental buffer zone was mined prior to approval…."[10] He argued that he is still:

> "…directly affected as it is the shared responsibility of all Albertan citizens for ensuring the protection, enhancement and wise use of the environment through individual action. The words 'directly affected' does [*sic*] not have time or distance attached to it, and to even suggest it, displays a total disregard to cumulative impacts as the environment has no boundaries."[11]

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7 Appellant's Rebuttal Submission, dated January 9, 2003, at page 3.

8 Appellant's Rebuttal Submission, dated January 9, 2003, at page 5.

9 Appellant's Rebuttal Submission, dated January 9, 2003, at page 3.

10 Exhibit 1.

11 Exhibit 1.

He also argued that he is directly affected because "…buffer zones [act as] 'areas to promote wildlife habitat and act as a natural filtration system to remove unwanted substances before they enter a water body.'"[12] The Appellant said:

> "There appears to be an act of negligence and wreckless [*sic*] disregard for the environmental approvals process, the environmental buffer zone, the aquifer/groundwater and surface water systems and the bio regional sustainability of the Sturgeon River Watershed, identified as a 'sensitive area', by unauthorized mining."[13]

Finally, at the Preliminary Meeting, in response to a question from the Board with respect to his well, he indicated, somewhat surprisingly, that he had not monitored his well for quantity or quality of the water.

B. Director

[17] The Director argued that the appeals were without merit and frivolous as a buffer between two separate and distinct gravel pits effectively becomes a berm "…which has the effect of isolating a resource as well as creating a potential hazard and a landscaping impediment."[14] According to the Director, he was the one who requested the Approval Holders apply to amend their approvals.[15]

[18] The Director stated there is no connection between the area identified in the Approvals and the groundwater referred to in the Appellant's Notices of Appeal. The Director further argued that the Appellant appears to live six miles from the Pits, and a number of issues mentioned in his Notices of Appeal do not relate to the decision to allow the removal of the buffer area. Thus, according to the Director, the Appellant is not directly affected.

[19] With respect to the issue of the Stay, the Director stated that the area included in the Lafarge Approval covers approximately 0.6 acres, compared to the 360 acres included in Lafarge's original approval, and 0.6 acres as compared to the 425 acres included in the original approval to Inland. He further argued that the buffer area would effectively become a berm,

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12 Exhibit 1.

13 Exhibit 1.

14 Director's Letter, dated December 13, 2002.

15 See: Director's Letter, dated December 13, 2002.

"…denoting the property boundary that from a visual perspective is an impediment to the landscaping requirements of the Department's criteria for gravel operations and amounts to a sterilization of a resource."[16] The Director submitted that the buffer area could be a safety concern if the Approval did not proceed. As the Director had requested the Approval Holders submit the applications, and the area involved is relatively small, the Director submitted that there is no serious issue to be determined.[17]

[20] The Director argued the Appellant would not suffer irreparable harm as a result of the Approvals, as the Appellant's residence is sufficiently far from the site that he would not be affected by the mining operations authorized under the Approvals. Based on the premise that the Appellant would not suffer any irreparable harm, the Director argued that the Approval Holder would suffer greater harm than the Appellant if the Stay were granted. The Director also submitted that the overall public interest does not warrant the granting of a Stay.[18]

[21] The Director argued that, as the removal of the buffer area would not affect groundwater at the Appellant's residence, the Appellant would not suffer any harm "…that is greater than any harm that is associated with other members of the general public…."[19] Thus, according to the Director, the Appellant is not directly affected.

[22] In response to the issue of the appeal being without merit or frivolous, the Director argued that the impact of the Approvals would be "extremely minor" in terms of the Approval Holders' entire operations at the Pits, and therefore, these appeals are not likely to succeed. The Director further submitted that the Appellant

> "…has concerns with respect to a large number of operations within an area and has chosen to file a Notice of Appeal with respect to an extremely small or minor aspect of his general concerns and is attempting to promote his overall general views through the forum of the Environmental Appeal Board. It is the submission of the Director that this is an entirely inappropriate place to present these concerns and would operate as an unwarranted waste of the Board's resources."[20]

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16 Director's Submission, dated January 3, 2003, at page 2.

