ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 24, 2005

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 Dennis and Barbara Hebner with respect to Amending Approval No. 773-01-06 issued under the *Environmental Protection and Enhancement Act* to EPCOR Generation Inc. and EPCOR Power Development Corporation Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Hebner* v. *Director, Central Region, Regional Services, Alberta Environment* re: *EPCOR Generation Inc. and EPCOR Power Development Corporation Ltd.* (24 January 2005), Appeal No. 03-117-D (A.E.A.B.).

PRELIMINARY MEETING BEFORE: Dr. Frederick C. Fisher, Q.C., Chair;
Dr. M. Anne Naeth, Board Member; and
Dr. James Howell, Board Member.

ATTENDANCE:

Appellants:	Mr. Dennis and Ms. Barbara Hebner, represented by Mr. Jack Agrios.
Certificate Holder:	EPCOR Generation Inc. and EPCOR Power Development Corporation Ltd., represented by Mr. Dennis R. Thomas, Q.C., Fraser Milner Casgrain LLP.
Director:	Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to EPCOR Generation Inc. and EPCOR Power Development Corporation Ltd. for the construction and operation of an emergency diesel generator at the Genesee thermal electric power plant located at 25-55-3-W5M near Genesee, Alberta.

The Board received a Notice of Appeal from Mr. Dennis and Ms. Barbara Hebner appealing the Amending Approval.

The Board held a preliminary hearing, to determine whether Mr. Dennis and Ms. Barbara Hebner were directly affected; if their objection was with respect to land use; and whether they had the opportunity to participate in a hearing or review under an Act administered by the Alberta Energy and Utilities Board at which all of the matters included in the notice of appeal were adequately dealt with.

The Board determined Mr. Dennis and Ms. Barbara Hebner were not directly affected by the operation of the emergency generator, and the appeal was dismissed. The Board also found the concerns expressed by Mr. Dennis and Ms. Barbara Hebner were actually land use issues and not within the Board's jurisdiction. As the appeal was not properly before the Board, it did not consider whether the Alberta Energy and Utilities Board had considered the issues.

TABLE OF CONTENTS

I. BACKGROUND

[1] On July 2, 2003, the Director, Central Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 773-01-06 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to EPCOR Generation Inc. and EPCOR Power Development Corporation Ltd. (the "Approval Holder" or "EPCOR"), for the construction and operation of an emergency diesel generator at the Genesee thermal electric power plant located at 25-55-3-W5M near Genesee, Alberta.

[2] On August 19, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Dennis and Ms. Barbara Hebner (the "Appellants"). The Board wrote to the Approval Holder and the Director, notifying them of the appeal, and to the Appellants, acknowledging receipt of their Notice of Appeal. The Board requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal.

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

[4] In a letter dated September 22, 2003, the AEUB stated a hearing was held in September 2001 regarding the approval to construct and operate a 490-megawatt expansion at the Genesee power plant, and the Appellants participated as interveners in the hearing. The AEUB further stated it had granted the Approval Holder an "…exemption pursuant to section 13 of the *Hydro and Electric Energy Act* to install and operate a 1.25 MW emergency standby diesel generator at the site of the Genesee Phase 3 power plant. The [A]EUB did not hold a hearing or review into this application."

[5] On August 27, 2003, the Board received a letter from the Approval Holder, submitting the Notice of Appeal was not valid on the grounds the appeal was frivolous, vexatious, and without merit, the Appellants were not directly affected, and the appeal was filed out of time.

[6] The Appellants responded on September 3, 2003.[1] On August 27, 2003, the Board received a copy of the Record. In the attached covering letter, the Director questioned whether the Appellants were directly affected and whether the Appellants' real objection was one of land use.

[7] The Board notified the Parties[2] on September 12, 2003, that it would hold a Preliminary Meeting to determine the preliminary issues raised by the Approval Holder and the Director. On October 9, 2003, the Board wrote to the Parties, notifying them the Preliminary Meeting would be held on November 24, 2003, and the issues to be heard would be:

> "1. the request by Mr. Thomas to dismiss the appeal;
>
> 2. the directly affected status of the Appellants;
>
> 3. whether the objection of the Appellants is with respect to land use; and
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> 4. whether the Appellants had the opportunity to participate in a hearing or review under an Act administered by the Alberta Energy and Utilities Board at which all of the matters included in the notice of appeal were adequately dealt with."

