ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 28, 2004

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by the Wood Buffalo First Nation with respect to *Environmental Protection and Enhancement Act* Approval No. 137467-00-00 issued to OPTI Canada Inc./Nexen Canada Ltd. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Wood Buffalo First Nation* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *OPTI Canada Inc./Nexen Canada Ltd.* (28 June 2004), Appeal No. 03-148 (A.E.A.B.).

BEFORE:		Mr. Al Schulz, Board Member.
APPEARANCES:		
	Appellant:	Wood Buffalo First Nation, represented by Mr. John Malcolm.
	Director:	Mr. Kem Singh, Director, Northern Region, Regional Services. Alberta Environment, represented by Mr. Randy Didrikson, Alberta Justice.
	Approval Holder:	OPTI Canada Inc./Nexen Canada Ltd., represented by Mr. Shawn H.T. Denstedt, Bennett Jones LLP.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 137467-00-00 to OPTI Canada Inc./Nexen Canada Ltd. for the construction, operation and reclamation of the Long Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site, near Fort McMurray, Alberta.

The Board received a Notice of Appeal from the Wood Buffalo First Nation appealing the Approval.

The Board conducted a Preliminary Meeting via written submissions on the issue of whether the Wood Buffalo First Nation had an opportunity to participate in a hearing before the Alberta Energy and Utilities Board at which all matters included in the Notice of Appeal were adequately dealt with.

The Board determined the Wood Buffalo First Nation did receive notice of, did participate in, and withdrew from an AEUB review of the matter, and all issues identified in the Notice of Appeal were adequately dealt with by the AEUB.

Therefore, the Board dismissed the appeal.

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I. BACKGROUND

[1] On November 10, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 137467-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to OPTI Canada Inc./Nexen Canada Ltd. (the "Approval Holder") for the construction, operation, and reclamation of the Long Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Fort McMurray, Alberta.

[2] On December 11, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from the Wood Buffalo First Nation (the "Appellant" or "WBFN") appealing the Approval.

[3] On December 15, 2003, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal, and the Parties provide available dates for a mediation meeting or hearing.

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

[5] On January 2, 2004, the Director informed the Board that there were preliminary issues associated with the appeal, including:

> "1. The legal status of the Wood Buffalo First Nation (WBFN);
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> 2. Whether WBFN is directly affected including issues in relation to WBFN membership;
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> 3. The validity of the appeal in light of prior Alberta Energy and Utilities Board proceedings;
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> 4. Whether the appeal is frivolous and vexatious; and,
>
> 5. The appropriate legal forum for determinations about assertions of aboriginal and treaty rights."

[6] On January 13, 2004, the Board received a letter from the AEUB, advising that:

> "… the Alberta Energy and Utilities Board (EUB) did receive an application from OPTI Canada Inc./Nexen Canada Ltd. for the Long Lake commercial oil sands scheme. The application was approved on August 20, 2003 without a public hearing being held."

[7] On January 15, 2004, the Board acknowledged receipt of the AEUB's letter and requested copies of (1) the AEUB Approval, (2) the AEUB decision, and (3) copies of the objections received by the AEUB from the Appellant, including the letters and documents from the AEUB in relation to the dismissal of the objections.

[8] On January 13, 2004, the Board received a letter from the Approval Holder, stating:

> "...we respectfully submit that the two motions raised in our letter of December 24, 2003 can be dealt with expeditiously and without the filing of detailed records or evidence. Those two motions are:
> 1. Whether Mr. Malcolm/Wood Buffalo First Nation had an opportunity to participate in an Energy and Utilities Board hearing or review process (section 95(5)(b)(i)); and
> 2. Whether Mr. Malcolm/Wood Buffalo First Nation's Notice of Appeal is without merit (section 95(5)(a)(i)."

[9] On January 15, 2004, the Board wrote to the Parties acknowledging the letter from the Approval Holder and asking the Parties to provide their comments regarding its motions.

[10] On January 19, 2004, the Director advised that he supported the approach outlined by the Approval Holder.