17 See: Director's Submission, dated January 3, 2003, at page 2.

18 See: Director's Submission, dated January 3, 2003, at page 3.

19 Director's Submission, dated January 3, 2003, at page 3.

20 Director's Submission, dated January 3, 2003, at page 4.

[23] At the Preliminary Meeting, the hygrogeologist for Alberta Environment, Mr. Robert George, testified that it was unlikely there was a continuous layer of gravel over the six miles between the Pits and the Appellant's well, but there may be an indirect connection. He further stated that it does not mean that there would not be a drop in the flow rate due to the gravel mining, but at this point, there is not enough information available to make the connections. Mr. George also explained the monitoring well system that has been established to determine if the mining operations have an effect on groundwater in the area. Finally, with respect to Mr. Skinner's well, Mr. George indicated that it was his information that Mr. Skinner's well had a 50 foot head, and as a result, it would be unlikely for gravel extraction operations to have any impact on the well, because a 10 foot head would be quite safe.

C. Inland

[24] Inland argued that the Appellant is not directly affected, as he did not provide any evidence "…of any direct affect upon him or any resources used by him as a result of the issuance of the Amending Approval."[21] (Emphasis in the original.) Inland stated that although the Appellant had general concerns regarding water issues in the area, he failed to provide specific evidence how the Inland Approval would directly affect him. Inland also argued that the Appellant referred to water policy and legislation and not specifically the Inland Approval, and these generalized concerns are not sufficient to find the Appellant directly affected.

[25] It was further argued that the Appellant had failed to provide any evidence on how the Inland Approval would remove the hydraulic connection in the area. Inland agreed with the views expressed by Alberta Environment hydrogeologists that there is no connection between the buffer zone and the groundwater used by the Appellant.

[26] Inland stated that the Approval affects only a small portion of the total lands that are subject to the original approval. It further stated that the Director had requested that it amend its approval. Inland submitted that, as the Director determined it to be routine matter and,

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[21] Inland's Submission, dated January 3, 2002, at page 2.

therefore, would have a "minimal" or "no adverse effect" on the environment, it could not affect someone six miles away if there is no affect locally.[22]

[27] Inland supported the Director's motion to dismiss the appeal because it was without merit and was frivolous. According to Inland, the grounds for dismissing the appeal were:

> "…that Mr. Skinner's appeal has little prospect of succeeding because he is not directly affected by the Amending Approval, the Amending Approval concerns a routine matter that will not result in any adverse environmental effects, and because Mr. Skinner is seeking relief … that is of a policy or legislative nature which is not relevant to the Amending Approval."[23]

[28] In response to the Stay application, Inland argued that the onus of substantiating the need for a Stay is on the person making the application, and as the Appellant did not address any of the Board's questions regarding the Stay, the application should be denied.[24]

[29] At the Preliminary Meeting, Inland confirmed that mining of the buffer zone between the Inland pit and the Lafarge pit had already been completed.

D. Lafarge

[30] Lafarge stated that removal of the buffer area would provide for "…reduced or flatter grades between the properties when final reclamation is completed, allowing for improved land capabilities, improved visual aesthetics and reducing potential safety concerns."[25]

[31] Lafarge further stated that it was unaware of any effect on the wells located at the Appellant's residence that is attributable to the operations of the Pits, and the information provided by the Appellant was associated with sand and gravel pits in the region and not specifically with the issue in the Lafarge Approval.[26] Lafarge stated that the Appellant "…provides no direct or specific evidence with respect to water or groundwater that can

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22 See: Inland's Submission, dated January 3, 2002, at page 3.

