

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Report and Recommendations

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Date of Hearing – January 24 and 25, 2005

Date of Report and Recommendations – February 24, 2005

**IN THE MATTER OF** sections 91, 92, 94, 95 and 99 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

**IN THE MATTER OF** appeals filed by Ben Gadd with respect to Approval No. 00188589-00-00 issued under the *Water Act* and Approval Nos. 11767-01-02 and 46972-00-01 issued under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

**HEARING BEFORE:**

Dr. Steve E. Hrudehy, Panel Chair,  
Mr. Ron V. Peiluck, Board Member, and  
Mr. Al Schulz, Board Member.

**APPEARANCES:**

**Appellant:** Mr. Ben Gadd, represented by Ms. Jennifer Klimek.

**Director:** Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darin Stepaniuk, Alberta Justice.

**Approval Holder:** Cardinal River Coals Ltd., represented by Mr. Dennis R. Thomas, Q.C. and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

**Intervenors:** Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins; Trout Unlimited, represented by Mr. Brian Meagher; Yellowhead County, represented by Mr. Andrew Stanton; Alberta Fish & Game Association, represented by Mr. Quentin Bochar; United Mine Workers of America, represented by Mr. Robin Campbell; Town of Hinton, represented by Mayor Glenn Taylor; and Alberta Council for Sustainable Communities and the Environment, represented by Mr. Robin Campbell.

**Board Staff:** Ms. Valerie Higgins Myrmo, Registrar of Appeals, Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Marian Fluker, Senior Research Officer.

**WITNESSES:**

**Appellant:** Mr. Ben Gadd, Ms. Dianne Pachal, Mr. Chris Severson-Baker, Mr. Cleve Werschler, and Mr. Tom Stang.

**Director:** Mr. Larry Williams, Mr. Ryan Puhmann, Mr. Andy McCracken, Mr. Jeff Kneteman, Ms. Fiona Slessor, and Ms. Celina Duong.

**Approval Holder:** Mr. Doug Whicker, Mr. John Kansas, Mr. Dermot Lane, Ms. Beth MacCallum, Dr. Peter Chapman, Mr. Peter Sagert, and Mr. Wim Veldman.

**Intervenors:** Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins; Mr. Brian Meagher; Mr. Andrew Stanton; Mr. Quentin Bochar; Mr. Robin Campbell; and Mayor Glenn Taylor.

## EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 00188589-00-00 under the *Water Act* and Amending Approval Nos. 11767-01-02 and 46972-00-01 under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. for the construction, operation, and reclamation of a private haul road near Cadomin, Alberta. The Approval and Amending Approvals modify the original design of the Cheviot coal mine project. The primary difference is the introduction of a private haul road and the elimination of the need to rebuild the existing abandoned railway line. The Board received Notices of Appeal from Mr. Ben Gadd appealing the Approval and the Amending Approvals.

The Board determined that Mr. Gadd was directly affected by the private haul road and, therefore, was granted standing. The Board granted full party status to a group of residents from Cadomin, and it also allowed a number of community groups, including the Town of Hinton, to participate as limited intervenors.

The Board also determined that the private haul road is sufficiently different from the transportation and utility corridor assessed by the Joint Review Panel of the Alberta Energy and Utilities Board and the Canadian Environmental Assessment Agency, that the Board retains jurisdiction to hear these appeals. However, the issues dealt with at the Hearing were strictly limited to the differences in the environmental impacts between the transportation and utility corridor that the Joint Review Panel assessed and the major change being the implementation of the new haul road option. The Hearing did not deal with the environmental impacts of the mine or other aspects of the Cheviot coal mine project.

Following a review of all of the evidence presented for the Hearing of these appeals, the Board determined that some aspects of the new design of the haul road negatively affect Mr. Gadd and the Cadomin residents in terms of their use and enjoyment of the local wilderness areas. However, the Board finds there are also environmental benefits to the haul road design relative to the original design, most notably with regard to the reduced impact on the local watershed and the improved control of human access to the wilderness areas to the west of the haul road, which

should reduce illegal hunting in the area. Therefore, as long as the potential for wildlife mortality associated with the haul road can be minimized, the haul road should have a net benefit for the environment compared to the original design of the project.

Therefore, the Board recommends the Approval and the Amending Approvals be confirmed subject to a number of variations. Most of these variations relate to providing additional protection for wildlife.

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## I. INTRODUCTION

[1] These appeals relate to a private haul road (the “Haul Road”) associated with a coal mine development (the “Cheviot Project”).<sup>1</sup> The Cheviot Project was originally designed as a “stand alone project” with both the mine and the coal processing plant being constructed in one location.<sup>2</sup> Part of the Cheviot Project as originally designed was the construction of a transportation corridor, including an upgraded existing public road, an upgraded existing railway, and a right of way for an electrical power transmission line.<sup>3</sup> The Cheviot Project as originally designed was approved in 2000, following a joint review panel (the “Joint Review Panel”) hearing under legislation administered by the Alberta Energy and Utilities Board (the “AEUB”) and under the *Canadian Environmental Assessment Act*, S.C. 1997, c. 37 (“CEAA”).<sup>4</sup> Development of the Cheviot Project was then delayed during a period when economic conditions were not favourable.

[2] In 2002, the Cheviot Project was revived and a number of authorizations, including the approvals under appeal, were applied for to allow the Cheviot Project to proceed in a modified form. One of the key changes to the design of the Cheviot Project was that an existing coal processing plant at a nearby existing coal mine development (the “Luscar Project”), would be used instead of constructing a new coal processing plant as part of the Cheviot Project. As a result, it was necessary to develop the Haul Road to allow the coal to be transported from the new coal mine of the Cheviot Project to the existing coal processing plant at the Luscar Project.<sup>5</sup> The Haul Road, which has now already been constructed,<sup>6</sup> is located within the

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<sup>1</sup> The Board stresses that these appeals relate only to the private Haul Road component of the Cheviot Project and not the mine itself.

<sup>2</sup> See: AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000), at page 11.

<sup>3</sup> See: AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000), at page 11. The existing public road is known as the Grave Flats Road.

<sup>4</sup> See: Letter from the AEUB, dated January 20, 2004. See also: AEUB Decision 97-08, Cardinal River Coals Ltd./TransAlta Utilities Corporation, Cheviot Coal Project (June 1997); AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000); *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 1666 (F.C.T.D.), [1998] F.C.J. No. 821 (F.C.T.D.), [1998] F.C.J. No. 1762 (F.C.A.), [1998] F.C.J. No. 1746 (F.C.A.); and *Alberta Wilderness Assn. v. Cardinal River Coal Ltd.*, [1999] F.C.J. No. 441 (F.C.T.D.).

<sup>5</sup> See: Letter from the AEUB, dated January 20, 2004.

<sup>6</sup> The Board notes that no stay was applied for by the Appellant.

McLeod River corridor. According to Cardinal River Coals Ltd. (the “Approval Holder”) the Haul Road

“...has been developed in anticipation of changing market conditions and improved truck technology. It eliminates the immediate need for construction of considerable infrastructure at the Cheviot [Project] mine (such as the coal preparation plant and handing facilities, a shop and office complex, water supply and tailings dams, and rail access/loadout).”<sup>7</sup>

## II. BACKGROUND

[3] On December 9, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00188589-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Approval Holder for the construction, operation, and reclamation of the Haul Road near Cadomin, Alberta.

[4] On December 19, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Ben Gadd (the “Appellant”) appealing the Approval.

[5] On December 29, 2003, the Board wrote to the Appellant, 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 relating to this appeal and the Parties to provide available dates for a mediation meeting or hearing.

[6] On December 5, 2003, the Director issued Approval Nos. 11767-01-02 and 46972-00-01 (the “Amending Approvals”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12 (“EPEA”) to the Approval Holder for the opening up, construction, operation, and reclamation of the Haul Road. The Amending Approvals<sup>8</sup> allow for the development of the Haul Road between the Luscar Project and the Cheviot Project.

[7] On January 5, 2004, the Board received Notices of Appeal from the Appellant appealing the Amending Approvals.

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<sup>7</sup> See: Director’s Record, Cardinal River Coals Ltd. Private Haul Road Overview (May 2002) at page 3.

<sup>8</sup> As the Approval and Amending Approvals were issued with respect to the same Haul Road, the Board will refer to the Approval and Amending Approvals collectively as the “Approvals.”



[8] On January 5, 2004, the Board acknowledged receipt of the Notices of Appeal and notified the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records relating to these appeals.

[9] On January 5, 2004, the Board received a letter from the Director suggesting the appeals of the Approval and the Amending Approvals be combined and the records for the appeals (the "Record") be sent at the same time. On January 6, 2004, the Board received a letter from the Approval Holder also asking that the appeals be dealt with by the Board together and that the Director produce only one set of records relating to both the Approval and the Amending Approvals.<sup>9</sup> It also requested that instead of scheduling a hearing or mediation meeting, a Preliminary Meeting should be scheduled first to address the following issues:

- “(a) whether Mr. Gadd is ‘directly affected’ by the Approvals under appeal;
- (b) whether Mr. Gadd had the opportunity to participate in a hearing or review administered by the Energy Resources Conservation Board [(AEUB)] at which all of the pertinent matters were adequately dealt with;
- (c) whether the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* at which all of the pertinent matters were adequately dealt with; and
- (d) which matters raised by Mr. Gadd in the Notices of Appeal ought to be addressed during the EAB’s [(the Board’s)] hearing of the appeal, if an appeal proceeds.”

The Board granted these various requests.

[10] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the AEUB asking whether this matter had been the subject of a hearing or review under their respective legislation. On January 13, 2004, the NRCB responded in the negative. On January 20, 2004, the Board received a letter from the AEUB advising that:

“...Cardinal River Coals Ltd. (CRC) applied to the Alberta Energy and Utilities Board (Board/[A]EUB) in August 2002, under the *Coal Conservation Act* for approval to develop a private haul road from the Cheviot Mine Site to the Coal Processing Plant located at the Luscar Mine Site. CRC applied to amend Permit 2000-37 to extend the Cheviot mine permit area so as to include the private haul road. Permit No. C2000-37 was issued to CRC with respect to the Cheviot mine

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<sup>9</sup> On February 20, 2004, the Board received a copy of the Record from the Director, and on February 26, 2004, copies were forwarded to the Appellant and the Approval Holder.

following two joint [A]EUB/Canadian Environmental Assessment Agency (CEAA) hearings in 1997 and 2000. The CRC also applied for an amendment of Permit No. C2000-2 with respect to those portions of the private haul road that would be located within the Luscar Mine site. Permit No. C2000-2 was issued to CRC for the operating of the Luscar Mine.

A number of objections were received to CRC's application to develop a haul road, including an objection from Mr. Ben Gadd. Following a review of submissions, the Board [(AEUB)] dismissed all the objections on the basis that the objectors did not have standing, pursuant to s. 26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the Board [(AEUB)] issued Permit No. C2003-4 on April 9, 2003. Permit No. C2003-4 rescinded Permit No. C2000-37 in order for the inclusion of a private haul road to the existing coal processing plant located at the Luscar Mine site." (Emphasis added.)

The AEUB provided a copy of Permit No. C2003-4 and AEUB Decisions 97-088 and 2002-59, which were the two decisions of the Joint Review Panel with regard to the Cheviot Project.<sup>10</sup>

[11] On January 22, 2004, the Board informed the Parties that it had decided to schedule a Preliminary Meeting to deal with the preliminary motions raised in the Approval Holder's letter of January 6, 2004. The Preliminary Meeting was held on April 26, 2004.

[12] The Board notified the Parties on May 26, 2004, that it had decided to grant the Appellant standing in these appeals and that the Board had jurisdiction to hear these appeals. The Board stated:

"The [Approvals relate] specifically to the haul road, and the changes allowed for under the [Approvals] alter the design of the haul road. To the extent these changes in the design of the haul road were not considered in the Alberta Energy and Utilities Board hearings, the Board retains jurisdiction to hear the matter.

The Board is in the process of setting the issues for the hearing. The issues will be narrowly defined and will focus on the difference in the environmental impacts that were originally before the AEUB and what now exists as the result of the [Approvals]. The hearing of these appeals will deal with the Haul Road only and not the project as a whole." [Emphasis deleted.]

On June 14, 2004, the Parties provided additional submissions on the issues that should be considered at the Hearing of these appeals.