[11] On January 22, 2004, the Board wrote to the Parties, advising that a response due January 19, 2004, from the Appellant had not been received, and stated that:

> "Upon review of the letter and attachments from the EUB the Board has decided to deal with the EUB matter pursuant to section 95(1)(b)(1) of the *Environmental Protection and Enhancement Act.* The Board will decide whether to deal with the remainder of issues once it issues its decision in the EUB matter."

[12] On February 6, 2004, the Board received a copy of an abbreviated Record from the Director, and copies were forwarded to the Appellant and the Approval Holder.

[13] On April 22, 2004, the Board wrote to the Parties to advise that the Board had decided to conduct the Preliminary Meeting via written submissions, as it was unable to find a common suitable date between the Parties and the Board to hold an oral Preliminary Meeting. In the same letter the schedule for providing written submissions was set.

[14] The Appellant submitted letters to the Board on April 30 and May 3, 2004, requesting an extension for filing their submission.

[15] The Approval Holder, in its May 5, 2004, stated its opposition to granting an extension of time, but submitted a reasonable length of time would be acceptable.

[16] On May 7, 2004, the Board wrote to the Parties, stating:

> "The Board has reviewed the letters from Mr. Malcolm that were received by the Board on April 29 and May 3, 2004, and Mr. Denstedt's and Mr. Block's letter of May 5 and 6, 2004. The Board is of the view that the issue for the Preliminary Meeting can be dealt with in writing. Specifically the issue for the Preliminary meeting is whether the Wood Buffalo First Nation received notice of or participated in or had the opportunity to participate in one or more hearings or reviews before the Energy and Utilities Board at which all matter included in their notice of appeal were adequately dealt with, pursuant to section (95)(5)(b)(i) of the *Environmental Protection and Enhancement Act.*
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> Although there was a delay in getting the Board's April 22, 2004 letter containing the schedule for written submissions to Mr. Malcolm, it is the Board's view that Mr. Malcolm has been aware of the issue for the Preliminary Meeting since the Board's letter of January 22, 2004 was forwarded to his former lawyer, Mr. Szakacs, on January 22, 2004, and therefore has had sufficient time to prepare.
>
> Given the above, the Board confirms its decision to conduct this Preliminary Meeting via written submissions. The Board notes Mr. Denstedt's request for a compressed deadline and Mr. Block's suggested submission schedule. The Board has also taken into consideration Mr. Malcolm's request for an extension to file his written submissions with the Board."

The Board's letter goes on to set a revised schedule for providing submissions.

[17] Submissions were received from the Parties between May 20, 2004, and June 3, 2004.

II. SUBMISSIONS

A. Appellant

[18] The Appellant explained they consist of 800 members who are Cree and Chip speaking people who were not included in the Treaty signing process.[1] They stated they wanted to know where the Parties stood, whether it was for justice or for profit, and if it was mere profit, then they needed to "…know how and when that aspect will apply to its members."[2]

[19] The Appellant requested the Approval be rescinded, or at least those elements that overlap with their lands of interest be rescinded, "…pending timely, meaningful and substantive consultation with the WBFN on the part of the Province, Canada and the industry applicants."[3]

[20] The Appellant argued their legitimate concerns and issues were not addressed, "…through either due process (such as an EUB hearing) or through consideration (such as compensation)."[4]

[21] The Appellant stated they had participated in the review process in good faith, but the AEUB issued the decision without holding a hearing. They submitted the oil sands applications are and will continue to affect their "core of Indian-ness," as their lifestyle as Aboriginal peoples is being destroyed. According to the Appellant, they are "…bearing the cost, without consideration of our rights to meaningful consultation, without the consideration of due process (a hearing) and without compensation."[5]

[22] The Appellant explained the lands in question overlap with lands traditionally used by the Appellant and the individual members, as some of their members hold traplines that overlap the application or hold land within the impact zone of the development. The Appellant argued they were unable to complete a traditional land use study, and therefore, "…Alberta and industry lack an understanding of the lands historically used and held by the WBFN."[6]

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1 See: Appellant's submission, dated May 20, 2004, at page 2.