[8] The Preliminary Meeting was held in Edmonton, Alberta, on November 21, 2003.

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[1] In the Appellants' letter, dated September 3, 2003, they argued the following points in response to the Approval Holder's comments:

> "1. EPCOR by omission acknowledges that there has not been a previous hearing in respect to the herein application.
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> 2. The application EPCOR has requested will be an aggravation of the existing environmental pollution that has taken place and there should be no further approvals until EPCOR takes appropriate remedial steps.
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> 3. EPCOR has taken a piece-meal approach and had they made the application for the entire project at one time, the appropriate approving authorities might have viewed the project differently.
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> 4. It would be improper for EPCOR to request this approval when it continues to conduct itself in breach of previous approvals. To allow EPCOR's application would be condoning the improper environmental procedures that it has been conducting.
>
> 5. It would be improper for any approving authority to grant the application of EPCOR when it continues to disregard its environmental obligation and it's [*sic*] undertakings and directions of previous approving authorities.
>
> 6. The appeal as filed by the Hebners would require cessation of the environmental impacts that currently exist prior to any approvals being granted.
>
> 7. The request of EPCOR as set out in their letter is an attempt to deprive the Hebners of their right to be heard."

[2] In this decision, the Appellants, Approval Holder, and Director are referred to collectively as the "Parties."

II. SUBMISSIONS

A. Appellants

[9] The Appellants stated they own land adjacent to and within one quarter and one half mile of the Approval Holder's operations, and as such, they are entitled to object to the application and the Board "…is obliged to hear the Appellants' evidence prior to granting any approval."[3] They argued the proposed generator would aggravate the existing environmental pollution that has already taken place and "…there should not be any further approvals until appropriate remedial steps are taken."[4] They argued the Approval Holder is not automatically entitled to future applications being approved on the basis the overall project has been approved.

[10] The Appellants argued the approval issued by the AEUB was based on the application as submitted in September 2001, and now the current Approval will allow the Approval Holder to operate under different circumstances. According to the Appellants, section 13 of the *Hydro and Energy Act*, R.S.A. 2000, c. H-16, allowing the AEUB to grant an exemption, cannot apply, as the "…exemption as granted is based on a false premise and is erroneous in that it fails to recognize the ultimate purpose of the application, namely, the generation of electrical energy for outsiders."[5]

[11] The Appellants stated there has been an impact on the environment as well as on their property, health, and well-being. They argued any further aggravation, no matter how minimal, is improper. They submitted the Approval Holder's indication that the generator would only be used occasionally is irrelevant, and its argument the project will not have any effect on the Appellants is an attempt to "…circumvent the entitlement of the Appellants to provide evidence as to the impact upon their property."[6]

[12] The Appellants stated the appeal was not related to any zoning or planning approval, and they intend to provide evidence relating to the environmental impacts, the pollution that has occurred, and the detriment to them.

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3 Appellants' submission, dated November 10, 2003, at paragraph 6.

4 Appellants' submission, dated November 10, 2003, at paragraph 2.

5 Appellants' submission, dated November 10, 2003, at paragraph 3.

6 Appellants' submission, dated November 10, 2003, at paragraph 7.

[13] The Appellants argued the AEUB hearing was not related to the operation of the emergency generator, and this is a separate and distinct application. They submitted that all the matters stated in the Notice of Appeal had not been dealt with at the AEUB hearing, as they intended to provide evidence the Approval Holder has "…disregarded its environmental obligations, disregarded its undertakings and disregarded directions of previous approving authorities."[7] They argued the Approval Holder's position is that once an approval is granted, all subsequent applications and amendments should automatically flow, regardless of the environment, its conduct, and whether it has complied with its stated intentions.[8]

B. Approval Holder

[14] The Approval Holder submitted the appeal should be dismissed on the basis it is frivolous, vexatious, and without merit. It argued the generator would have minimal environmental impacts, and the Appellants filed the appeal "…in an attempt to coerce EPCOR to purchase the Appellants' land. With respect, the conduct of the Appellants constitutes an abuse of process and the Notice of Appeal ought to therefore be dismissed."[9]

[15] The Approval Holder stated the Approval allows for the installation of an emergency generator at the Genesee Plant and permits the Approval Holder to emit effluent streams to the atmosphere from the generator. According to the Approval Holder, the generator will be located between two existing buildings.