[13] On July 26, 2004, the Board provided a letter stating the issues that would be considered at the Hearing would be as follows:

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<sup>10</sup> See: AEUB Decision 97-08, Cardinal River Coals Ltd./TransAlta Utilities Corporation, Cheviot Coal

- “1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that ‘pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended.’”

The Board scheduled a Hearing for September 27 and 28, 2004, in Hinton, Alberta.

[14] In response to the Board’s notice of the Hearing, the Board received intervenor requests from Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, Mr. Roger Wilkins, Mr. Tom Stang, Trout Unlimited Canada, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, the Town of Hinton, West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities and the Environment. The Board requested the Parties provide their comments regarding the intervenor requests, and the Parties’ responses were received on September 7, 2004.

[15] On September 1, 2004, the Approval Holder requested the Board stay its proceedings until an application previously filed in the Federal Court of Canada, Trial Division, had been adjudicated. The Federal Court application was for an order compelling the Federal Minister of Fisheries and Oceans to prepare an environmental assessment of the Haul Road pursuant to CEAA. The Approval Holder stated that depending on the outcome of the Federal Court application, the Board may lose jurisdiction to hear the appeals. The Board received the Parties’ responses to the Approval Holder’s request on September 3, 2004.

[16] On September 9, 2004, the Board notified the Parties and the intervenors that Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins and Mr. Roger Wilkins (collectively the “Cadomin Residents”) had been granted full party status; the Alberta Council for Sustainable Communities and the Environment, West Yellowhead Community Futures Development Corporation, the Town of Hinton, United Mine Workers of

America, Alberta Fish and Game Association, Trout Unlimited, and Yellowhead County had been given limited intervenor status; and the intervenor request of Mr. Tom Stang had been denied.

[17] On September 9, 2004, the Board also notified the Parties that the Approval Holder's request for a stay of the Board's proceedings had been denied.

[18] On September 14, 2004, Mr. Tom Stang requested a reconsideration of the Board's decision to deny his intervenor application. On September 15, 2004, the Board notified Mr. Stang and the Parties that his reconsideration was denied.<sup>11</sup>

[19] The Board received submissions for the Hearing from the Parties and the Intervenors between September 13 and September 21, 2004.<sup>12</sup>

[20] On September 17, 2004, the Approval Holder commenced an action in the Court of Queen's Bench of Alberta for a judicial review of the Board's decisions regarding the directly affected status of the Appellant, the stay, and the intervenors. The Approval Holder requested an adjournment of the Board's proceedings until the issues raised in the application had been determined. On September 21, 2004, the Board granted the adjournment stating:

"In making its decision to adjourn the hearing at this time, the Board took into account the difficulty that the parties would have preparing for both the Court application and the hearing at the same time. The Board also did not want to have the parties spend their time preparing for the hearing, with the potential that the Court could order the Board to adjourn the hearing on Friday [September 24, 2004].

The Board will re-visit this matter on November 1, 2004, at which time all parties are requested to provide the Board with a status report regarding the judicial review and the status of the federal court judicial review. In this regard, the Board requests the parties expedite the judicial review process." (Emphasis deleted.)

[21] On October 13, 2004, the Board provided the Parties with a copy of its decision on the Preliminary Meeting,<sup>13</sup> and on October 14, 2004, the Board provided its intervenor decision to the Parties.<sup>14</sup>

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<sup>11</sup> The Board notes that Mr. Stang appeared before the Board as a witness for the Appellant.

<sup>12</sup> The Board received a revised submission from the Town of Hinton on December 15, 2004, as Mayor Glenn Taylor replaced Alex Galbraith in the October 2004 elections.

<sup>13</sup> See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID (A.E.A.B.).

[22] On October 15, 2004, the Board provided the Parties with its reasons for denying the Approval Holder's stay request pending the application filed in the Federal Court of Canada.

[23] On November 3, 2004, the Approval Holder's judicial review application was heard by the Court of Queen's Bench. On November 4, 2004, the Court denied the Approval Holder's judicial review, finding the Board's determination that the Appellant was directly affected was correct, and in any event, the application by the Approval Holder was premature.<sup>15</sup>

[24] On December 10, 2004, the Board confirmed the Hearing was rescheduled to January 24 and 25, 2005, in Hinton, Alberta.

[25] On December 23, 2004, the Board provided the Parties with a copy of its decision with respect to the interim costs application of the Cadomin Residents.<sup>16</sup>

[26] The Hearing was held on January 24 and 25, 2005.

### **III. GENERAL COMMENTS**

#### **A. Appellant**

[27] The Appellant explained he is a naturalist and licenced interpretative guide who uses the area where the Haul Road is located to conduct guided tours. The Appellant argued the Director did not properly assess the environmental impacts of the Haul Road, and the Approvals should be set aside until the impacts are properly assessed. He submitted the Director did not impose proper conditions in the Approvals.

[28] The Appellant stated the Workplans<sup>17</sup> and associated studies required by the Approvals should have been completed before a decision was made on whether or not to grant

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<sup>14</sup> See: Intervenor Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (12 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID2 (A.E.A.B.). The West Yellowhead Community Futures Development Corporation did not provide any submissions to the Board and therefore was not considered in the Board's deliberations.

<sup>15</sup> See: *Cardinal River Coals Ltd. v. Environmental Appeals Board (Alberta)* (4 November 2004), Edmonton 0403 18462 (Alta. Q.B.). In the judicial review, the Approval Holder abandoned its objections regarding the Board's decisions to deny the stay and to grant some of the intervenors status. The Approval Holder only advanced its arguments on the Appellant's standing.

<sup>16</sup> See: Interim Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (21 December 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID3 (A.E.A.B.).

<sup>17</sup> "Workplans" are part of an iterative process included in the Approvals to address mitigative measures.

the Approvals rather than being conditions in the Approvals. He stated information collected to date on the Harlequin duck population should have been used to determine the vital rates and thereby the specific and cumulative impacts of the Haul Road before the Approvals were granted.

[29] The Appellant stated many of the conditions pertaining to the dust and the hauling of coal are vague and immeasurable and therefore difficult to enforce. He argued the emission monitoring plan should have been developed before the Director made his decision so it could have been reviewed by the Director and the public.

[30] The Appellant argued there is insufficient monitoring of the water and sediment management dugouts, and there are no conditions with respect to selenium.

[31] The Appellant provided a brief summary of the history of the Cheviot Project. The Appellant explained that in the original design, the Approval Holder addressed the alternative of using the Luscar Project's coal processing plant instead of constructing a new coal processing plant at the Cheviot Project and transporting the coal to the Luscar Project by way of high-speed trucks. According to the Appellant, the Approval Holder dismissed this alternative on the basis that it was unacceptable for environmental, social, economic, and technical reasons, and the Joint Review Panel accepted the Approval Holder's position that it was not an acceptable alternative.

[32] The Appellant stated the Joint Review Panel determined the original design would cause significant adverse effects, but the effects were justified considering the social and economic benefits of the Cheviot Project. The Appellant explained the Joint Review Panel directed certain studies and compensation plans be completed in order to further assess specific impacts of the Cheviot Project and to plan for mitigation.

[33] The Appellant outlined a number of differences between the original design and the design based on the Haul Road. He stated under the original design, the access corridor would remain public land open to public access, but with the Haul Road design, the Haul Road is included in the mine permit area, putting it and the Grave Flats Road under the Approval Holder's exclusive control.

[34] The Appellant stated the Haul Road design requires 19 major dugouts for water and sediment control, and the original design did not require any such developments.

[35] Another difference noted by the Appellant was the Haul Road design includes rock and cement berms along the Haul Road while the original design did not contain any berms.

[36] The Appellant stated the driving surface of the Haul Road will be 30 metres wide in places, and large trucks (150 tonne or more) would utilize the road 24 hours a day, every day, with a vehicle passing any given point on the Haul Road every 9.6 minutes.

[37] The Appellant explained the Haul Road would use a 36-year old coal processing plant at the Luscar Project rather than a new coal processing plant with state-of-the-art technology. Therefore, according to the Appellant, emissions from the Luscar Project must be considered when determining the cumulative effects of the emissions from the construction and use of the Haul Road.<sup>18</sup>

[38] The Appellant explained that, under the original design, the Luscar Project's mine would have been closed and reclaimed, but now it will not be reclaimed in the near future.

[39] The Appellant explained the area in which the Haul Road is located has been zoned general recreation, and one of the objectives for the area is to maintain its recreation and tourism capacity. He stated: "This area and the immediately adjacent wildlands is the most intensively used recreation area in the entire 8,400 square kilometer Coal Branch planning region."<sup>19</sup> He also stated the area is used recreationally by people who live in the region and those who travel to the area for that purpose.

[40] The Appellant stated the Haul Road area is surrounded by lands zoned as Prime Protection, including the Whitehorse Wildland Park and Whitehorse Creek Provincial Recreation Area.

[41] The Appellant stated the Director did no independent studies of the effect of the Haul Road and did not require an environmental impact assessment be completed with respect to the Haul Road design.

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<sup>18</sup> See: Appellant's submission, dated September 13, 2004, at Tab 1, Affidavit of Ms. Dianne Pachal at paragraph 37.

<sup>19</sup> Appellant's submission, dated September 13, 2004, at paragraph 28.

[42] The Appellant stated the effect of the Haul Road would be in addition to the original design and other activities in the area, and these effects may be significant. The Appellant submitted the Board must understand the cumulative effects in order to determine whether or not the Haul Road should be approved.

[43] The Appellant stated that, although the Approval Holder explained how it overcame the technical problems of the Haul Road, it provided little or no information as to how the environmental, social, and economic problems have been solved.

[44] The Appellant stated the original approval imposed timing constraints to minimize the harm to birds during nesting and breeding seasons, but the Haul Road was built at the time when the most harm would be done.

[45] The Appellant argued the Approval Holder did not provide adequate or complete answers to Alberta Environment's supplemental information questions. The Appellant submitted the Director's approach "...was incomplete and misdirected."<sup>20</sup> According to the Appellant, the Director misinterpreted the conclusions of the Joint Review Panel regarding the environmental impacts of the original design.

[46] The Appellant stated the Director asked for advice from others in his and other Departments, and these people advised him that necessary information had not been provided, that there would be environmental impacts, and that certain monitoring should be done, but in spite of these concerns, the Director issued the Approvals anyway. According to the Appellant, the Director did not obtain updated information on other activities and likely activities in the area.

[47] The Appellant stated the disturbed right-of-way of the Haul Road would be 100 metres in many places.

[48] The Appellant stated that companies should improve their operations and address key environmental issues, especially when they are making significant financial investments in existing facilities or extending the life of old, existing facilities. He submitted it is a societal expectation that a company will address key environmental issues and effects resulting from modifications to a regulated project and bring the modified project up to the standards of the day



through continuous improvements. He argued there is no indication the Approval Holder plans to bring the Luscar Project, including the coal processing plant, up to current standards.

[49] The Appellant recommended that a risk assessment be completed before any approval is granted, and this information should be used in designing the approval to avoid or mitigate the risks identified. The Appellant submitted the approval should specify the avoidance and mitigation measures.

[50] The Appellant argued the Director based his decision on incorrect information regarding the significant, adverse impacts of the Cheviot Project as a whole and the authorizations for the Haul Road portion of that project.

[51] The Appellant submitted the Director "...must determine the current environmental problems, use information that has become available since the review of the Original Project and assess what environmental problems are likely to occur as a result of the approval if granted."<sup>21</sup> He argued the Director did not have the information to do a proper assessment.

[52] The Appellant requested the Approvals be set aside considering the nature of the area, the significance of wildlife species impacted, and the Director's inability to determine the effects of the Cheviot Project.

## **B. Approval Holder**

[53] The Approval Holder stated if the environmental impact would have occurred with the original design, then the Board should not consider that impact. It stated this also applies to cumulative effects, as the AEUB would have taken these into consideration.

[54] The Approval Holder submitted the process followed in the submission of the applications and in the Director's review of the applications was detailed and thorough, making the issuance of the Approvals appropriate.

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<sup>20</sup> Appellant's submission, dated September 13, 2004, at paragraph 43.

<sup>21</sup> Appellant's submission, dated September 13, 2004, at paragraph 109.