2 Appellant's submission, dated May 20, 2004, at page 1.

3 Appellant's submission, dated May 20, 2004, at page 1.

4 Appellant's submission, dated May 20, 2004, at page 1.

5 Appellant's submission, dated May 20, 2004, at page 2.

6 Appellant's submission, dated May 20, 2004, at page 3.

[23] The Appellant argued that, given the commitment of the governments to cumulative effects assessment, they considered it was "completely incomprehensible" that hearings are not held for every major oilsands application in the region, and expedience has taken on a higher value than due process.[7] They stated the AEUB decision not to proceed with a hearing means the Appellant does not have the same political status of other First Nations and environmental groups within the region and province.

[24] The Appellant stated the AEUB did not hold a hearing even though they had submitted written statements of concern within the specified timelines. They argued the public interest test of the AEUB failed to protect the Appellant's members. They stated the granting of the approvals by the AEUB "…closed the door for WBFN to orally submit our concerns as a directly affected party. Our view is that oral submissions are a fundamental aspect of our tradition. Requiring that we participate in regulatory processes solely through written submissions is outside of our traditions."[8]

[25] The Appellant expressed concern regarding the availability of game in the area, including the woodland caribou, grayling, mink, walleye, and freshwater clams. They stated monitoring is not enough, and the issue of cumulative effects and thresholds is overdue. In addition, the Appellant stated other issues warrant a review, including groundwater and surface water, air, land, fish and other aquatic species, terrestrial wildlife, soils and geology, vegetation, climate, and cumulative effects.

[26] The Appellant stated the Approval Holder held an information meeting with members of the Appellant in Anzac, Alberta, but the Approval Holder did not allow elders and members from other communities to attend, and the Approval Holder refused to meet with members in Fort McMurray, Chard, and Conklin or include them in the Traditional Land Use Study. According to the Appellant, "…important socio-economic and environmental concerns of the WBFN have not been heard."[9]

[27] The Appellant argued the "…absence of meaningful consultation consistent with our culture is unacceptable…" and that "…failure to be properly consulted (as a collective) in the

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7 See: Appellant's submission, dated May 20, 2004, at page 4.

8 Appellant's submission, dated May 20, 2004, at page 5.

decision-making process followed by Alberta Environment in the issuance of the above referenced approvals infringes on our constitutional rights, as Indians, and even more profoundly, as Canadians."[10]

[28] The Appellant stated the consultation meetings with the Approval Holder were "…sporadic, discontinuous and disingenuous efforts…."[11] They submitted that they can make a positive contribution with respect to environmental and social decision-making in the region.

[29] The Appellant disagreed with the Approval Holder that they had ample opportunity to participate in the application process. They submitted that mitigating circumstances during the application process resulted in a failure of the opportunities needed for the Appellant to participate in a meaningful manner. They stated the core of Indian-ness remains relevant in the appeal.

[30] The Appellant argued the Crown did not fulfill its duty to consult with First Nations, and it did not keep its promise to protect First Nations members from undue exploitation.

[31] The Appellant stated they are at a distinct legal disadvantage as they do not have any technical support through other agencies.

[32] The Appellant stated there was no hearing, because the AEUB did not accept the Appellant's standing. They argued they are "…asking for an original opportunity to present our views and to influence the outcome of the decision-making process."[12] They stated they expected to "…be involved in the decision-making using the same standard as any other First Nation in the region (and not by the same standard as the general public)."[13]

[33] They explained there was some form of information exchange "…in the guise of consultation," but no meaningful consultation with the Appellant as an entity occurred. According to the Appellant, even though the AEUB may have been satisfied with the consultation efforts of the Approval Holder, they were far from satisfied.

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9 Appellant's submission, dated May 20, 2004, at page 6.

10 Appellant's submission, dated May 20, 2004, at pages 6 to 7.

11 Appellant's submission, dated June 3, 2004, at page 2.

12 Appellant's submission, dated June 3, 2004, at page 4.

[34] The Appellant argued the onus is on the Approval Holder and the Director to show where in the application process or draft approvals the people who run traplines have been considered.

[35] The Appellant argued the "…lack of opportunity for the WBFN to submit effective, informed and traditional and expert advice to the decision-makers, at this stage and earlier in the application processes amounts to a blatantly unfair process."[14]

B. Approval Holder

[36] The Approval Holder submitted it is clear the Appellant had notice of and participated in an AEUB review that considered the issues in the Notice of Appeal, and therefore, the Board must dismiss the appeal.