[16] The Approval Holder explained the generator is being installed to provide emergency standby power to the coal-fired generating unit, and it is expected it will run infrequently and on an intermittent basis. It stated that although the generator is capable of running continuously for eight hours, the shut down procedure and restoring of the auxiliary station generally will be completed in much less time. According to the Approval Holder, the generator is required when there is a blackout situation, as it will automatically start to re-energize the Essential Power Distribution Centre, allowing for the continued operation of the essential services which are required for the safe operation and orderly shutdown of the coal-fired generating unit. The Approval Holder stated that since the generator will be used

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7 Appellants' submission, dated November 10, 2003, at paragraph 9.

8 Appellants' submission, dated November 10, 2003, at paragraph 9.

infrequently, the potential environmental effects will be minimal, and the generator will be equipped with a silencer to mitigate potential noise impacts.[10]

[17] The Approval Holder submitted the Notice of Appeal raises issues regarding land use and land acquisition that is outside of the Board's jurisdiction. It argued the Appellants' real issue is they want the Approval Holder to purchase their land. The Approval Holder referred to section 6.2.2 of the AEUB Decision 2001-111 which states:

> "The Hebner Group requested that EPCOR's land acquisition policy be revised so that lands caught between the mine and the [North Saskatchewan River], whose ownership pre-dated the present Genesee Generating Station, will qualify for purchase by EPCOR."

It submitted the Board does not have jurisdiction to compel the Approval Holder to purchase the Appellants' land nor to adjudicate land disputes or determine appropriate compensation for land use.

[18] The Approval Holder argued the Appellants may be directly affected by the entire Genesee Plant, but they are not directly affected by the issuance of the Approval. It argued the Appellants have not provided any evidence to show they will be directly affected by the installation and operation of the generator. The Approval Holder submitted the Appellants, in their Notice of Appeal, did not allege they are directly affected by the installation and operation of the generator.

[19] The Approval Holder stated the Board is precluded from reviewing issues related to the coal-fired generating plant and the overall Genesee Plant as it was subject to an intensive public review by the AEUB. The Approval Holder argued the Appellants participated in the AEUB hearing regarding the coal-fired generating plant, but they did not make any submissions regarding environmental impacts despite having the opportunity to do so.

[20] The Approval Holder also argued land use issues were dealt with at the AEUB hearing. Therefore, according to the Approval Holder, the Appellants cannot successfully argue that since a separate AEUB hearing was not held regarding the generator, section 95(5)(b)(i) of EPEA does not apply. It argued land use issues were dealt with in the context of the coal-fired generator plant at the AEUB hearing, and therefore, the test on whether matters included in the

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9 Approval Holder's submission, dated November 10, 2003, at paragraph 12.

10 Approval Holder's submission, dated November 10, 2003, at paragraph 5.

Notice of Appeal had been adequately dealt with has been satisfied. The Approval Holder further stated the addition of the generator would not affect the Appellants' use of their land.

C. Director

[21] The Director submitted the appeal should be dismissed on the basis of section 95(5)(a)(i) or alternatively, section 95(5)(a)(iii).[11] The Director argued the Notice of Appeal does not mention the activity to which the Approval relates to, but instead it refers to a policy of the Approval Holder, presumably the land acquisition policy. He stated the policy is not defined in the Notice of Appeal and therefore its relevance to the Approval is unknown.

[22] The Director argued the appeal has nothing to do with his decision to authorize the generator and has everything to do with trying to get the Approval Holder to comply with an internal policy regarding adjoining landowners. The Director stated the relief sought by the Appellants does not relate to his decision nor is it in his power to require the Approval Holder to comply with one of its internal policies. The Director further stated the relief requested is not a relief the Board could recommend and the Minister could order.[12]

[23] The Director stated there is lack of information on how the Appellants are directly affected by the operation of the generator, and the Notice of Appeal only refers to non-environmental consequences, specifically the land acquisition policy. The Director submitted the Board does not have jurisdiction to address the issues related to land use.