[55] The Approval Holder argued the Appellant presented materials in his written submission and Affidavits that were not related to the five issues set out by the Board and such information should not be considered by the Board.

[56] The Approval Holder noted the Appellant had stated that he had not read any documents to prepare for the Hearing. The Approval Holder also pointed out that when the Appellant was specifically asked what mitigation measures he might suggest, the Appellant declined to offer any.

[57] The Approval Holder submitted the Approvals should not be set aside, as the AEUB already determined the Haul Road is in the public interest. It argued the Appellant failed to establish the Approvals are inappropriate, and therefore the Board should not modify them. The Approval Holder submitted the appeals should be dismissed in their entirety.

**C. Director**

[58] The Director explained the original design of the Cheviot Project and then stated that, with the Haul Road design, the railway is no longer required, and the transmission line has been downgraded and is to be constructed within the Haul Road right-of-way wherever possible. The Director stated the Haul Road was to be constructed across public land.

[59] The Director stated the AEUB considered the application and considered the Haul Road a part of the mine permit area, and it had to be included within the mine permits issued by the AEUB for the Luscar and Cheviot Projects. The Director explained the AEUB modified the mine permits issued under the *Coal Conservation Act*, R.S.A. 2000, c. C-17, to have the Haul Road entirely within the approved mine permit area.

[60] The Director stated the original design consisted of three components, none of which required an approval under EPEA. He explained the rail line presently exists and the Canadian National Railway would have had to apply to Federal agencies for approval to update and operate the line; TransAlta Utilities Corporation would have had to apply for approval of the transmission line; and the Municipality of Yellowhead County would have operated the upgraded Grave Flats Road.

[61] The Director stated the Haul Road design consolidates the transportation and utility corridor. He stated the original transmission line was no longer required, nor was the upgrading of the rail line with the resulting disturbances within the McLeod River.

[62] The Director stated he properly exercised his discretion in granting the Approvals, and the issues raised in the appeals were carefully considered during the application review process.

[63] The Director argued the Appellant did not restrict his evidence to the five issues identified by the Board and is asking the Board to re-examine the entire Cheviot Project. The Director submitted the Board should not consider the other issues raised by the Appellant.

[64] The Director stated he complied with the environmental assessment process, and he noted that the Board does not have the authority to review the environmental assessment decision-making process.

[65] The Director stated the Approvals for the Haul Road eliminate effects that would have occurred under the original design, and the effects are not in addition to the original design.

[66] In response to the Appellant's comments that the Workplans set out in the original approval should have been completed and the results considered by the Director in making his decision respecting these Approvals. The Director stated the Joint Review Panel required further information be provided, and it did not require this information be provided before the Approvals for the project could be issued. The Director explained the Workplans prescribed in the EPEA Approval

“...are a dynamic and ongoing requirement and were not intended to be undertaken prior to the issuance of the Approvals for the various elements of the Cheviot Coal Project. They were intended to provide for ongoing collection of information including any reaction to the monitored effects that are appropriate.”<sup>22</sup>

[67] With regards to the reclamation at the Luscar Project, the Director explained that an approval is required to undertake reclamation of an activity, and until an application is received, it is not a matter the Director can fully address. The Director stated the Joint Review Panel did not make it a condition of its approval that the Luscar Project, including the coal

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<sup>22</sup> Director's submission, dated September 20, 2004, at paragraph 107.

processing plant, had to be reclaimed as a condition of the approval of the Cheviot Project. The Director also stated the Approval Holder is obligated under its Luscar Project approval to ensure specified reclamation is undertaken.

[68] The Director explained he consulted Federal authorities and was advised no Federal approvals were required for the construction of the Haul Road.

[69] The Director explained the conditions in the Approvals require the provision of Workplans for undertaking the studies, and the Approval Holder has been providing the Workplans in accordance with the Director's directions as provided in the initial approvals.

[70] The Director stated he acted reasonably and in compliance with the obligations imposed under the legislation. He stated, "...he must clearly act himself and not simply implement the advice that he may receive from his staff and technical advisors."<sup>23</sup>

[71] The Director stated he complied with the Joint Review Panel report by requiring the Approval Holder to provide additional information through assessments and reports, and the Director can adapt his management and regulation of the Approvals based on the ongoing provision of information.

[72] The Director submitted the appeals should be dismissed.

#### **D. Intervenors**

##### **1. Cadomin Residents**

[73] The Cadomin Residents stated the public and their personal interest are better served by the railroad alternative with the bypass road hauling men and supplies. They stated they did not "... agree with the monetary compensation being offered to Cadomin landowners as a sufficient mitigating measure to address our concerns..." and acceptable alternatives were rejected.

[74] The Cadomin Residents stated the design of the Haul Road requires more land to be used than the bypass road, resulting in a 13.2 hectare increase in land disturbances. They

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<sup>23</sup> Director's submission, dated September 20, 2004, at paragraph 118.

argued the increase affects the width of the Grave Flats Road at critical junctures. They stated the construction of the Haul Road east into the river channel has narrowed the channel, and the Grave Flats Road, as constructed, will have a greater potential for flooding and washouts as it has been under water or washed out at this point during floods of the McLeod River.

[75] The Cadomin Residents argued there is a greater potential for pollution from the Haul Road due to the proximity to the McLeod River and the number of vehicles that may leak fluids or spill loads. They stated the possible use of road salt during the winter months increases the possibility of water pollution. They argued the Approvals do not require the impact on the McLeod River and the McLeod River valley be avoided or mitigated.

[76] The Cadomin Residents submitted the Director should have requested a current assessment of ambient noise levels and whether the additional noise from the Haul Road is within acceptable levels. They stated noise mitigation measures should be developed, as the Approval Holder's noise assessment indicates levels could increase by 10 decibels when a truck passes. They argued noise spikes at night are harder to live with than a steady state of noise. The Cadomin Residents submitted that even though the application stated the noise levels at the Whitehorse Creek campground and in Cadomin would be within the AEUB directives, they were concerned about the fluctuations in noise. They stated campers have the option of moving from their campsite, but the only option for Cadomin Residents is to sell their property.

[77] The Cadomin Residents stated they do not have expert evidence regarding particulate matter. However, they explained that during construction, the plumes of dust were visible daily, and they questioned what magnitude of dust would be created when the mine is in full operation. They argued there was insufficient mitigation during construction, and they questioned the reliability of the assurances made by the Approval Holder regarding dust suppression and mitigation.

[78] According to the Cadomin Residents, the option of paving the road was rejected by the Approval Holder due to the weight, number, and capacity of the mine vehicles, and other measures were required to mitigate dust concerns. They argued the past summer was "...ample

proof as to the ineffectiveness of the watering or the attention paid to it by the proponent [Approval Holder] as a mitigative measure.”<sup>24</sup>

[79] The Cadomin Residents stated the frequent south west winds, measuring up to 200 kilometres per hour, combined with the freeze/dry cycles and Chinook conditions resulting in no snow cover, can affect the road surface and create dust. They stated use of the watering process for wintertime dust control measures might cause ice to form on the Haul Road.

[80] The Cadomin Residents argued the conditions in the Approvals are vague and do not provide assurance that the dust problem will be addressed.

[81] The Cadomin Residents stated people who live in the Coal Branch value the privilege of living amongst the beauty of the mountains and the opportunities for a wilderness experience.

[82] The Cadomin Residents argued a variety of resource industries in the area have created a negative cumulative effect for access to recreation. They stated the impact of the Luscar Project was at least six miles away from Cadomin. Furthermore, in contrast to how the Haul Road design had been developed, the impact on the residents and their enjoyment of their properties was considered by the Approval Holder in its development of the Cheviot Project mine pits on the west side of the valley.

[83] The Cadomin Residents stated the passing of major vehicles every nine minutes would effectively and severely limit their access to recreation and the enjoyment of their properties for most of their lifetimes. They argued the Haul Road severely restricts their ability to access areas on the west side of the Haul Road for its entire length. They stated the design of the Haul Road restricts activities previously enjoyed, such as hiking, biking, and general exploration. The Cadomin Residents also expressed concern regarding access to the east side of the Grave Flats Road, especially in the McLeod River valley south of Whitehorse Creek.

[84] The Cadomin Residents argued the crossings to be built will not provide the same level of accessibility previously enjoyed. They stated the original bypass road and rail line might have limited access east of the railroad, but there would have been full access to the McLeod River from Cadomin to the Cheviot Project.

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<sup>24</sup> Cadomin Residents' submission, dated September 20, 2004.

[85] The Cadomin Residents explained there was more than the usual random camping along the McLeod River this past summer, and since all terrain vehicle drivers were only allowed access to the McLeod River valley, these vehicles frequently traversed the McLeod River to gain access to the east mine area. The Cadomin Residents stated this disturbed the fish habitat in the McLeod River.

[86] The Cadomin Residents argued the cumulative effects of reduced camping areas and access has impacted land use in and north of Cadomin, and the impact on fish habitat and animals along the river might not be easily evaluated for some time.

[87] The Cadomin Residents did not agree that coal mining observation points would mitigate the loss of access to that terrain.

[88] The Cadomin Residents stated the "...ability to access prime recreation areas from the Luscar [Project] mine site, east to Cadomin, and south to Mountain Park, has been severely impeded and the landscape irreparably altered."<sup>25</sup> They argued the Director failed to recognize the significant loss of access to prime recreational land.

[89] The Cadomin Residents stated the Haul Road is the quickest and easiest way for the Approval Holder to abandon the mine if the coal market becomes less economical, leaving behind a damaged landscape.

[90] The Cadomin Residents submitted the unit-holders of Fording Coal Trust (the parent company of the Approval Holder) expect an increase in unit price over consideration of a commitment to the community and the environment of Cadomin and the McLeod River valley.

[91] The Cadomin Residents requested the Approval be set aside, an in-depth environmental assessment be completed which includes an identification and assessment of alternatives, and a public commitment to a reclamation process of the Haul Road if it is not used for one year.

## 2. Trout Unlimited

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<sup>25</sup> Cadomin Residents' submission, dated September 20, 2004.

[92] Trout Unlimited stated it hoped the construction of the Haul Road would follow the regulations set out in the Fish Habitat Protection Guideline for Stream Crossings. It stated its major concern is the protection of the coldwater resources downstream of the Cheviot Project. It stated it wanted assurance that siltation damage will be minimal and there will be no net loss of fish habitat or aquatic life due to the construction of the Haul Road. Trout Unlimited wanted to know what checks and balances have been put in place to take these environmental factors into consideration.

[93] Trout Unlimited explained it is developing a project where it anticipates it will re-establish the native fishery of the McLeod River. It hoped the "...construction and implementation of this proposed haulroad will not harm or damage this aquatic ecosystem and the species that it contains."<sup>26</sup>

### 3. Yellowhead County

[94] Yellowhead County stated it fully supports the Cheviot Project, as it presents numerous social, financial, and employment benefits to the area and to the citizens of Yellowhead County and the towns of Edson and Hinton.

[95] Yellowhead County explained the upgrading of the Grave Flats Road between Cadomin and Mountain Park is a major benefit, as the road had not been in optimum condition. It stated the road will be upgraded to meet proper engineering standards and Yellowhead County will maintain the road for summer use.

### 4. Alberta Fish & Game Association

[96] The Alberta Fish and Game Association stated it is in favour of the Haul Road. However, it had concerns how the Haul Road will impact the movement and migration of wildlife from one side of the valley to the other. It stated it wanted assurances the effect of the Haul Road would be minimal towards the large ungulates that frequent the area, and it wanted to know what checks and balances are in place to take these factors into consideration.

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<sup>26</sup> Trout Unlimited's submission, dated September 15, 2004.



[97] The Alberta Fish and Game Association stated it wanted assurances that access to areas such as the Whitehorse Wildland Park and Whitehorse Creek Provincial Recreation Area would still be available to the hunting and angling community.

[98] The Alberta Fish and Game Association was concerned with the protection of the coldwater resources downstream of the Cheviot Project. It also wanted assurances siltation damage would be kept to a minimum along the affected portions of the stream and that there would be no net loss of fish habitat or aquatic life as a result of any construction. It wanted to know what checks and balances have been put in place to take these factors into consideration.

[99] The Alberta Fish and Game Association concluded by stating it did not want to see these areas lost to the recreational hunting and angling community.<sup>27</sup>

#### 5. United Mine Workers of America

[100] The United Mine Workers of America provided its submission on behalf of the members who work at Cardinal River Coals Ltd. and the Cheviot Project.