[37] The Approval Holder explained the AEUB issued a Notice of Application for the project in which it stated it would continue to process the application without further notice if no objections were received. The Approval Holder stated the Appellant responded, indicating they would not be pursuing any objections to the project. Therefore, according to the Approval Holder, the Appellant received notice of the AEUB review.

[38] The Approval Holder stated it initiated a consultation program for all interested parties as part of the environmental impact assessment process, which included community meetings and one-on-one discussions with various First Nations groups, including the Appellant. The Approval Holder stated it undertook extensive consultation with the Appellant between February 2000 and December 2003. The Approval Holder explained the consultation efforts were reiterated in the environmental impact assessment and the supplemental information provided to the Appellant, all of which were provided to the AEUB.

[39] The Approval Holder stated the Appellant reviewed and provided comments concerning the project application, environmental impact assessment, and supplemental documents, and the Appellant was compensated for their time and efforts in reviewing the documents.

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13 Appellant's submission, dated June 3, 2004, at page 5.

14 Appellant's submission, dated June 3, 2004, at page 5.

[40] The Approval Holder stated the Statement of Concern filed with the Director raised issues concerning air quality monitoring, surface water levels on Gregoire Lake, identifying burial sites and places of spiritual significance, impacts on traditional land use, socio-economic benefits, traffic and safety, and cumulative impacts. According to the Approval Holder, it summarized these issues in the supplemental information provided to the AEUB to ensure the AEUB was satisfied the issues raised were adequately dealt with.

[41] The Approval Holder stated it responded in writing to various questions and concerns the Appellant had regarding the project, and these responses were submitted as part of the application process for the AEUB review.

[42] The Approval holder stated the Director sent a copy of a draft EPEA approval to the Appellant for their review and comments, but no comments were received from the Appellant.

[43] The Approval Holder submitted that, considering the Appellant participated in an extensive consultation process, including reviewing and commenting on the application, submitting a Statement of Concern, and advising the AEUB that it did not intend to pursue any objections to the project, the Appellant did participate in the AEUB review and all of their issues had been addressed.

[44] The Approval Holder submitted the Appellant had the opportunity to participate in a hearing or review, "…but declined to do so by failing to advance any objections."[15] The Approval Holder argued the Appellant "…is now attempting to duplicate the [A]EUB process…" by filing this appeal.

[45] The Approval Holder submitted the grounds for the appeal set out in the Notice of Appeal include potential detrimental effects to the water, including fish and fish habitat, to the wildlife, and to the traditional land use, including trapping issues and consultation efforts. The Approval Holder stated these issues were adequately addressed by the AEUB in the application process since an environmental impact assessment was prepared and submitted to the AEUB that addressed water related issues, including hydrogeology, hydrology, water quality and impacts on fish and fish habitat; baseline wildlife surveys, key indicator resources, and an impact assessment

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[15] Approval Holder's submission, dated May 26, 2004, at page 3.

on wildlife; and traditional land use, including trapping issues and consultation efforts with First Nations groups, including the Appellant.

[46] The Approval Holder stated it responded to various questions posed by the Appellant, including water issues, wildlife, traditional land uses, and cumulative environmental effects. The Approval Holder explained it reviewed and revised the answers provided in response to the Appellant's questions when various changes were made to the project, and the Appellant and the AEUB received a copy of the revised responses.

[47] The Approval Holder stated the AEUB reviewed the application and all of the supplemental materials and was satisfied the Approval Holder had "…provided complete and adequately detailed information within the development area….The [AEUB] commends OPTI and Nexen for their proactive approach to consultation."[16]

[48] The Approval Holder referred to the May 14, 2003 letter from the Appellant, stating:

> "WBFN has entered into a dialogue with Nexen to discuss both our concerns about the Project and ways to addressing those concerns… Nexen has moved forward in a co-operative and respectful way with WBFN. Nexen has acknowledged the concerns we have about the Project's impacts on our traditional lands, and has committed to an ongoing consultation process to address our concerns."[17]

[49] Therefore, according to the Approval Holder, there are no new issues contained in the Notice of Appeal that have not already been extensively and adequately considered by the AEUB.