[24] The Director submitted the conditions under section 95(5)(b)(i) have been met, and therefore, the Board is required to dismiss the appeal. According to the Director, the Appellants participated as intervenors in the AEUB hearing, and the issues regarding the Approval Holder's land acquisition policy was dealt with by the AEUB. The Director referred to the decision of the AEUB where it recognized the Approval Holder's land acquisition policy had been in existence since the initial commissioning of the Genesee 1 and 2 units, and it had been

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[11] Section 95(5)(a) of EPEA states, in part:

"The Board may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit …

(iii) for any other reason the Board considers that the notice of appeal is not properly before it…."

[12] Director's submission, dated November 10, 2003, at paragraph 20.

developed and improved with community input. According to the Director, the AEUB noted that evidence was presented illustrating the Approval Holder had made exceptions to its land acquisition policy in the past, and therefore, the AEUB requested the Approval Holder and the Appellants renew their negotiations.

[25] The Director argued that, given the grounds stated in the Notice of Appeal, the concerns expressed by the Appellants, and the relief requested do not mention the generator, "…it is irrelevant to the Board's consideration of s. 95 of the *Act* as the issues raised in the Notice of Appeal were adequately dealt with in an [A]EUB hearing."[13]

III. FRIVOLOUS OR VEXATIOUS APPEAL

[26] Under section 95(5)(a)(i) of EPEA, the Board "…may dismiss a notice of appeal if it considers the notice of appeal to be frivolous or vexatious or without merit." The Appellants raised an issue regarding the effect of a generator being added to the already existing structures at the Genesee site and the resulting increase in noise and air pollution. These are concerns to the Appellants, and they live within half of a mile from the site. They have a right to file an appeal and to have the Board determine whether they are directly affected by the Director's decision.

[27] The Approval Holder asked the Board to find the appeal frivolous or vexatious. The Appellants took the time to file an appeal and appear before the Board. Citizens of this Province do have a right to file an appeal of a director's decision, and this is clearly stated in section 2 of EPEA.[14] Even though the Board may find an appellant is not directly affected, it does not equate that to a frivolous appeal.

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[13] Director's submission, dated November 10, 2003, at paragraph 43.

[14] 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

[28] Although the Board is not willing to classify this appeal as frivolous or vexatious, it does have concerns regarding the real motive behind the appeal. The arguments provided by the Appellants refer to the Approval Holder's unwillingness to purchase their property or treat them as though they reside in the development zone. The Board's jurisdiction is limited pursuant to the acts and regulations that govern it. The Board's role is to review decisions made by a director under EPEA or the *Water Act*, R.S.A. 2000, c. W-3. It does not have the jurisdiction to review a policy decision implemented by a company regarding the purchase or offer to purchase of lands.

IV. DIRECTLY AFFECTED

A. Statutory Background

[29] Before the Board can accept a notice of appeal as being valid, the person filing the notice of appeal must show that he or she is directly affected. Under section 91 of EPEA, a person who is directly affected by the decision of the Director – here the issuance of the Approval – has the right to file a notice of appeal with the Board.[15] The Board has examined the

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and of government policies, programs and decisions;

(e) the need for Government leadership in areas of environmental research, technology and protection standards;

(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;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

(j) the important role of comprehensive and responsive action in administering this Act."

[15] Section 91 of EPEA provides:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or

term "directly affected" in numerous previous appeals, thereby providing a framework to determine if appellants should be given standing to appear before this Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.[16]

[30] The requisite test for determining a person's directly affected status has two elements; the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*, the Board stated "…that the word 'directly' requires the Appellant to 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."[17]

[31] 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.
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> 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."[18]

> (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)."

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

[17] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.) (*Kostuch*").

[18] *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 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

[32] 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 surpasses the common interest of all residents who are affected by the approval."[19] In *Kostuch*, the Board considered its previous decision in *Ross*,[20] 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."[21]

[33] Further, in *Kostuch* the Board stated 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."[22]

The Board further stated that:

> "If the person meets the first test, they must then go to show that the action by the Director will cause a direct effect on that 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."[23]

[34] 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

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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.).