[101] The United Mine Workers of America argued the appeals are frivolous and without merit, and the appeals are an attempt to rehear the two Joint Review Panel's rulings that have twice approved the project. It submitted: "There is nothing this company will be able to do other than shut down the project that will appease the constant assault by these groups."<sup>28</sup>

[102] The United Mine Workers of America stated the people working on the Cheviot Project have made a commitment to satisfy the needs of federal and provincial departments, the First Nations, and the wildlife in the area. It explained a large population of wildlife makes the area their home, including grizzlies, wolves, elk, deer, and sheep, and the wildlife and people can co-exist, flourish, and make a living.

[103] The United Mine Workers of America stated many of its members enjoy the outdoors, like to recreate in the area, and understand the value of looking after the resources. It argued there is no evidence the Haul Road will hurt the wildlife in the area. It hoped poaching would decline with workers in the area constantly.

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<sup>27</sup> Alberta Fish and Game Association's submission, received September 20, 2004.

<sup>28</sup> United Mine Workers of America's submission, received September 20, 2004.

[104] The United Mine Workers of America argued the Appellant "... is the voice of the minority trying to impose on the majority their moral and social views."<sup>29</sup> It stated the area has been designated a coal mining area since the turn of the century, and the Approval Holder has the right to mine the coal in this area.

[105] The United Mine Workers of America argued a number of the issues raised by the Appellant, such as selenium, have nothing to do with the Haul Road.

[106] The United Mine Workers of America stated the Approval Holder is obligated to meet the conditions of the Approvals, and the Approval Holder has an impeccable record when dealing with the environment and the stewardship of the land. It stated its members take their role seriously as stewards of the resource while actively mining and reclaiming the land.<sup>30</sup>

## 6. Town of Hinton

[107] The Town of Hinton stated its residents are most affected by the development of the Haul Road and its environmental, social, and economic effects.

[108] The Town of Hinton stated its residents are the most likely and frequent users of the Haul Road, whether for work or pleasure. It stated the Haul Road has been discussed and understood within the community for some time.

[109] The Mayor of the Town of Hinton explained the Town Councillors toured the Haul Road when it was under construction, and they were impressed with what they saw, from the storm water management and sediment erosion control to improved access to the Cadomin Cave.

[110] The Town of Hinton submitted the Haul Road has its overall support as a sustainable project. The Town stated it "...has a high level of confidence in the company and their employees to be environmentally responsible in the construction, operation and reclamation of the road."<sup>31</sup> The Town stated the Approval Holder has operated a socially and economically responsible coal mining operation since the 1970s, and the Approval Holder has successfully

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<sup>29</sup> United Mine Workers of America's submission, received September 20, 2004.

<sup>30</sup> United Mine Workers of America's submission, received September 20, 2004.

<sup>31</sup> Town of Hinton's submission, dated December 15, 2004.

built, operated, and reclaimed more miles of road and ditches on the mine site than what the Haul Road involves.

[111] The Town of Hinton explained the Haul Road design has benefits compared to the original design. It stated the Haul Road eliminates one right-of-way to the Cheviot Project and the associated environmental impacts. The Town also stated it would be a much better quality public road to the south of Cadomin that would enhance public and worker safety and would improve emergency response times in the area. The Town of Hinton stated visitation and tourism would increase in the area, including the provision of public bus tours of the Cheviot Project.

[112] The Town of Hinton stated road building, storm water management, and mine pit reclamation are regular activities of coal mining. It stated that, other than the wash plant and rail-loading infrastructure at the Luscar Project, the remaining pits and parts of the Luscar Project can be fully reclaimed.

#### 7. Alberta Council for Sustainable Communities and the Environment

[113] The Alberta Council for Sustainable Communities and the Environment (“Sustainable Communities”) explained it is a grass roots coalition whose common goal is to protect resource based economies and the environment.

[114] The Sustainable Communities stated the Approval Holder has some of the best reclaimed lands in any mining area within Alberta.

[115] The Sustainable Communities explained most of the current attractions listed by the Appellant are the result of discoveries by miners.

[116] The Sustainable Communities stated the Haul Road is more beneficial to Albertans than the original design. It explained it is better to combine the roadways to accommodate the public, haul trucks, and power distribution than to have three separate corridors. It also stated the Haul Road seems to be the most appropriate solution to the transportation corridor, as there would have been significant challenges trying to mitigate the environmental impacts of the rail line that lies on the river bank most of the way through the valley.

[117] The Sustainable Communities stated the Approval Holder had constructed an access point to Cadomin Cave that is superior to what existed previously.

[118] The Sustainable Communities submitted mining is a temporary land use, and the lands will come alive again and provide habitat for the wildlife and recreational opportunities for Albertans.

[119] The Sustainable Communities submitted there are many jobs at stake other than mine personnel. It stated the area is a resource based community, and the local economy, schools, medical facilities, and retail sector are partially dependent on the mine proceeding.

[120] The Sustainable Communities stated the Approval Holder has been very conscious of the environment, wildlife sustainability, and other users in the area, and it did not expect the Haul Road to be any different.<sup>32</sup>

#### **IV. LEGISLATIVE OVERVIEW**

[121] Under section 99 of EPEA, the Board is required to provide a report to the Minister that includes its recommendations regarding the issues under appeal. Under section 100 of EPEA, the Minister has the authority to confirm, reverse, or vary the Director's decision. Section 100 provides:

- “(1) On receiving the report from the Board, the Minister may, by order,
- (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,
  - (b) make any decision that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and
  - (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.”

[122] In any appeal before it, the Board must remain cognizant of the purposes of the act, whether it is EPEA or the *Water Act*. Section 2 of these acts provides the Board with the general basis on which to interpret and evaluate the appeals before it. Section 2 of EPEA states:

“The purpose of this Act is to support and promote the protection, enhancement

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<sup>32</sup> Alberta Council for Sustainable Communities and the Environment's submission, received September 20, 2004.

and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (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."

Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in

administering this Act.”

Of particular relevance to these appeals is section 2(b) of EPEA and the *Water Act*, indicating the need to balance the environmental concerns in the area with the economic concerns.

[123] The Board will make recommendations and the Minister will ultimately decide what is in the best interests of the environment, taking into consideration the purposes of the acts, including the need for economic growth and prosperity in Alberta. The Board and the Minister can review all aspects of the environment providing it is consistent with the legislation and is relevant to the issues identified in the appeal. Section 2(t) of EPEA defines “environment” as:

“...the components of the earth and includes

- (i) air, land and water,
- (ii) all layers of the atmosphere,
- (iii) all organic and inorganic matter and living organisms, and
- (iv) the interacting natural systems that include components referred to in subclauses (i) to (iii).”

[124] When the Director receives an application for a project, one of his key responsibilities is to assess the environmental impacts of the project. If he identifies issues that may be a concern, he is also required to determine if there are mitigation measures in place or that can be implemented to minimize the risk to the environment. As the Minister can make any decision the Director can, this responsibility ultimately rests with the Minister. The Board prepares its Report and Recommendations with this mind and takes into consideration all of the relevant information and argument that is presented in front of it. Through the Hearing process, the Board has the opportunity to hear arguments supporting and opposing the different viewpoints. Through this adversarial process, the Board often acquires additional information that was not available to the Director at the time he made his decision. This affords the Board the opportunity to recommend modifications to the approval that, from its perspective, improves the effectiveness of the approval in protecting the environment.

[125] The Director has an obligation to consider all aspects of the environment when considering an application for a major project such as a coal mine or for an amendment to an existing approval. The Director also has the authority and should include representatives from other departments in the review of an application when he considers it appropriate. In this case,

the Director included representatives from Community Development and Sustainable Resource Development in the review of the application. It is important for the Director to receive input from those responsible of ensuring the interests of others using the area are considered. When warranted, the Director should include conditions or mitigation requirements to address concerns raised by the other departments. Community Development and Sustainable Resource Development do not issue approvals for many of the projects reviewed by the Director, but it is vital to consider the effect of such projects on wildlife and public use of the area. It is through the Director that these concerns are considered and reflected in the conditions contained in any approval. In this case, the Approvals issued by the Director are regulatory instruments that apply to the Haul Road.

[126] Although the Appellant requested the Board set aside the Approvals, the Board must take into consideration all of the purposes of EPEA and the *Water Act*. Both of these acts require the Board to balance the economic growth with the environmental effects. In this case, the Joint Review Panel determined the Cheviot Project as a whole is in the public interest. This Board does not rehear this public interest determination. What this Board can do is to provide recommendations to the Minister to minimize negative impacts on the environment by recognizing the EPEA principle of "...the importance of preventing and mitigating the environmental impact of development..."<sup>33</sup> The Board appreciates the concerns of the Appellant and the Cadomin Residents regarding the loss of wildland areas in the region, but the Board must also listen to the concerns expressed by the Approval Holder, the Town of Hinton, and the other intervenors who appeared before the Board. They expressed the economic benefits of the project and how the Board's decision could affect their livelihood. Therefore, in reviewing the submissions and evidence and in making its recommendations for minimizing and mitigating negative impacts on the environment, the Board must consider these competing interests in recognizing "...the need for Alberta's economic growth and prosperity in an environmentally responsible manner..."<sup>34</sup>

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<sup>33</sup> Section 2(d) 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 importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions...."

<sup>34</sup> Section 2(b) of EPEA provides:  
"The purpose of this Act is to support and promote the protection, enhancement and wise use of

[127] In these appeals, the Board determined there would be five issues that would be heard:

- “1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that ‘pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended’?”

Each of these issues will be discussed below.

## **V. PRELIMINARY MATTERS**

[128] At the start of the Hearing, the Approval Holder and Director raised preliminary motions regarding the submissions of the Appellant and the Cadomin Residents. Specifically, the Approval Holder and Director stated that some of the material provided by the Cadomin Residents was late and was outside the recognized issues. This material included maps of the Haul Road area and alternative methods of transporting coal that was obtained from various web sites. This material was provided to the Board and the other Parties on January 19, 2005. The Approval Holder argued project alternatives were discussed before the AEUB and are not included as part of the Hearing by the Board. The Director and Approval Holder did not object to the maps, as they were part of the material already before the Board.

[129] In response, the Cadomin Residents referred to the last page of their written submissions in which they recommended the identification and assessment of all alternatives to the Haul Road. They explained the information showed a variety of alternatives available and was to be used for illustrative purposes to demonstrate the improvement in technologies. They stated they did not intend to argue the benefits of the different alternatives.

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the environment while recognizing ... 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....”



[130] The Board determined the Cadomin Residents could present their material, but they must be able to establish the relevancy to the issues identified. The Director and the Approval Holder would have the opportunity to cross-examine and respond to the information presented by the Cadomin Residents.

[131] The material provided by the Appellant on January 21, 2005, included a compact disc containing documents relating to selenium management processes, excerpts from the document "Report on Alberta Grizzly Bear Assessment of Allocation," (the "Grizzly Bear Report") and various maps. The Appellant explained he just received the CD, and it includes possible mitigation strategies regarding selenium the Board could consider. He stated Alberta Environment was aware of the document, and selenium is applicable to the water issue. In regards to the report on the grizzly bears, the Appellant stated the report was referenced in the affidavit of one of his witnesses.<sup>35</sup> The Appellant stated the maps are not new information and should not be a surprise to the Director and the Approval Holder. He explained he intends to use the maps to bring the project to life in a visual way.

[132] The Director and the Approval Holder conceded that, as the Grizzly Bear Report was referred to in the affidavit, they would have no problem accepting it as part of the Appellant's evidence. The Approval Holder stated the maps could be helpful and did not take further issue with them being accepted as evidence. The Director argued there had been no notice by the Appellant that he intended to rely on the CD. He stated it is not enough to suggest the evidence may be relevant. The Director submitted, and the Approval Holder concurred, that the process has to be fair to all Parties. The Approval Holder stated the selenium report is dated April 2004 so it was available before the filing dates for submissions. Furthermore, it was unable to print the document, its expert was unable to review it.

[133] The Board accepted that the Grizzly Bear Report was referred to in the Appellant's submission, and therefore it would be accepted into evidence.