23 Inland's Submission, dated January 3, 2002, at pages 3 to 4.

24 See: Inland's Submission, dated January 3, 2002, at page 4.

25 Lafarge's Submission, dated January 3, 2003.

26 See: Lafarge's Submission, dated January 3, 2003.

establish any reasonable probability of harm or impact to the water supply on the Skinner property as a result of any pit operations on the Lafarge property."[27]

[32] As Lafarge did not find any evidence to illustrate how the Appellant would be harmed or impacted by the Approval, it did not believe that the Appellant would suffer irreparable harm if the Stay was denied. However, Lafarge argued that it would suffer greater harm if the Stay was granted because of the potential loss of sales and business if it could not access the aggregate source for any extended period of time, and there would be an "…increased potential for negative perceptions by the general public of Lafarge businesses, activities and operations…."[28]

[33] Lafarge submitted that the overall public interest would not warrant a Stay, as there is no specific or direct evidence to suggest any "…reasonable probability of harm or impact to water supplies…" due to the existing Pit operations.[29]

[34] Lafarge argued that the Appellant is not directly affected because he has not provided any evidence that indicates that water supply on his property would be affected by the operations of the Pits; any effect is on Lafarge's property; he has no interest in adjacent properties; and he lives more than eight kilometres west of the site.[30]

[35] Lafarge agreed with the Director that the appeal was without merit or frivolous.

[36] At the Preliminary Meeting, Lafarge also confirmed that mining of the buffer zone between the Inland pit and the Lafarge pit had already been completed. Further, Lafarge indicated that they had done environmental studies on the impact the removal of the buffer area would have and concluded that there would be no negative environmental impacts.

III. DISCUSSION

[37] The Board has three motions before it: the Appellants application for a Stay, whether the Appellant is directly affected, and whether the appeals are frivolous or without

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27 Lafarge's Submission, dated January 3, 2003.

28 Lafarge's Submission, dated January 3, 2003.

29 See: Lafarge's Submission, dated January 3, 2003.

30 See: Lafarge's Submission, dated January 3, 2003.

merit. As a result of the new evidence presented at the Preliminary Meeting, the Board also needs to consider whether the appeals are moot.

A. Stay Application

[38] Filing an appeal with the Board does not automatically stay the decision being appealed. Sections 97(1) and (2) of EPEA provide:

> "(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."

[39] At the commencement of the Preliminary Meeting, the Appellant stated that the issue of the Stay was "no longer useful" as the work allowed under the Approvals had been completed, and the Approval Holders verified that the buffer area has been removed. As a result, the Appellant advised that he did not wish to proceed with his Stay application.

[40] Therefore, the Board accepts the withdrawal of the Stay application, and the Board will only consider this evidence with respect to whether these appeals are now moot.

B. Directly Affected

[41] Under section 91 of EPEA, an individual who is directly affected by the decision of the Director – here the issuance of the Approvals – has the right to file a notice of appeal with the Board.[31] Therefore, before the Board can accept the notice of appeal as valid, the individual must show that he or she is directly affected. The Board has examined the term "directly affected" in a number of previous appeals, thus providing a framework to determine if appellants

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[31] Section 91(1) of EPEA provides:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
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> (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…
>
> (ii) by the approval holder or by any person who is directly affected by the Director's decision in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3)."

should be given standing to appear before this Board. Although this framework is in place, the Board recognizes that there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.[32]

[42] The requisite test in determining directly affected has two elements - the decision must have an affect on the person and that affect must be directly on the person. In *Kostuch*,[33] the Board stated "…that the word 'directly' requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question."[34]

[43] The principle test for determining directly affected was stated in *Kostuch*:

> "Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' means the person claiming to be 'affected' must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.
>
> Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[35]

[44] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "…must have a substantial interest in the outcome of the approval that

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[32] See: *Fred J. Wessley* v. *Director, Alberta Environmental Protection* (2 February 1994) (A.E.A.B.) (Appeal No. 94-001).

[33] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) (E.A.B. Appeal No. 94-017) ("*Kostuch*").

[34] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (A.E.A.B.) (E.A.B. Appeal No. 94-017).