C. Director

[50] The Director explained the Approval was issued subsequent to the AEUB granting Approval No. 9485 for the Long Lake Project.

[51] The Director stated one of the requirements included in the terms of reference for the environmental impact assessment, required the Approval Holder to "'provide results of

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16 Approval Holder's submission, dated May 26, 2004, at page 8.

17 Approval Holder's submission, dated May 26, 2004, at page 8.

consultation with Aboriginal groups to determine the extent of traditional use of the local Study Area [and] Document any stakeholder concerns with respect to the development of the Project based on the historical significance of the Study Area or its current use by traditional users.'"[18] The Director explained the use referred to included traditional plant harvesting, cultural use, and outdoor recreation with respect to the Aboriginal peoples, and the Approval Holder was required to determine the impact of the project on these uses and to identify possible mitigation measures.

[52] The Director stated the Appellant responded to the joint AEUB Notice of Filing and EPEA Notice of Application setting out their areas of concern. The Director accepted the letter as a Statement of Concern in the EPEA application review process.

[53] The Director explained the AEUB asked the Approval Holder to provide supplemental information regarding the consultation agreements between the Approval Holder and various First Nations, including the Appellant. The Director stated the information was provided to the Appellant.

[54] According to the Director, in August 2002, an amended Notice of Filing was published due to modifications in the original application, and the Approval Holder reviewed and revised the answers it had previously provided to the Appellant as a result of the changes to the project. The Director stated a Notice of Application was published by the AEUB, which included a statement that the AEUB may continue to process the application without further notice if no objections were received.

[55] The Director stated the Appellant submitted a letter to the AEUB, advising that "…it would not be pursuing any objections to the Long Lake Project. The WBFN reserved its right to seek whatever remedies may be available to it including remedies before the [A]EUB."[19]

[56] The Director stated the AEUB issued the approval for the project and commended the Approval Holder for its proactive approach to consultation and its success in reaching agreement and understanding with a number of Aboriginal communities and other stakeholders.

[57] The Director stated he provided a copy of a draft EPEA approval to the Appellant for their review and comments, but no comments were received.

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[18] Director's submission, dated May 27, 2004, at paragraph 9.

[58] The Director submitted that the "…purpose of section 95(5)(b)(i) is to avoid duplication in the hearing process and to ensure there is no multiplicity of proceedings based on similar evidence."[20] The Director argued this section can apply to an AEUB process that does not result in a public hearing, provided the Appellant has been afforded a reasonable chance to make their views known to the AEUB. He submitted that "…this section also precludes an Appeal from proceeding where the Notice of Appeal raises a matter that was not specifically addressed during an [A]EUB hearing or review and the Appellant had an opportunity to raise the matter during the [A]EUB process but failed to do so."[21]

[59] The Director submitted the section prevents parties who are dissatisfied with an AEUB decision from seeking redress from this Board, and such parties should use the review and appeal options available under the AEUB administered legislation.

[60] The Director stated it is clear the AEUB conducted a review of the project and the AEUB considered Aboriginal consultation issues. The Director submitted that the Appellant had notice of and participated in the AEUB review process, as they submitted their concerns to the AEUB and acknowledged the Approval Holder's on-going consultation process to address their concerns.

[61] The Director also referred to the Approval Holder's supplemental response and revised answers to the Appellant to indicate the Appellant's participation in the review process.

[62] The Director submitted the Appellant's concerns regarding business opportunities, trapper compensation, and potential effects to water, land, fish, and wildlife were addressed in consultation with the Approval Holder prior to the issuance of the AEUB approval. The Director stated these issues, as well as the consultation program and employment opportunities, were also addressed in the Approval Holder's response to the Appellant.

[63] The Director stated the Appellant was consulted on all economic and environmental issues listed in the Notice of Appeal and subsequent letters during the AEUB

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19 Director's submission, dated May 27, 2004, at paragraph 20.

20 Director's submission, dated May 27, 2004, at paragraph 32.

21 Director's submission, dated May 27, 2004, at paragraph 33.

process, and the concerns were apparently sufficiently addressed since the Appellant advised the AEUB that they would not be pursuing their objection to the project.