[134] As to the selenium documents, the Board recognized the concerns of the Director and the Approval Holder that filing deadlines should be respected. The Board must ensure the interests of Albertans are served and the best recommendations are made to the Minister on the

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<sup>35</sup> See: Appellant's submission, dated September 13, 2004, at Tab 1, Affidavit of Ms. Dianne Pashal, at

matter. Therefore, the Board allowed the Appellant to refer to the material, and if the Director and Approval Holder were unable to respond once they heard how the Appellant used the information, then they would be able to renew their objections. If during the Board's deliberations on the matter it finds the information in the selenium documents to be determinative of the issue, then the Board can re-open the Hearing to allow the Parties to assess, analyze, and comment on the information included in the selenium documents.

[135] As discussed below, the information provided in the selenium documents were not determinative of the issue of the effects of the Haul Road on the watershed, and therefore no additional evidence on this matter is required.

## **VI. PROJECT OVERVIEW**

[136] Before the Board addresses each of the issues, it considers it appropriate to make a few comments regarding the Haul Road compared to the original design of the transportation and utility corridor. Although the Board discussed some of the differences in its previous decision with respect to the issues for the Hearing,<sup>36</sup> the Board has received additional information through the course of the Hearing.

[137] The Approval Holder and the Director submitted that the Appellant was attempting to have the Board rehear the entire Cheviot Project. The Board appreciates that some of the evidence brought forward did pertain to the Cheviot Project as a whole, but the Board believes this information was presented to assist the Board in understanding the differences between the two designs that have been proposed.

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paragraph 76.

<sup>36</sup> See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID (A.E.A.B.).

[138] Under section 95(5) of EPEA,<sup>37</sup> the Board does not have jurisdiction to hear the appeals if the matter was heard by the AEUB or if the Alberta Government participated in a CEAA review. The issue of the Cheviot Project as a whole was heard by an AEUB/CEAA Joint Review Panel. After reviewing the issues under appeal and the decision of the Joint Review Panel, the Board determined the Haul Road was not discussed before the Joint Review Panel, as the Approval Holder had determined it was not an environmentally, economically, or socially acceptable alternative at that time. However, as coal mining processes and the economics of the Cheviot Project have changed since the initial review, the Approval Holder reassessed its options and determined the Haul Road is now a viable option. As the coal mine itself was previously assessed and reviewed by the Joint Review Panel, and the Approvals before the Board only apply to the Haul Road, this Board did not have jurisdiction to consider the overall effects of the Cheviot Project. The AEUB must consider the public interest in all of its decisions, and it is not this Board's role to question the AEUB's findings on public interest. Therefore, in defining the issues before this Board, the Parties and intervenors were instructed that only the effects of the Haul Road that were different from the original design would be addressed.

[139] Prior to the start of construction of the Haul Road, the Approval Holder was required to obtain the necessary approvals from the Director. The Director, under section 68(4) of EPEA must consider any decision of the AEUB and may consider any evidence that was before the AEUB. Section 68(4) states:

“In making a decision under this section, the Director

- (a) shall, in addition to any criteria that the Director is required by the regulations to consider, consider any applicable written decision of the Energy Resources Conservation Board, the Board, as defined in the *Agricultural Operation Practices Act*, under Part 2 of that Act or the Natural Resources Conservation Board in respect of the subject-matter of the approval or registration, and

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Section 95(5)(b) states:

“The Board shall dismiss a notice of appeal if in the Board's opinion

- (i) 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, or
- (ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act (Canada)* in respect of all of the matters included in the notice of appeal.”

- (b) may consider any evidence that was before the Energy Resources Conservation Board, the Board, as defined in the *Agricultural Operation Practices Act*, under Part 2 of the Act or the Natural Resources Conservation Board in relation to that written decision.”

This suggests that when the AEUB determines a project is in the public interest, then the expectation, subject to some significant issue, is that the Director will issue the necessary approvals. The Director still has the obligation to ensure the environment is protected. The Board has found, in these circumstances, no grounds for recommending that the Approvals be rescinded. What the Board will look at though, is how the Approvals were drafted and for ways to improve the Approvals to minimize the environmental effects and to ensure clarity for all those concerned – the Approval Holder, inspectors, enforcement officers, and the public.

[140] Although the Director and Approval Holder attempted to argue the effects of the Haul Road would be the same as the transportation and utility corridor originally planned, the Board notes a number of advantages, as well as disadvantages, with the Haul Road design. The Haul Road will be a linear disturbance as was the original design. The original design actually had three separate linear disturbances within the McLeod River valley. The Haul Road design has only one linear disturbance, but it is considerably wider than any of the original linear disturbances. The Haul Road will involve the construction of one to two metre high earthen and rock berms along the length of the Haul Road. These berms, which could impede the movement of some animals, were not included in the original design. The Haul Road traffic will involve trucks traveling 24 hours a day, seven days a week, as compared to two trains a day. Traffic on the Grave Flats Road will be decreased with the construction of the Haul Road, and as the Grave Flats Road will not be upgraded to the same extent as in the original design, speed limits will remain where they are at now with only seasonal traffic. Under the original design, traffic on the Grave Flats Road would have been allowed to travel at speeds of 80 kilometres per hour, with mine workers using the road to access the site throughout the year. The speed on the Haul Road was originally expected to be 25 to 45 kilometres per hour, but with the chosen haul trucks, speeds could reach up to 70 kilometres per hour. The Haul Road design will have the processing of coal completed at the Luscar Project. The original design involved the construction of a new coal processing plant, closer to Cadomin, resulting in increased noise levels during construction and, in all likelihood, during operation. The original design required disturbances of the McLeod

River, Whitehorse Creek, and Prospect Creek. The Haul Road design requires no crossings of the McLeod River and less invasive disturbances of Whitehorse Creek and Prospect Creek.

[141] The Haul Road design requires the construction of 19 sediment ponds along the length of the road. The original design did not require the construction of any sediment ponds. These additional structures provide for sediment control that would not have been provided by the original design, so while they are additional structures, they provide a water quality benefit for the McLeod River compared with the original design. The probability of poaching in the area also will be reduced because access to the wilderness area west of the Haul Road will be restricted as a result of the Haul Road.

[142] As the Appellant stated, the Haul Road is now essentially constructed. Even though the Appellant wanted the Board to recommend the Approvals be rescinded, he was also aware the Board could recommend to the Minister that the Approvals be confirmed or varied. The appeal process was an opportunity for the Appellant to argue his preferred remedy and also an opportunity for the Appellant to provide alternatives for the Board to consider should it decide to recommend the Approvals be varied. However, the Appellant provided few alternatives for the Board to consider.

[143] The AEUB determined the Haul Road is in the best interest of the public, specifically considering the economic benefits to the region. That judgment call was for the AEUB to make. As such, the Director would have faced a challenge from the Approval Holder if he had simply refused the application for the Haul Road. Ultimately, such a challenge would have come before this Board, and if the Director's decision had been sustained by the Board, it likely would have gone to Judicial Review. There are no cases specifically involving the Board that have addressed this question, but the Board is prepared for the purposes of this case, to accept that the way in which the regulatory scheme is set up between the AEUB and the Director, that absent some significant issue, there is an expectation that the Director should issue some sort of approval.<sup>38</sup>

[144] However, it is the Director's responsibility to ensure the necessary steps are taken to ensure the environment is protected and any possible adverse effects are minimized through

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<sup>38</sup> See: *British Columbia Telephone Company v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739.

mitigation. The Joint Review Panel identified a number of important environmental impacts that required mitigation measures. Therefore, although the Appellant and the Cadomin Residents requested the Approvals be reversed, this is not an alternative the Board will recommend to the Minister in this case. However, the Board can, and intends to, recommend the Approvals be varied to ensure the Approval Holder is taking sufficient mitigative measures, and to ensure the Director continues to have all of the relevant information provided to him.

## **VII. EFFECTS ON WILDLIFE**

### **A. Submissions**

#### **1. Appellant**

[145] The Appellant argued the Director did not properly assess the impacts of the Haul Road on wildlife, as he failed to understand the Cumulative Effects Study Areas where the Haul Road is located, and the impacts of the Haul Road were in addition to the original design and other activities in the area. The Appellant argued the Director failed to appreciate the status of the wildlife in the area and the significance of the Harlequin duck population.

[146] The Appellant also argued the Director failed to understand the effect of linear disturbances on wildlife and that the mitigation measures provided for in the original design were no longer possible or not in place.

[147] The Appellant stated the Director determined the original design would not cause significant environmental effects, but the Joint Review Panel concluded there would be significant adverse effects regarding fisheries, grizzly bears, First Nations' traditional use of the area, soil landscapes, general terrain features, and neotropical birds.<sup>39</sup> Therefore, according to the Appellant, the Director could not have properly assessed the cumulative effects of the Haul Road in relation to the remainder of the original design.

[148] The Appellant argued the Director did not determine what other activities are being carried out or likely to be carried out in the area. The Appellant referenced the oil and gas

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<sup>39</sup> See: Appellant's submission, dated September 13, 2004, at paragraph 51. See also: Report of the [A]EUB-CEAA Joint Review Panel Cheviot Coal Project (June 1997) at section 8.1.

activities and the failure to implement the Joint Review Panel's recommendation that the headwaters of the Cardinal River be protected.

[149] The Appellant argued the Director did not properly assess the status of the wildlife in the area. He stated the area where the Haul Road is located is part of the home range for 10 grizzly bears, and in 2002, the Alberta's Endangered Species Conservation Committee determined grizzly bears in Alberta are a threatened species.

[150] The Appellant stated the Harlequin duck breeding population in the area is the largest in Alberta, next to the Bow River, and the general status of this species is listed as sensitive, and a slight increase in mortality could lead to long-term population declines. The Appellant argued the Director did not evaluate the available information to determine the impacts of the Haul Road on the Harlequin ducks, and no analysis was done of the information gathered by the Approval Holder on these ducks over the past seven years nor was it incorporated into an assessment of the specific and cumulative impacts of the Haul Road.

[151] The Appellant stated the grizzly bears and Harlequin ducks are indicators of the health of a wilderness area, and given the status of these species, the effects of the Haul Road on these species becomes even more significant and important to address.

[152] The Appellant stated submissions from Parks Canada and provincial departments indicate the Haul Road is fundamentally different from the original design.<sup>40</sup>

[153] The Appellant argued other mitigation measures have not been undertaken or completed. He stated the Joint Review Panel recommended a Carnivore Compensation Program<sup>41</sup> be developed to compensate for the effects caused by the original design, but little progress has been made on the plan, deadlines have not been met, and evidence indicates compensation is now unlikely.

[154] The Appellant argued the Director did not understand the adverse impacts linear disturbances can have on wildlife, including: decreasing the effectiveness of habitat; fragmenting the habitat and wildlife populations; causing avoidance of the area; mortality increases due to collisions, poaching, or hunting if the animals habituate to the linear disturbance; changes to

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<sup>40</sup> See: Appellant's submission, dated September 13, 2004, at Tab 1, Affidavit of Ms. Dianne Pachal at paragraphs 33 and 34.

biodiversity and species composition including the invasion of exotic plant and animal species; increased interaction with humans; and restriction of movement of small mammals. The Appellant stated, "These effects may be disproportionate to the amount of area disturbed or lost. Linear disturbances pose the most imminent threat to grizzly habitat today."<sup>42</sup>

[155] The Appellant stated it has been recommended in the United States that no new roads be developed within 300 feet of or visible from occupied or potential Harlequin duck breeding streams.<sup>43</sup>

[156] The Appellant argued the wildlife, their populations, habitat, and movement are compromised by the Haul Road, and there are potential specific adverse effects. He stated that without understanding these effects, it is impossible to determine what effects cannot be effectively mitigated or avoided or what mitigation is possible, what modifications of the project should be done to avoid significant impacts, and what mitigation measures should be implemented where mitigation is possible.

## 2. Approval Holder

[157] The Approval Holder submitted the Appellant failed to establish the Haul Road would have an effect on wildlife that would not have occurred with the original design. It stated expert evidence indicated many effects of the Haul Road on wildlife are less than those associated with the original design. It stated the primary factors for the reduced effects include "...the reduced linear disturbance as a result of eliminating the Cadomin Bypass; eliminating the CN rail restoration; changing the location of the power line; reduced public access in the winter; [and] removal of the Private Haulroad by reclamation when the project is completed."<sup>44</sup> It also stated wildlife mortality would be reduced with the Haul Road as a result of reduced speed and traffic volume on the Haul Road as well as the elimination of the rail line, the use of arch

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<sup>41</sup> See: Permit No. 97-14.