[35] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (A.E.A.B.) (E.A.B. Appeal No. 94-017). These passages are cited with approval in *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

surpasses the common interest of all residents who are affected by the approval."[36] In *Kostuch* the Board considered its previous decision in *Ross*[37] saying directly affected "…depends upon the chain of causality between the specific activity approved…and the environmental effect upon the person who seeks to appeal the decision."[38]

[45] Further, in *Kostuch* the Board states that the determination of directly affected is a

> "…multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act."

The Board further stated that

> "…if the person meets the first test, then they must go on to show that the action by the Director will cause a direct effect on the interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified."[39]

[46] A similar view was expressed in *Paron* where the Board held that the

> "…Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision."[40]

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[36] *Ross* v. *Director, Environmental Protection* (24 May 1994), (A.E.A.B.) (Appeal No. 94-003) ("*Ross*").

[37] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (A.E.A.B.) (E.A.B. Appeal No. 94-017).

[38] *Ross* v. *Director, Environmental Protection* (24 May 1994) (A.E.A.B.) (E.A.B. Appeal No. 94-003).

[39] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (A.E.A.B.) (E.A.B. Appeal No. 94-017).

[40] *Paron et al.* v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001) at paragraph 22 (A.E.A.B.) (Appeals No. 01-045, 01-046, and 01-047-D) ("*Paron"*).

[47] *Paron* also reminds us that the onus to demonstrate this unique interest, to show they are directly affected, is on the Appellant. In *Paron*, the Board held that:

> "Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected."[41]

The Board's Rules of Practice also make it clear that the onus is on the Appellant to prove that he is directly affected.[42]

[48] The Board still adheres to the two-step approach in determining directly affected, and the individual must pass both parts of the test. It is not enough to show that an individual is affected by an activity, as arguments can be presented to show countless individuals are affected by the Director's decision, but in reality only a few can show they are *directly* affected.

[49] In these appeals, the Board accepts the groundwater in the area is connected on a regional scale. However, in reviewing the piezometric graph[43] provided by the Director, there is a strong indication that isolated blocks have developed in the groundwater regime. This may be the result of localized disconformities (impurities mixing with the gravel layer) creating independent pockets that are not clearly connected. Although Mr. George stated that it is not impossible for the water to move from one area to the other, the Board accepts that it is highly unlikely.

[50] Mr. George further explained that even though he could not state that "…no drop of water could never flow from the location where you [the Appellant] are to the location where the pits are…," the flow would be indirect, and any change in the pressure at the Pits would not

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41 *Paron et al*. v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001) at paragraph 24 (A.E.A.B.) (Appeals No. 01-045, 01-046, and 01-047-D).

42 Section 29 of the Board's Rules of Practice provide:

"Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence."

43 See: Exhibit 2, page 4.

be easily transmitted to the Appellant's location. According to Mr. George, a "…torturous indirect connection is quite likely, but a direct connection … is not very likely."[44]

[51] In reviewing the piezometric graph, the Director explained the monitoring well closest to the Pits was affected by the operation of the Pits. Although there is a slight fluctuation in the other monitoring wells, including the one closest to the Appellant's residence, the Board does not consider the difference in levels significant. The Board also notes that the Director is aware of these fluctuations, but he explained there is insufficient data at this time to determine the cause of the fluctuations. He stated these changes might be a result of seasonal changes and not operation of the Pits. Until further data are collected and analyzed, the cause of the fluctuations would be merely conjecture and not evidence the Board can place much weight on.[45]

[52] The Board notes that the Onoway River Valley Conservation Association (the "Association") drafted a series of suggestions it wanted incorporated into an environmental plan for the area. With respect to water use, this Association requested well sampling be undertaken of wells "…within a 3 km. area of active pits interfering with surface or ground water systems…" and if impacts are identified, the sampling area was to be increased.[46]

[53] Even though the Appellant was aware of the distance limitation recommended by the Association, and that his property was roughly three times as far away, the Appellant still argued he would be directly affected. The Board notes these distance recommendations were made based on the activities within the entire area of the Pits and not just the buffer area. Therefore, it is difficult for the Board to accept the Appellant's arguments that he will be affected by the activities in the Pits, let alone the removal of the buffer area.[47]

[54] The Board also notes that the Appellant was living in the area at the time the approvals for the main operations were renewed in 1997. It appears it would have been more

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[44] Preliminary Meeting Tape.