[64] The Director submitted the Appellant's concerns regarding the contracting agreement, the failure to negotiate a gravel pit agreement, and compensation to their members, have nothing to do with "meaningful consultation." The Director argued consultation does not mean agreement, but it does imply "…the parties communicate on issues of mutual concern in an attempt to reach understanding and agreement."[22]

[65] The Director stated the Appellant should have used available appeal procedures in the AEUB administered legislation if they believed the Approval Holder was not honouring its agreements, or they could have advised the Director of their concerns after being provided a copy of the draft EPEA approval. According to the Director, there is no evidence the Appellant pursued their remedies under the *Energy Resources Conservation Act* or took any action in the civil courts if the Appellant believed the Approval Holder failed to honour a contracting agreement or negotiated in bad faith.

[66] The Director argued the Appellant should not be allowed to use this Board's appeal procedures to attempt to enforce a contract, and the Board does not have the jurisdiction or the remedies to deal with matters that should be heard by the Trappers' Compensation Board.

[67] The Director submitted the Appellant is essentially dissatisfied with the final outcome of the consultations and with the AEUB decision to grant the approval, and is not appealing because there were no consultations.

III. ANALYSIS

A. Statutory Basis

[68] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if, in our opinion, it has been heard and adequately dealt with by the AEUB and the person had the opportunity to participate in the hearing. Section 95(5)(b)(i) states:

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[22] Director's submission, dated May 27, 2004, at paragraph 45.

> "The Board shall dismiss a notice of appeal if in the Board's opinion the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…."

B. Discussion

[69] There are two basic conditions that have to be met in order to have the Board lose jurisdiction in this appeal. What the Board needs to determine is whether: (1) the Appellant received notice of, participated in, or had the opportunity to participate in an AEUB review of the project at issue; and (2) the AEUB adequately dealt with the matters raised by the Appellant in this appeal.

1. Did the Appellant receive notice of or participate in an AEUB review?

[70] The AEUB notified the Board that no public hearing was held with respect to the project.[23] Therefore, what the Board must determine is whether the Appellant was aware of and was given the opportunity to participate in the AEUB process. As the Board stated in *Bildson*,[24] "…the underlying question in this appeal is whether Mr. Bildson had a reasonable chance to make his views known to the [A]EUB."[25]

[71] The Appellant started in the review process with the AEUB, but later withdrew, notifying the AEUB that they did not have any objections to the project. The Appellant stated in their letter to the AEUB that:

> "Nexen has moved forward in a co-operative and respectful way with WBFN. Nexen has acknowledged the concerns we have about the Project's impacts on our

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[23] See: Letter from AEUB, dated January 8, 2004. The AEUB stated:

> "…the Alberta Energy and Utilities Board (the Board) did receive an application from OPTI Canada Inc./Nexen Canada Ltd. for the Long Lake commercial oil sands scheme. The application was approved on August 20, 2003 without a public hearing being held."

[24] *Bildson* v. *Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection* re: *Smoky River Coal Limited* (8 December 1998) Appeal No. 98-230-D2 (A.E.A.B.).

[25] *Bildson* v. *Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection* re: *Smoky River Coal Limited* (8 December 1998) Appeal No. 98-230-D2 (A.E.A.B.) at paragraph 14.

> traditional lands, and has committed to an ongoing consultation process to address our concerns. We anticipate that this process with Nexen to address impacts and concerns will continue over the life of the Project. We look forward to continuing to build a constructive, positive relationship with Nexen as regards the Project.
>
> In light of the co-operative approach that is now being taken by Nexen, WBFN will not be pursuing any objections to the Project before this Board at this time. However, if Nexen should, in the future, fail to seek workable accommodations of our interests with the Project, then WBFN reserves the right to seek whatever remedies may be available to us, including remedies before this Board."[26]

[72] Section 95(5)(b)(i) only requires that a party has had the opportunity to participate in the AEUB process. The Appellant participated in the review process and decided they would not be filing an objection to the project. If the opportunity was there to participate in the AEUB process, and the Board believes it was, and the party chose not to make use of the opportunity, they cannot now use another process to achieve what should have been done under the original process.