<sup>42</sup> Appellant's submission, dated September 13, 2004, at paragraph 62.

<sup>43</sup> See: E.F. Cassirer et al., *Harlequin Duck (*Histrionicus histrionicus*) habitat conservation assessment and conservation strategy for the U.S. Rocky Mountains* (U.S. Forest Service/Bureau of Land Management, 1995) (Working draft, updated to Draft Report in 1996).

<sup>44</sup> Approval Holder's submission, dated September 20, 2004, at paragraph 11.



culverts, predictable traffic flow on the Haul Road, and reduced access in winter on the Grave Flats Road.<sup>45</sup>

[158] The Approval Holder stated the incremental effect of the Haul Road on grizzly bears, the gray wolf, wolverine, and other species is less than the original design as the linear disturbance is reduced, there is reduced public access in winter, and the removal of the Haul Road through reclamation when the Cheviot Project is completed.

[159] The Approval Holder explained mitigation measures were in various stages of progress when the Cheviot Project was put on hold, but it maintained several of the conditions, including the Harlequin duck monitoring program and support of the Foothills Model Forest Grizzly Bear Research Study. It explained it will also fund a technical report as part of its participation in the Foothills Model Forest Harlequin Duck Study, which includes studies on the vital rates of the Harlequin duck.

[160] The Approval Holder stated wildlife vehicle collisions on the Haul Road would be reduced as drivers would be trained to respond to variable conditions, there is a wide field of view, slow speeds, low traffic volume, and wildlife would become habituated to predictable traffic patterns.<sup>46</sup> The expert witness for the Approval Holder, Ms. Beth MacCallum, did qualify this last point refers mainly to ungulates rather than carnivores during examination by the Panel Chair.<sup>47</sup> It also explained the stopping distance of the haul trucks is within the illumination distance of their headlights at night.

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<sup>45</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Ms. Beth MacCallum.

<sup>46</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Ms. Beth MacCallum.

<sup>47</sup> See: Transcript, January 25, 2005, at page 372, lines 18 to 35 and at page 373, lines 1 to 13:

“Dr. Hrudey: That’s specifically what I was interested in. He was talking about ungulates?”

Ms. MacCallum: Yes, but he did summarize and I would have to check again because that is the most of them, the amount of collisions is the ungulates, but he did work with wolves and bears as well, that was summer. Especially this wasn’t just TransCanada, it was CN rail so there is some carnivore mortality associated with that rail going through Jasper, and so he didn’t just use this term, I think, with the ungulates but the ungulates were sort of the bulk of what they were dealing with.

Dr. Hrudey: I guess I am wondering, you know, if it does apply to carnivores, it seems to me this could be another one of these two-edged swords. I don’t think from what I understand, the advice that we hear from folks like yourself, that having carnivores acclimated to human activities is necessarily a good thing.

Ms. MacCallum: This table wasn’t – I really wasn’t working with carnivores from this table and so I guess that would be John’s. I was limiting myself to other than – that

[161] The Approval Holder stated that, other than the listing of grizzly bears as threatened, there is no evidence that grizzly bear populations are lower or declining more rapidly than previously determined. It explained reclamation would continue on the mined lands not immediately in the vicinity of the coal processing plant, and this would provide hiding cover and facilitate movement around the mine for grizzly bears. It submitted, "The incremental effect of the haul road on grizzly bears is less than that of the corridor in the Original Application."<sup>48</sup>

[162] The Approval Holder stated the habitat affected by the Haul Road is generally of less quality for grizzly bears than the habitat affected in the original design. It explained closed coniferous forest, generally a low quality habitat for grizzly bears, comprises 41 percent of the habitat affected by the Haul Road and 17 percent of the original design; high quality riparian shrubland habitat comprises 17 percent of the Haul Road design and 32 percent of the original design.

[163] The Approval Holder stated trappers will not use the Haul Road, and the Grave Flats Road would have fewer improvements, thereby reducing the opportunity for improved trapper access.

[164] The Approval Holder stated wolves are unlikely to avoid the McLeod River because of the Haul Road traffic activity, and the slow speed of the traffic is not expected to result in significant road kill of wolves.

[165] The Approval Holder agreed that, given the uncertainty of the precise population status of the lynx in the study area, the lynx is a candidate for a regional research and planning approach.<sup>49</sup> However, the Approval Holder did not agree a regional research and planning approach should be used for fishers, as they are extremely rare in the region and they are not likely to occur routinely in the area dominated by coniferous forest cover.

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wasn't what I was doing here but, yes – no, you don't want over-familiarization with humans and carnivores.

Dr. Hrudey: I can't point to a specific spot here, or maybe I can. The next row is road width and you observe sort of a benefit for the haul road in terms of good field of view reduces collisions and so on but, overall, the total crossing distance the wildlife has to have, being wider is not better?

Ms. MacCallum: That is correct."

<sup>48</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Mr. John Kansas at page 3.

<sup>49</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Mr. John Kansas at page 7.

[166] The Approval Holder submitted there is a great deal of understanding of the effects of the Haul Road on wildlife, and there is unlikely any other road construction project in Alberta that has received a greater amount of study.

3. Director

[167] The Director stated the Joint Review Panel considered the effects of the Cheviot Project on wildlife as a whole and considered the transportation and utility corridor as a specific component of the project.

[168] The Director summarized the Joint Review Panel findings regarding the effects of the original transportation corridor on the movement and migration of wildlife. He stated the Joint Review Panel found the development of the upgraded access road would contribute to creating significant new barriers to movement of wildlife over at least the life of the mine. The Director also stated the Joint Review Panel determined the upgraded access road would result in a significant increase in the chance of vehicle caused mortality to carnivores, ungulates, and raptors, and the most effective mitigation tool would be a general reduction in speed limits along the upgraded road. The Director stated the Joint Review Panel also noted the upgraded road would result in reductions in habitat effectiveness for ungulates, particularly in the winter months when the road was traditionally closed. According to the Director, the Joint Review Panel stated the Harlequin ducks would be, at best, temporarily disturbed during the construction of the road and rail and culverts, and at worst, make stream sections unavailable to Harlequin ducks for at least the duration of the Cheviot Project.

[169] The Director explained the original EPEA approval implemented the decisions of the Joint Review Panel by requiring the Approval Holder to create Workplans, including Workplan requirements on monitoring and responding to increased traffic impacts on wildlife and addressing the Carnivore Compensation Program.

[170] The Director stated the Haul Road application included an assessment of the impacts of the Haul Road on mammalian carnivores, ungulates, small mammals, amphibians, and birds, and the potential differences in impacts from the original design to the Haul Road

were identified. The Director referred to Table 32.1 of the Approval Holder's supplemental information.<sup>50</sup>

[171] The Director provided additional observations with respect to the original design and the Haul Road design. He identified that even though the trucks on the Haul Road may travel at a slower speed, they have greater stopping distances. The Director stated the expected two-way vehicle per day traffic volumes associated with the original road upgrade was 202 mine vehicles and 274 public vehicles in the summer, and with the Haul Road proposal, there would be 124 haul trucks (assuming 150 tonne trucks) and 88 other mine traffic. According to the Director, there would have been two trains per day as a two-way traffic count, each consisting of 100 to 110 cars and four locomotives traveling at a speed of 32 kilometres per hour. The Director stated that, with a more continuous traffic pattern associated with the Haul Road, there could be some additional impacts beyond that expected from the original design. The Director stated the Approval Holder's choice of using 240 tonne trucks would reduce the traffic volume as compared to the 150 tonne trucks, but the trucks would be capable of speeds above 45 kilometres per hour.

[172] The Director explained the original design of the upgraded Grave Flats Road would have had a travel surface width of 12 metres, and the Haul Road design would see the Grave Flats Road maintained at a width of 7 metres while the Haul Road would have a width of 16 or 30 metres, depending on the section. The Director stated the right of way areas for the two proposals are similar.

[173] The Director stated he was aware the Haul Road would have impacts on wildlife, but he concluded there would be no significant differences in the transportation corridor impacts on wildlife between the original design and the Haul Road design. He explained he addressed uncertainties in the effects of the Haul Road on wildlife by including requirements for revised monitoring and monitoring response Workplans.

[174] The Director stated the Appellant's submission regarding wildlife had assertions that were in error. The Director stated the Joint Review Panel considered the effects of the Cheviot Project, including a transportation and utility corridor, and the Haul Road Approvals are

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<sup>50</sup> See: Director's submission, dated September 20, 2004, at page 9.

the transportation and utility corridor approved for the Cheviot Project by the Joint Review Panel. The Director stated he considered the change in effects of the corridors.

[175] Regarding the Appellant's assertion that the Director did not properly assess the status of wildlife in the area, the Director stated he was aware of and considered the Regional Carnivore Management Group. He stated the Approval Holder "...fully participates and will assist in facilitating in land use and grizzly/human management practices that will compensate for the use of the road."<sup>51</sup> The Director explained the project is ongoing and will continue, and the project is not restricted to the Cheviot Project but applies to the entire region.

[176] The Director stated he had access to and relied upon available information regarding Harlequin ducks. He argued the construction of the Haul Road and the elimination of the rail line eliminates construction within a watercourse, thereby making the Haul Road an improvement over the original design. The Director stated that, acting on the advice of the wildlife specialist from Sustainable Resource Development on the technical team, he included a condition in the Approvals requiring a report providing additional information with respect to Harlequin ducks.

[177] The Director did not agree with the Appellant's statement that the Haul Road design is fundamentally different from the original design. He argued the Haul Road is the transportation and utility corridor as considered by the Joint Review Panel. He stated, as the Haul Road is a component of the Cheviot Project, he can now proactively regulate the road through the conditions in the Approvals.

## **B. Discussion**

[178] The wildlife in the area of the Haul Road needs to be considered and, whenever possible, protected. If it is demonstrated that there is an area of the Haul Road that is frequented by grizzly bears and other wildlife, then the Approval Holder should take appropriate measures to reduce the risk of collisions. The Approval Holder mentioned the possibility of erecting overpasses or underpasses or using infrared animal detectors as possible mitigation measures. This indicates there are options available to reduce the risk of animal mortality on the Haul

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<sup>51</sup> Director's submission, dated September 20, 2004, at paragraph 44.

Road, and the Approval Holder needs to seriously consider implementing the best option to reduce the risk of wildlife mortality.

[179] The Board is concerned regarding the potential impact of the Haul Road on the grizzly bear population that uses the area. Mr. Kneteman, the area wildlife biologist for Alberta Sustainable Resource Development and a member of the Director's panel, stated under questioning from the Panel:

“Dr. Hrudehy: Can I ask, presuming that by some mechanism or another, that reporting would take place, what would be your threshold at which you would say you would have a problem. Are we talking about one grizzly bear dead, two, five? At what point would some mitigation have to be implemented?”

Mr. Kneteman: ...Our current understanding of the grizzly bear population in the Cheviot area is that it may not be sustainable due to current rates of human-caused mortality. So one bear even periodically, particularly if it is a female, is increasing the current understanding of our risk.”

Dr. Hrudehy: That would be very serious, one bear?”

Mr. Kneteman: That's correct.”<sup>52</sup>

[180] In its decisions, the Joint Review Panel identified the possible negative impact the project might on the grizzly bears,<sup>53</sup> and the Board believes there are important negative differences in the risk for grizzly bears with the Haul Road design.

[181] Given the extensive discussion that occurred about grizzly bears and the recognized need for their protection, the response of the Approval Holder to the question regarding adaptive management plans was not reassuring:

“Dr. Hrudehy: We talked about the adaptive management. Just to put some, pardon the pun, teeth into the example, what would you foresee happening in terms of adaptive management if everybody's worst nightmare, a road mortality of a female grizzly, happened a month after you start up? Can you foresee the kinds of things that your adaptive management process would kick in as a result of that?”

Mr. Lane: You know, that is tough question to answer.

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<sup>52</sup> Transcript, January 25, 2005, at page 283, lines 13 to 31.

<sup>53</sup> See: Report of the [A]EUB-CEAA Joint Review Panel Cheviot Coal Mine (12 September 2000) Decision 2000-59 at page 3.