[45] The Board applauds the efforts of the municipalities, industry, and Alberta Environment for establishing a water monitoring system in the area as part of the Area Structure Plan. This is an important step in gathering information to determine the effect of these industries on groundwater regimes in the area.

[46] See: Appellant's Letter with Attachments, dated November 4, 2002, Letter from Onoway River Valley Conservation Association to Mr. Brendan Vickery, dated July 17, 2002.

[47] Although the area affected by these Approvals is relatively small, the Board does not consider size a determining factor in whether an activity will directly affect an individual. There are activities that can be perceived as small that can have a major effect on an individual and his or her environment.

reasonable had the Appellant filed Notices of Appeal with respect to the 1997 approvals as they involved the full site, totaling more than 700 acres, versus approximately one acre involved in these Approvals. In these particular circumstances, the Appellant's concerns would have been more evident and the potential risk of an effect would possibly have been greater with the approval of the Pits.

[55] When examining how the Appellant will be affected by the Approvals, the Board looked at the potential effect the removal of the buffer area would have on the Appellant's groundwater. During questioning at the Preliminary Meeting, Mr. George stated the aquifer on which the Appellant's well is situated is a very productive aquifer. According to this witness, there would be minimal effect on the Appellant of work being completed at the Pits, six miles away. He stated:

> "I think we would have to measure significance in terms of whether or not it could do harm to Mr. Skinner, and that depends very much then on the amount of available pressure head from the top of the aquifer. That is how high will the water line rise above the top of the aquifer in his well. And that is about 50 feet. So he has a lot of available head. It's a very productive aquifer. Mr. Skinner doesn't need 50 feet of water above the top of the aquifer in order to have a very reliable, safe water supply. You would need 10 feet and that would be quite safe."[48]

[56] The Board notes that in a memorandum from Mr. George dated December 30, 2002, attached to the Director's submission, Mr. George in fact states: "The well is productive with over *60 feet* of available pressure head above the top of the aquifer." [Emphasis added.] The Board accepts this as evidence that the likelihood of any impact on the Appellant would be very small.

[57] During the Preliminary Meeting, the Board questioned Inland as to whether any of the environmental studies it had completed demonstrated there would be any significant environmental effect. Inland responded that it was its belief "…there is no environmental effect from a property line removal."[49] According to Inland, the removal of the buffer area under the Approvals would not go deep enough to reach the water-bearing portion of the site.[50]

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48 Preliminary Meeting Tape.

49 Preliminary Meeting Tape, Mr. Vickery response to questioning by Dr. Alan Kennedy.

50 See: Director's Record, "Stratigraphic Cross-Section A-A and B-B." In reviewing the schematic diagrams

[58] Based on all of this information, the Board does not believe the Appellant would be affected by the work permitted under the Approvals. Again, significantly, the Board notes that the Appellant did not present any data regarding his own well and how it has been affected by the removal of the buffer area. The Appellant stated in the Preliminary Hearing that he intends to have his well measured and this new data compared to the data he has for the well when it was originally drilled. This information would have been valuable to present to the Board in these appeals to illustrate how he might have been affected. It is important for the Appellant to realize that even if that data had shown an effect, it would have been necessary for him to differentiate the effect of the operations in the Pits and the effect of removing the small buffer area. Given the lack of this data, and based on all of the information presented by the Parties, the Board concludes that the Appellant has not discharged his burden of demonstrating that he is directly affected and as a result, the appeals must be dismissed.

C. Is the Matter Moot?

[59] Even if the Board had found the Appellant directly affected, the Board would have to determine whether the matter is now moot and how any available remedies would affect the Appellant and the environment. The Board has considered when an issue is moot in previous cases. For example, in the *Butte Action Committee*, the Board stated that:

> "By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical."[51]

[60] The moot issue was also discussed in *Kadutski*,[52] where the Board stated:

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

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of the site, it is unclear whether the removal of the buffer area would reach the groundwater. However, the Board will accept there was minimal disturbance, if any, of the groundwater when the buffer area was removed.