[73] EPEA does not specifically define "participate." One of the reasons becomes evident in this case. There are different levels of participation and different processes. The Appellant in this case was involved in the review of the application. The Approval Holder ensured the Appellant received a copy of the application as well as the responses to any supplemental information requests by the AEUB and Alberta Environment. In fact, the Appellant also submitted questions, and the Approval Holder provided the Appellant with the answers. The Appellant was actually compensated for reviewing and providing comments on the application materials. When reviewing this history of the application process, it becomes evident the Appellant did play an active role in the application process. Even though the AEUB did not hold a formal public hearing, the Appellant was involved in the process throughout and provided input towards the final outcome of the AEUB decision.

[74] If the Appellant was not satisfied with AEUB outcome, there are review mechanisms 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:

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[26] See: Appellant's letter to AEUB, dated May 14, 2003.

> "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…."

[75] These review and appeal mechanisms were available to the Appellant, but they chose to file an appeal with this Board. As stated in *Bildson*:

> "…the Legislature's apparent objectives in adopting section 87(5)(b)(i) [now section 95(5)(b)(i)] are to promote efficiency and fairness – i.e., to prevent this Board from duplicating an [A]EUB review, at least, when the appellant before the [A]EUB had a reasonable chance to participate in the [A]EUB' review. Notably, by requiring dismissal if the appellant chose not to participate in the [A]EUB review but 'received notice of' and 'had the opportunity to participate in' that review, the Legislature intended to preclude this Board from addressing particular concerns simply because they were never raised before the [A]EUB."[27]

[76] Section 95(5)(b)(i) contains the word "or" in its requirements of participating or had the opportunity to participate in an AEUB review. What has to be demonstrated that, at the minimum, the Appellant had the opportunity to participate. It is evident the Appellant did participate in the process. They had no concerns and withdrew their objections to the project. Section 95(5)(b)(i) of EPEA clearly states the Board does not have jurisdiction to hear an appeal if the party filing the appeal was notified and had the opportunity to participate in the AEUB process. The Appellant withdrew from the AEUB process on their own accord.

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[27] *Bildson* v. *Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection* re: *Smoky River Coal Limited* (8 December 1998) Appeal No. 98-230-D2 (A.E.A.B.) at paragraph 12.

2. Were the issues adequately dealt with by the AEUB?

[77] The only issued raised in the Notice of Appeal was that they wanted "…confirmation that there has been meaningful consultation with the Wood Buffalo First Nation by the Applicant OPTI Canada Inc. and Nexen Canada Inc." In response to the Board's request for further clarification on the Appellant's concerns, the Appellant referred to negotiations with the Approval Holder, employment opportunities, potential detrimental effects to their water and land, including fish and wildlife, the consultation process, existing trap lines, and the effect on the muskeg.

[78] Although technically the only concern expressed in the Notice of Appeal relates to the level of consultation completed by the Approval Holder, the Board did allow the Appellant to provide a further explanation of their concerns. Therefore, the Board will include in the analysis of the issues those matters raised in the letter of clarification provided by the Appellant to the Board on December 30, 2003.

[79] The purpose of section 95(5) of EPEA is to avoid duplication in the hearing process.[28] As stated in the previous case, *Carter Group*[29]:

> "The jurisdiction of this Board to become involved in a 'review' of ERCB [(now the AEUB)] decisions that led to approvals which are eventually appealed here – is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence….
>
> The Board interprets s. 87(5)(b)(i) [now section 95(5)(b)(i)] of [the] *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually…. In other words, there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB."[30]

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[28] *Ed Graham et al*. v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025.

[29] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (December 8, 1994), E.A.B. Appeal No. 94-012 ("Carter Group").

[30] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (December 8, 1994), E.A.B. Appeal No. 94-012.