Dr. Hrudey: I realize that.

Mr. Lane: It would matter what were the circumstances that occurred, that caused that to occur. I should point out that we had a female on site with I think one or two cubs, one cub, for more than one year and they were frequently around the Cardinal River operation across the haul road. So it is not unusual for us to have that. As a matter of fact, the presence of large ungulate populations on the mine site is quite a strong attractant to grizzlies in the spring and, of course in the fall, a great source of protein which is very important for that species especially in the springtime, especially females with cubs.

We do have experience there. I would say that if that occurred, we haven't had an incident like that in 30 years, all of us would take that as a very significant event. There is no question that we would investigate what were the circumstances leading up to that and were there any things that we should change to prevent that occurrence from happening again."<sup>54</sup>

[182] The Board acknowledged this was a difficult question, but a more tangible and explicit discussion might have reassured the Board that substantial thought had already been directed to this concern by the Approval Holder. In the Board's view, the Approval Holder should be taking a proactive approach to minimizing environmental effects rather than a reactive approach to damage that has already occurred.

[183] The Board believes the Haul Road has changed the impact on grizzly bears and other wildlife from those impacts identified in the original design. The Board does not believe the impact from the upgraded Grave Flats Road would have the same impact as the Haul Road. The upgraded Grave Flats Road would have had a posted speed limit of 90 kilometres per hour, but traffic would likely be less, particularly at night when wildlife is most vulnerable. The haul trucks on the Haul Road run 24 hours a day, seven days a week.

[184] The Approval Holder stated it is involved in the Foothills Model Forest Management Plan for Grizzly Bears. The Board will recommend the Approvals be amended to include a condition requiring the Approval Holder to continue its participation in the study. This will assist the Approval Holder in identifying areas where the grizzly bears are most likely to be found within the area, and it will assist the Approval Holder in developing the best mitigative measures possible to reduce the risk of harm to the bears from a regional perspective.

[185] The threats to grizzly bears are primarily from human impacts. It was acknowledged that in the previous five years, there have been only two mortalities on regional roads compared with 57 mortalities caused by legal hunting and 39 by other unspecified human impacts. Although vehicular mortality might appear small compared to other reasons, the expert witnesses for the Director and the Approval Holder agreed that even one death of a female grizzly bear could have significant adverse consequences to the grizzly bear population. The Board regards the threat to the sustainability of grizzly bears in this region to be a serious concern, as was noted by the area wildlife biologist from Sustainable Resource Development<sup>55</sup> and as previously expressed by the Joint Review Panel.

[186] The carnivore expert for the Approval Holder, Mr. John Kansas, revealed that, based on recent research, grizzly bears frequent this immediate area and cross the Haul Road right-of-way at locations known with some precision:

“Mr. Kansas: I have seen the final work from that study on large scale photos for this area and I must say I am very impressed with it. I think it is fairly accurate and they actually tested it where they held back some of the radio-collared bears and tested movements. I think it is as good as you can get in North America right now, I have to say, for understanding movements.

Dr. Hrudey: That is good news but I guess I am wondering specifically, though, is can you say they crossed the Portal [Prospect] Creek. How specific is it?

Mr. Kansas: Yes. Yes, you can.

Dr. Hrudey: The fact is that right now, you can have that recent information in mind as to where the greatest risk may be for grizzly bear crossings on this haul road?

Mr. Kansas: It doesn't mean that every bear crosses there, it just means they are focused areas, it doesn't mean that every species crosses there but it sure makes sense. If one large carnivore tends to move through a certain area, it is likely that other animals do as well for similar reasons.

Dr. Hrudey: It would be possible as part of the adaptive management we are hearing about to maybe focus some attention on those locations?

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<sup>54</sup> Transcript, January 25, 2005, at page 384, lines 7 to 34 and page 385, lines 1 to 4.

<sup>55</sup> See: Transcript, January 25, 2005, at page 283, lines 13 to 31.



Mr. Kansas: Absolutely.”<sup>56</sup>

[187] This evidence suggests that specific measures can be implemented, such as operator training, that can maximize the use of the site-specific knowledge of wildlife crossings. As further information regarding the movement of grizzly bears and other animals through the area becomes known, the Approval Holder should take measures to reduce the negative impacts to these species.

[188] The Board will recommend the Approval Holder be required to submit a report to the Director outlining the specific training to be given to all employees and haul truck drivers to minimize wildlife mortality. This report will be referred to Sustainable Resource Development for comment and recommendations. Based on this report and the recommendations from Sustainable Resource Development, the Director will determine if the training adequately makes use of opportunities to minimize the collision risk to wildlife.

[189] Because of the consensus of all Parties that human-caused mortality is a critical issue for vulnerable species like the grizzly bear, the Board will also recommend that any wildlife mortality in relation to the Approval Holder’s operation shall be reported immediately to the Director and Sustainable Resource Development for any critical species (e.g. grizzly bear, lynx, wolverine) and in addition, it shall be reported in the Approval Holder’s annual report. The mortality report must be accompanied by an analysis of the circumstances of the mortality and recommendations for avoiding future mortality. It is important for Sustainable Resource Development to have all of the information possible to carry out its mandate. Based on the comments and recommendations from Sustainable Resource Development, the Director will determine what mitigative measures, if any, should be implemented.

[190] The Board will recommend the Approval Holder submit a report to the Director regarding the feasibility of adding side-lighting (analogous to fog lights, except directed sideways) onto the haul trucks to illuminate the margins of the Haul Road. The report will be referred to Sustainable Resource Development for comments and recommendations. The intent is to determine if side lighting would assist the truck drivers in seeing wildlife at the side of the road and ultimately reduce wildlife mortality on the Haul Road.

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<sup>56</sup> Transcript, January 25, 2005, at page 375 at lines 21 to 35 and at page 376 at lines 1 to 10.

[191] The Appellant and Cadomin Residents raised the issue of using salt on the Haul Road in winter. The Approval Holder stated it does not use salt on its Haul Road but would not commit that it would not use it in the future. The Approval Holder stated it uses other methods to manage the roads, including grading the Haul Road and using coarse gravel. The Approval Holder stated for safety reasons, it does not use salt on its Haul Road.

- “Ms. Klimek: Now, one question that has come up a few times, Mr. Lane, is whether or not CRC would be using salt. Is that something – what is their plans with respect to that?
- Mr. Lane: No, we do not use salt on our haul roads at the mine site.
- Ms. Klimek: And that would never be a possibility?
- Mr. Lane: Probably not. I think it is a safety issue with us.
- Ms. Klimek: Is that a commitment, then, that you would never use salt?
- Mr. Lane: It depends what you mean by salt. I think the currently available products that are used on roads do tend to – anyone who has driven on salted roads knows exactly what they are like, they are very slippery, and as I think someone else has pointed out, we have other ways of dealing with road surfaces that we prefer to use.
- Ms. Klimek: I am just wondering if that is a commitment because, as I understand it, there may be wildlife issues if you put salt that many animals are attracted to it. I guess what I am looking for, is there a commitment that CRC would not do that in the future?
- Mr. Lane: We haven’t made that kind of commitment.
- Ms. Klimek: You would agree with me, Mr. Kansas, that if salt were put on the road, it may have some wildlife impacts in that it may attract certain animals to the road?
- Mr. Kansas: Yes.”<sup>57</sup>

[192] It is known, and the Approval Holder agreed, that salt will attract animals, and as the Approval Holder should take steps to minimize the risk to wildlife, it seems reasonable to avoid the use of salt on the Haul Road. As the Approval Holder explained it has not used salt on its Haul Road, the Board will recommend a condition be included in the Approvals that no salt shall be used without first completing an assessment of the negative impact that would arise for

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<sup>57</sup> Transcript, January 25, 2005, at page 339, lines 30 to 33 and at page 340, lines 1 to 26.

wildlife. The Director will refer the report to Sustainable Resource Development to review and to provide comments to the Director. Salt will only be applied after receiving written approval of the Director.

[193] The Approval Holder was asked about the lighting on the haul trucks, and the Approval Holder advised the headlights illuminate a distance down the road, about the equivalent to the stopping distance of the haul trucks. The matter of lighting the periphery of the Haul Road by some form of side lighting on these vehicles was raised at the Hearing.<sup>58</sup> Although concerns were raised about the possibility of side-lighting interfering with oncoming drivers, this does not consider the possibility of aiming side-lighting at a low level below the line of sight of on-coming drivers, as is done with fog lights.

[194] The wildlife biologist for Sustainable Resource Development requested further information from the Approval Holder. Although the Director may have been satisfied the information was not required before making his decision, the Board is not as confident. The wildlife biologist from Sustainable Resource Development stated there was information that should have been provided. The following are excerpts from the Hearing in which the wildlife biologist from Sustainable Resource Development, Mr. Jeff Kneteman, was questioned on the missing information by counsel for the Director.

<sup>58</sup>

See: Transcript, January 25, 2005, at page 345, lines 8 to 35 and at page 346, lines 1 and 2:

“Ms. Klimek: Now, you are talking about the lights on these shine 80 meters down the way. Do you know what the range out the sides would be on those? Like are they lighting up quite an area as they are going down the road?”

Mr. Lane: They would be probably a standard width to the sides to provide just adequate vision. Again, you are on a road so it wouldn't be hugely wide. I think one of the issues you have is when truck passes truck, just like high beams on a highway, you don't want to have lights that would interfere with driving, safe driving, to another operator coming the other way. So they would tend to be standard light configurations whereby vehicles could pass each other on the road.

Ms. Klimek: One of the things I understood with that is the advantage of these lights is you would be able to – they are far enough that you can stop if you see something. Is that going to get the peripheral, if there is things along the way, that they are going to be able to see them? Have you considered that?

Mr. Lane: I think just like an ordinary vehicle, these lights would be a similar kind of zone of influence. They do tend to cover probably the whole haul road with light, the brightest section of course being the part you are driving through in the center and the lights are located lower down and they do shine straight ahead and lower and, again, for reasons of safety so that they are not shining up into the operators of adjacent trucks.”

- “Mr. McDonald: After completing your review of the haul road application in September 2002, what was your overall impression?
- Mr. Kneteman: For the most part, we weren’t satisfied with the quality of the information in the application. We see it as part of our responsibility when asked to review an application to encourage proponents to provide the highest quality of information possible.
- Given the controversial nature of the Cheviot project we were hoping that CRC would take a very comprehensive approach to this project revision. The types of information we were looking for was data specific to the project area that only the proponent had, statistical analysis of that data, greater use of papers, clear statements on the assumptions and limitations behind conclusions, detailed mitigation strategies including testable hypothesis. We find that that approach reduces the subjectivity associated with debate and possible rancor and does provide some clarity to the limitations of conclusions. Additionally, detailed mitigation proffered by proponents tends to have greater acceptance by the proponent and likelihood of success.
- Mr. McDonald: Now, Ms. Pachal has attached some documents as exhibits to her Affidavit that were filed for the hearing. Is Exhibit I from her Affidavit a copy of a response that you provided to the application review coordinator during your review?
- Mr. Kneteman: Yes.
- Mr. McDonald: What was done with that response in terms of continuation of the application review process?
- Mr. Kneteman: The comments were included in the supplemental information request.
- Mr. McDonald: And did Cardinal River Coals respond to that request, and have you reviewed the response?
- Mr. Kneteman: Yes.
- Mr. McDonald: And your views are reflected in Exhibit N to Ms. Pachal’s Affidavit?
- Mr. Kneteman: Yes.
- Mr. McDonald: Are you able to provide any further context for those views?
- Mr. Kneteman: As I referred to earlier, there was a discrepancy between our expectations of the wildlife assessment and that which

was done. The supplemental information largely did not bridge that gap.

Mr. McDonald: Did that prevent you from reaching an overall position about the significance of impacts on wildlife?

Mr. Kneteman: No. Based on the information within the application, the joint panel finding, other information that we have access to, my own knowledge and experience of industrial impacts on precise determinations, I was unable to conclude that there was a significant difference between the private haul road proposal and that which was – that access corridor that was originally approved.

Of course, there is a degree of uncertainty with that determination but, importantly, the risks, as identified by the joint panel and as included in the Director's submission to the Board, largely remain.

Mr. McDonald: Was that conclusion conveyed to the Director?