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

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

21 *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

22 *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

23 *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

> 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."[24]

[35] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the Appellants. 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."[25]

The Board's Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.[26] The onus or burden of proof issue, in a slightly different context, was recently upheld in by the Court of Queen's Bench.[27]

[36] In the recent *Court*[28] decision, Justice McIntyre reversed a standing decision based on the Board's previous cases and provided the following summary on the principles of standing before the Board:

> "First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B.D. No. 33 at para. 4. …
>
> Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other

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[24] *Paron et al.* v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) ("*Paron"*).

[25] *Paron et al*. v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

[26] Section 29 of the Board's Rules of Practice provides:

> "Burden of Proof
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> 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."

[27] See: *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

[28] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

Albertan or even from those of any other user of the area in question. See *Bildson* at paras 21-24. …

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

> What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

> [T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and

> proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated."[29]

[37] Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted…."[30]

B. Discussion

[38] The Board can only consider the project named in the Approval itself when assessing the directly affected status of an appellant. As stated in the Board's decision of Court,

> "…to be considered directly affected, an appellant must be directly affected by the approval that is under appeal in and of itself. There must be a nexus between the approval being appealed and the impacts that the appellant is using as the foundation for standing."[31]

[39] The project allowed under the Approval is the construction and operation of an emergency diesel generator. Therefore, the Board can only assess the impacts this generator would have on the Appellants. The existing facilities at the Genesee Power Plant are not part of this Approval and therefore, are not within the Board's jurisdiction.

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29 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson* v. *Acting Director of North Eastern Slopes Region, Alberta Environmental Protection,* re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.); *Mizera et. al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal No. 98-231-98-234-D (A.E.A.B.); and *Vetsch* v. *Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal No. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

30 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

31 *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 37.

[40] The purpose of the project is to make it safer for the residents in the area, as the backup generator is to be installed to allow for an orderly shut down of the systems should a power outage occur. The generator will be used only when it is necessary, will not run continuously, and may never be used at all. The Approval Holder stated the generator is quiet, and although the Board has not heard the specific generator operating, the Board accepts the Appellants will hear little noise at their residence resulting from the operation of the generator. The Approval Holder explained the generator will be located between two existing buildings and will be equipped with a silencer, which will baffle noise emanating from the generator. The Appellants live more than six kilometres from the project, and the distance will reduce the level of noise reaching the Appellants.

[41] The Appellants stated their concerns were the "…continuation of noise, odour and visual pollution. Our land has been totally degraded and the Genesee operations have resulted in our occupancy being severely handicapped." The Appellants reference continuing noise, odour and visual pollution. This clearly indicates their concerns exist already and are not specifically related to the project permitted under the present Approval, specifically the generator.

[42] Considering the extent of development in the area with the existing facilities operating continuously, the amount of noise produced by the operation of the generator will be negligible. Based on the distance between the Appellants' residence and the location of the generator, plus the intermittent use of the generator and the mitigation measures taken by the Approval Holder, the requisite nexus between the activity being approved and the concerns being raised by the Appellants does not exist. Therefore, the Board finds the Appellants are not directly affected by the Director's decision.

V. LAND USE

[43] The Appellants stated they were not arguing land use issues. However, when reading their Notice of Appeal and submission and hearing their arguments, it appears the Appellants are more concerned with the Approval Holder's unwillingness to include their properties in the land purchase plan than any potential environmental effects of the construction and operation of the generator.

[44] The AEUB held a public hearing in 2001 when the expansion of the Genesee plant was in its initial stages. As part of the hearing process, the Appellants presented their concerns, specifically as they relate to the policy of the Approval Holder regarding land purchases of the neighbouring properties. The AEUB responded to the Appellants' concerns and clearly stated it does not have the authority, and neither does this Board, to change an internal policy of the company, unless there are obvious environmental consequences resulting from the policy. The AEUB recommended the Approval Holder and the Appellants "…renew their negotiations in the interest of finding a resolution that is satisfactory to both parties."[32]

[45] The Board is uncertain as to whether the Approval Holder and the Appellants discussed the policy since the AEUB hearing, but it is hoped both sides have made some effort to come to an understanding of the others' issues and concerns. The Board cannot force the Parties to meet regarding these issues, but it would be beneficial to all concerned to settle the matter.