[80] In *Graham*,[31] the Board examined the specific terms of section 95. The Board interpreted "matter" to mean

> "…subject matter or issues raised in the proceedings before the NRCB and before this Board. But it cannot encompass generic subject matters, such as air pollution, generally. Nor is 'matter' a static concept so that a subject once raised before the NRCB can never be the subject of appeal to this Board…. [C]ounsel for the Director acknowledged that new information that substantially alters one's previous understanding of the facility may be a new matter."[32]

The Board then interpreted the term "considered" as meaning "to look at closely, examine, contemplate." The Board continued:

> "Consideration, in the context of this appeal, requires that a matter be raised or presented through submissions by parties or questions by the NRCB. This must be reasonably explicit rather than merely inferential, and must not be arbitrary. The matter must then be subject to a meaningful consideration. Further, consideration requires that the NRCB respond to the matter, at least by treating it as relevant and properly taking it into account in its decision."

[81] Although the Board was referring to hearings held by the NRCB, it is equally applicable to a review undertaken by the AEUB. Applying these definitions to the evidence presented in the Parties' submissions, the Board determines the appeal must be dismissed.

[82] The issues raised by the Appellant, specifically those relating to compensation and hiring practices, are not within the Board's jurisdiction to hear. If there was an agreement between the Appellant and the Approval Holder, these are issues that would have to be settled through a civil action in the courts. Therefore, the Board will not consider these issues in this decision.

[83] The only issues the Board will consider are those raised regarding the possible detrimental effects to the water and land which the Appellant, and their members, have an interest in.

[84] In the supplemental questions provided to the Appellant, the Approval Holder discussed such issues as cumulative environmental effects, water issues, air issues, plant

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[31] *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025.

[32] *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025.

operation concerns, and the consultation program.[33] The Appellant received all of this information, as well as the application provided to the AEUB, and was provided an opportunity to review and comment on the submissions.

[85] If the Appellant still had concerns, it was during that review process that they should have been raised.

[86] If a person has a specific concern regarding the project and how they will be affected, it is important to convey the information to the AEUB. The AEUB cannot guess what issues will be concerns to persons in the area. It is also not acceptable to withhold an issue in a veiled attempt to leave the door open for the matter to be heard by a different board. If the opportunity is there to participate and provide information to the AEUB, that opportunity must be taken, unless new information surfaces that was not available at the time the AEUB was making its decision. Section 95(5)(b)(i) of EPEA was included to prevent an abuse of the administrative process, and as stated, to avoid duplication in the hearing process and to ensure there is no multiplicity of proceedings based on similar evidence.[34] As previously stated in the Board's decision, *Carter Group*, "…an Appellant cannot raise the challenge to an Approval, arguments which were available to the Appellant when the [AEUB] heard the evidence and made its decision."[35]

[87] The Appellant appears to be mainly concerned with the lack of compensation and employment opportunities. Even if this Board heard the appeal, there are no remedies this Board can provide to satisfy these concerns. These issues are not within the jurisdiction of the Board. The Board can make recommendations to the Minister to confirm, reverse, or vary the decision of the Director,[36] and the Director made no determination regarding these issues. His realm of authority is limited to the environmental effects of the project.

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33 See: Director's Record.

34 See: *Weber* (2003), 47 C.E.L.R. (N.S.) 61 (Alta. Env. App. Bd.), (*sub nom. Weber et al.* v. *Director, Approvals, Bow Region, Regional Services, Alberta Environment re: Corridor Pipeline Ltd.*) (10 May 2002), Appeal No. 01-072-D (A.E.A.B.) at paragraph 45.

35 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Prote*ction (8 December 1994) Appeal No. 94-012 (A.E.A.B.) at page 12.

36 See: Sections 98 and 99 of EPEA.

[88] Therefore, the Board finds the Appellant received notice of and participated in the AEUB review of the application. The Appellant played an important role in the process and was able to raise issues and concerns to the Approval Holder. The Approval Holder provided information on all of the matters raised in the Appellant's Notice of Appeal and clarification letter, and this information was provided to the AEUB for review. Therefore, based on the information provided by the Parties and the AEUB, the Board finds all of the issues were adequately dealt with by the AEUB.

IV. CONCLUSION

[89] Pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, the Board dismisses the Appeal, as the Appellant had the opportunity to participate in a review before the AEUB, and all issues raised in the Notice of Appeal were considered and addressed by the AEUB.

Dated on June 28, 2004, at Edmonton, Alberta.

"*original signed by*"

Mr. Al Schulz
Board Member