[51] *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resource, Alberta Environment* re: *Crestar Energy* (9 January 2001) at paragraph 28 (A.E.A.B.) (E.A.B. Appeal Nos. 00-029 and 00-060-D).

[52] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001) (A.E.A.B.) (E.A.B. Appeal No. 00-055-D).

[61] In this case, the Appellant was asking that the removal of the buffer area, allowed under the Approvals, be reconsidered. However, as admitted by the Approval Holders and acknowledged by the Appellant, the buffer area has been removed already. As a result, the Board has no remedy available that could be practically enforced. Re-establishment of the buffer area would have limited, if any, effect on the groundwater. To require the Approval Holders to replace the buffer area would, in all likelihood, result in more environmental damage to the area than relegating it to that portion of the Approval Holders' reclamation plans. The Board therefore concludes that because the work under the Approvals is complete and that there is no remedy that the Board can grant, the appeals are moot and must be dismissed.

D. Frivolous or Without Merit

[62] The Director made motions to dismiss the appeals on the grounds that they were frivolous or without merit. Under section 95(5) of EPEA, the Board has the authority to dismiss an appeal if "…it is considers the notice of appeal to be frivolous or vexatious or without merit."

[63] The Board accepts that the Appellant presented valid – albeit broad - concerns regarding the groundwater in the area and the effect industry has on the quality and quantity of water. It is a citizen's right and obligation to become involved in the protection and wise of the environment. Section 2 of EPEA provides:

> "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;…
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;…."

[64] The Director expressed concerns regarding the Appellant using the Board as a forum to express his views on broad issues that extended past the matters included in the Notices of Appeal and were not relevant to the subject matter of the Approvals. The Board notes the concerns expressed by the Director, and as Mr. McDonald said, we certainly are busy. However, upon reviewing the issues raised by the Appellant, the Board does not consider his appeals frivolous or without merit. The Appellant has a *bona fide* concern of groundwater issues in the area in which he resides. He had a basis on which to file an appeal, though the matters raised did go beyond the issues that could be appealed under the Approval. Therefore, even though the Board has determined that the Appellant is not directly affected by the decision of the Director, his appeals were neither frivolous nor without merit.

E. Removal of the Buffer Area

[65] In his submission dated January 28, 2003, the Appellant stated that the buffer area was removed prior to the issuance of the Approvals.[53] No real evidence was presented regarding the actual time the buffer area was removed. The Board notes that the issue of when the buffer area was removed is not a subject of this appeal and is a matter more properly dealt with by the enforcement side of Alberta Environment. When questioned by the Board regarding the timing of the buffer area removal, the Director stated that portions of the buffer area had been removed by October 10, 2002. He also stated that parts of the buffer area had been removed before 1973 and before the *Land Surface Conservation and Reclamation Act*,[54] the predecessor Act of EPEA, came into effect. According to the Director, no approval was required at that time.

[66] With respect to the other concerns raised by the Appellant regarding the timing of the removal of the buffer area, the Director further stated that: "…Mr. Skinner is aware of the appropriate mechanism to take and has taken it."[55] The Appellant did confirm he was now aware of the part of EPEA to follow to pursue, ostensibly, an investigation/enforcement issue. The

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[53] See: Exhibit 1.

[54] R.S.A. 1980, c. L-3, Repealed and Substituted with the *Environmental Protection and Enhancement Act*, effective September 1, 1993.

Board is satisfied that the matter has been adequately dealt with and will be handled in the appropriate forum.

IV. CONCLUSION

[67] The Board concludes that the Appellant is not directly affected by these Approvals. Further, and in the alternative, the Board concludes that the appeals filed by the Appellant are now moot. As a result, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, the Board dismisses Appeal No. 02-086 and Appeal No. 02-087.

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

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

"original signed by"
Mr. Ron V. Peiluck

"original signed by"
Dr. Alan J. Kennedy

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[55] Preliminary Meeting Tape.