[46] The Appellants in this case are questioning the Approval Holder's land purchase plan, an internal planning document. If the Board allowed the appeal to proceed, regardless of the outcome, the Appellants' true concerns would still exist – their lands are adjacent to the Approval Holder's, and they will continue to see and hear the existing operations. Even if the Board rescinded the Approval, the existing operations would continue as there are valid approvals in place, from Alberta Environment and the AEUB, that allow it to operate. The Board would not have the ability to order the Approval Holder to purchase the Appellants' lands. It will not assist the Appellants to disguise their land issue concerns, the underlying reason for the appeal, as an environmental matter.

[47] In this particular case, the Appellants have filed an appeal of the generator in an attempt to circumvent the decision made by the AEUB, allowing the Genesee power plant to be constructed, and the internal decision of the Approval Holder to limit its land acquisition policy. This Board does not have the authority to overturn decisions made by the AEUB, and it cannot force a company to change its internal policy.

[48] The Appellants argued the AEUB should not have allowed the exemption under section 13 of the *Hydro and Energy Act*, as the purpose of the application was to generate energy

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[32] AEUB Decision 2001-111, EPCOR Generation Inc. and EPCOR Power Development Corporation, (December 2001) at section 6.2.3.

for outsiders. The Board does not agree. The Approval allows for the construction and operation of an emergency generator, which will be used on-site to enable an orderly shut down of operations in cases of an emergency. It is not intended to produce energy for outsiders.

[49] Section 13 of the *Hydro and Energy Act*, R.S.A. 2000, c. H-16, provides:

> "(1) Sections 9, 10 and 11 do not apply to a person generating or proposing to generate electric energy solely for the person's own use, unless the Board otherwise directs.
>
> (2) Notwithstanding subsection (1), a person generating or proposing to generate electric energy solely for the person's own use shall, if required by regulation to do so, immediately notify the Board of the use or proposed use and provide any details of the generation and use that he Board requires."

[50] The Appellants questioned whether the AEUB properly applied section 13 of the *Hydro and Energy Act* when it exempted the present application. If the Appellants had concerns regarding the decision of the AEUB, there are legislated review mechanisms available. If the Appellants were not satisfied with the AEUB outcome, there are review procedures in place in the legislation under the AEUB's jurisdiction. To illustrate, under the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "ERCA"), there are review and appeal mechanisms available. Section 39 of the ERCA provides:

> "The Board may review, rescind, change, alter or vary an order or direction made by it, or may rehear an application before deciding it."

Section 40(1) of ERCA states:

> "A person affected by an order or direction made by the Board without the holding of a hearing may, within 30 days after the date on which the order or direction was made, apply to the Board for a hearing."

Section 41 provides an appeal mechanism:

> "(1) Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.
>
> (2) Leave to appeal shall be obtained from a judge of the Court of Appeal on application made within one month after the making of the order, decision or direction sought to be appealed from, or within a further time that the judge under special circumstances allows…."

[51] These review and appeal mechanisms were available to the Appellants, and should have been pursued if the Appellants considered the AEUB decision incorrect. This Board cannot be used as a mechanism to review AEUB decisions.

[52] The Board believes the real concern of the Appellants is the Genesee Power Plant itself and the designated land use around the plant site. An objection of land use classification is not in the Board's jurisdiction, and therefore, the Board must dismiss the appeals as not being properly before the Board.[33]

VI. AEUB MATTER

[53] As the Board has found the Appellants are not directly affected by the Director's decision, and the appeal is not properly before the Board, it does not have to consider whether the matter had been adequately dealt with by the AEUB.

VII. CONCLUSION

[54] Pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal of Mr. Dennis and Ms. Barbara Hebner.

Dated on January 24, 2005, at Edmonton, Alberta.

"*original signed by*"

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Dr. Frederick C. Fisher, Q.C.
Chair

"*original signed by*"

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Dr. M. Anne Naeth
Board Member

"*original signed by*"

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Dr. James Howell
Board Member

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[33] See: *Dzurny et al.* v. *Director, Northeast Boreal Region, Regional Services, Alberta Environment* re: *Shell Chemicals Canada Ltd.* (15 June 2002) Appeal Nos. 01-106 and 108-D (A.E.A.B.).