Mr. Kneteman: Yes.”<sup>59</sup>

Mr. Kneteman was also questioned by the Appellant.

“Ms. Klimek: Just bear with me for a second, I would like you to look at your June 24<sup>th</sup>, 2002 memo. Again, that outlines your concerns as of that date. Is that correct?

Mr. Kneteman: That is correct.

Ms. Klimek: And I would like to look at the section under the Harlequin ducks here, Mr. Kneteman. Under the first statement you said we have concerns with regard to dust, sedimentation, altered surface or groundwater input.

Dr. Hrudey: Excuse me, Ms. Klimek, which tab is that?

Ms. Klimek: I am sorry, that is Tab M under Ms. Pachal's Affidavit.

Dr. Hrudey: Thank you.

Ms. Klimek: Were all of those concerns addressed?

Mr. Kneteman: No, those are some of the issues in which the applicant was not able to provide that level of information.

Ms. Klimek: So in your review of it, then, you were unable to determine whether those were going to be an affect on the ducks then but they were still a concern to you?

Mr. Kneteman: They remain a concern, yes.

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<sup>59</sup> Transcript, January 25, 2005, at page 216, lines 1 to 35 and at page 217, lines 1 to 33.

- Ms. Klimek: Then at the bottom of that page, or that paragraph, it says, We suggest the information be examined for the capability to estimate the reduction in the Harlequin duck breeding population that is expected to occur and the extent of the permanent loss of habitat that may occur respectively to concurrently approved activities in the proposed activity.
- Did you get that information?
- Mr. Kneteman: No, Section 4.1 refers to statements within the application and those events were expected, and what we are asking them to do was to try and quantify that.
- Ms. Klimek: They did not do that for you?
- Mr. Kneteman: That's correct."<sup>60</sup>
- "Mr. Kneteman: We wanted to get a better understanding of the pre-project status of the population beyond just simply a count of adults.
- Ms. Klimek: And if I am understanding what you are saying here is because this is a significant population that – is vulnerable the correct word for that?
- Mr. Kneteman: Their life history traits would suggest that they are vulnerable to alterations.
- Ms. Klimek: And the reason – I take it you never got those vital rates because that is a condition of the approval. Is that correct?
- Mr. Kneteman: Yes, we did make it a condition.
- Ms. Klimek: But you didn't have them before you assessed this?
- Mr. Kneteman: That is correct.
- Ms. Klimek: And would have that information been useful to your in your review of this?
- Mr. Kneteman: If those vital rates in conjunction with the population count information we had have suggested that there was some lack of vigor in this population, we may have then identified that there is an issue of a greater degree of risk. Other than that, it would simply have allowed us to better determine status of the population.
- Ms. Klimek: So because you didn't have that information, you weren't able to do that prior to issuing the approval?
- Mr. Kneteman: That's correct."<sup>61</sup>

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<sup>60</sup> Transcript, January 25, 2005, at page 241, lines 8 to 33 and at page 242, lines 1 to 13.

<sup>61</sup> Transcript, January 25, 2005, at page 243, lines 18 to 33 and at page 244, lines 1 to 10.

[195] The Director has an obligation to, and the public expects the Director to, review all relevant material before making his decision on whether or not to issue an approval. If he, or one of his review team members, identifies areas where information is missing or lacking, public accountability and section 2 of EPEA require the gaps be filled. The wildlife biologist from Alberta Sustainable Resource Development wanted additional information to be confident in his decision that there would be no adverse effect on the wildlife and waterfowl in the area of the Haul Road. However, when asked to supply the additional information, the Approval Holder failed to do so.

[196] The Board does not doubt the experience and knowledge of the wildlife biologist with Sustainable Resource Development can complete some of the information gaps, but in the Board's judgment, his analysis would be weakened by the limited information provided by the proponent. In this case, the information appears to have been obtainable by the Approval Holder and should have been provided to the Director when it was requested.

[197] The critical nature of protecting wildlife species that are threatened is clearly an obligation under EPEA, as stated in section 2(c) of EPEA: "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing ...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..." The Board does not believe the Approval Holder would wish to contribute to irreversible damage to a critical wildlife species, bearing in mind the imperatives of the market place in which the Approval Holder functions. The measures proposed to reduce further the prospects of causing mortality among grizzly bears have no substantial capital cost implications. As such, the Board is confident the Approval Holder's commitment to environmental protection will lead to welcoming these opportunities to demonstrate adaptive management at work.

## **VIII. EFFECTS ON PUBLIC ACCESS**

### **A. Submissions**

#### **1. Appellant**

[198] The Appellant stated the Haul Road is part of an area with great recreation and tourism value. He explained, "One of the Province's objectives for this area is to maintain its recreation and tourism capability, including the protection of the scenic landscape qualities of the very route of the haulroad development."<sup>62</sup> The Appellant stated no assessment was completed to assess the degree to which total tourism and recreation capability of the area would be impacted.

[199] The Appellant stated the Joint Review Panel recognized the original design posed a problem for tourism and recreation and would impact those seeking a wildland experience. He stated the Joint Review Panel noted the impact would be lessened by the remaining wildland to the north of the Cheviot Project, the very area that has been added to the Cheviot Project for the Haul Road.

[200] The Appellant explained that under the original design, the public could still have access to the valuable recreation and tourism area, as it was not part of the mine permit area and was not subject to the industrial noise, dust, and scarring of the landscape. The Appellant explained people could tour the Grave Flats Road and stop wherever it was safe to do so, and they could hike the old rail line and access wildlands on either side of the Grave Flats Road. The Appellant stated there was no restriction to horse or foot access along the McLeod River valley or into the adjacent backcountry, but the Haul Road changes these attributes.

[201] The Appellant explained the Whitehorse Wildland Park was created after the original design was approved. He stated one of the purposes of a wildland park is to provide a wilderness experience. The Appellant argued that, even though the Haul Road abuts and directly affects the Whitehorse Wildland Park, no assessment was completed on how the Haul Road will affect the intent and purpose of the park.

[202] The Appellant explained the Whitehorse Creek Provincial Recreation Area is an integral part of the park and is the only campground for the park. He stated Community Development recognized the importance of the campground, and that it would likely no longer be used for camping due to the construction and use of the Haul Road. According to the Appellant, even though the department recommended immediate mitigative measures be

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<sup>62</sup> Appellant's submission, dated September 13, 2004, at paragraph 67.



established to deal with the loss of the campground function, none were included in the Approvals. He argued, "Monitoring is not mitigation."<sup>63</sup>

[203] The Appellant argued the Director did not consider the government's objective that the scenic landscape along the Grave Flats Road and auto-touring opportunities be developed when the road was upgraded under the original design, but this can no longer be met with the Haul Road.

[204] The Appellant submitted the area would lose its value as a destination for commercial guides and ecotourism, including his own business.

[205] The Appellant argued the long-term economic future for the area is in its value to tourism and other non-consumptive recreation. He stated that, as the Haul Road has been essentially built, it should be used strictly for public access.

[206] The Appellant explained the trip to Mountain Park and the Cardinal Divide will pass right beside the Haul Road, separated in many places by only a berm. He stated, "An uglier travel experience for ecotourists can hardly be imagined."<sup>64</sup> He doubted recreationists who are disgusted with what they see would appreciate signs extolling the mining operation.

[207] The Appellant described how the Haul Road would adversely affect the scenic qualities of the area.

## 2. Approval Holder

[208] The Approval Holder explained it has arranged for public access to the Cardinal Divide, Whitehorse Creek and Wildland Park, and the Cadomin Cave. It stated access has been maintained to Wildland Park up the Whitehorse Creek and Prospect Creek, and the Grave Flats Road will allow full time unimpeded access to the Cardinal Divide area.

[209] The Approval Holder stated it has incorporated aspects into the Haul Road design to ensure it has as little impact as possible on the public's access to wilderness areas and tourist sites.

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<sup>63</sup> Appellant's submission, dated September 13, 2004, at paragraph 75.

<sup>64</sup> Appellant's submission, dated September 13, 2004, at Tab 4, Affidavit of Mr. Ben Gadd at paragraph 7.

3. Director

[210] The Director stated the Joint Review Panel commented that the Cheviot Project would have direct impacts on the recreational opportunities available in the area.

[211] The Director explained the Approval Holder was required to apply for a mineral surface lease under the *Public Lands Act*, R.S.A. 2000, c. P-40, for the area in which the Haul Road is located. He stated the existence of a mineral surface lease<sup>65</sup> "...creates an area of exclusive possession for CRC along the entire length of the haul road."<sup>66</sup>

[212] The Director stated the Approval Holder's application included information identifying the potential differences between the Haul Road and the original design.

[213] The Director explained the review team included staff from Sustainable Resource Development and Community Development to address public access. He stated the EPEA Approvals did not specifically address access, as access is an issue that involves the management of public lands.

[214] The Director stated the Approval Holder is committed to address public access in response to issues raised by Community Development. The Director explained the Approval Holder made and implemented changes to the Cadomin Cave access trail, placed signs marking the boundary of the Mineral Surface Lease near the trail to the Cadomin Cave, and installed a clear span open bottom culvert at Prospect Creek.

[215] The Director submitted the protection of the scenic landscape along Grave Flats Road is a public interest responsibility that was exercised by the Joint Review Panel.

[216] The Director stated the Joint Review Panel recognized there would be an impact on the recreational use of the area, and Whitehorse Wildland Park was created in response to the Joint Review Panel recommendations. He stated Community Development is responsible for managing this park, and a representative was on the technical team that provided advice to the Director.

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<sup>65</sup> The "Mineral Surface Lease" was issued by the Public Lands Division of Sustainable Resource Development and puts the lands identified under the control of the Approval Holder.

<sup>66</sup> Director's submission, dated September 20, 2004, at paragraph 50.

[217] The Director stated the "...management of public lands falls within the Public Lands Division of Sustainable Resource Development and the decision of that department to issue Cardinal River Coals a Mineral Surface Lease for the haul road is a complete response. The decision of Alberta Sustainable Resource Development to issue the Mineral Surface Lease is not open to appeal."<sup>67</sup>

**B. Discussion**

[218] The issue of access was a prime concern to the Appellant and the Cadomin Residents. The Director and the Approval Holder explained the Mineral Surface Lease granted by Public Lands allows the Approval Holder to take control of public access. The Approval Holder stated that after the Haul Road is built, they would seek a re-issuance of the mining surface lease to restrict its control to the actual area that is required, in this case, the Haul Road. The Approval Holder stated there is no public access during construction for public safety reasons, but once it is constructed, it is only the Haul Road where no public access is permitted.<sup>68</sup> In fact, the Approval Holder advised the Cadomin Residents that it is a requirement of the AEUB that the public road and access to the east would become accessible to the public once the finished Haul Road is surveyed and the Mineral Surface Lease issued for the Haul Road is amended by Sustainable Resource Development.<sup>69</sup>

[219] The Board appreciates the position of the Approval Holder in that it must have regard to public safety at all times. By limiting the mine surface lease boundary to the Haul

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<sup>67</sup> Director's submission, dated September 20, 2004, at paragraph 57.

<sup>68</sup> See: Transcript, January 25, 2005, at page 325, lines 1 to 36.

<sup>69</sup> See: Transcript, January 25, 2005, at page 331, lines 14 to 31:

"Mr. Lane: Once the haul road construction is complete, then we will survey the final road structure, we will supply that survey to, and I think it is SRD [Sustainable Resource Development] we apply to for the MSL [Mine Surface Lease], and then they will re-issue a new MSL [Mine Surface Lease] and it will use the survey specifications for the new MSL [Mine Surface Lease] which would mean, from that point forward, that the closed area would simply be the haul road.

The public road which is right adjacent to the haul road would remain open as would access to the east.

Ms. Melnychuk: I understand that, but I do want to clarify, then, whether we may want to make that a condition that we ask the Board to address through our summation at the end. So I was asking the question to check whether that would be a problem for you?

Mr. Lane: It is actually a requirement of the [A]EUB that we do this."

Road, this should allow visitors to the area access to both sides of the McLeod River, although the Board accepts that those seeking a wildland experience may not appreciate traveling along the boundaries of the Haul Road.

[220] The Appellant and the Cadomin Residents also stated access to the Cadomin Cave would be restricted. The Approval Holder has constructed access to the cave to allow for visitor access. Although the new access is an underpass beneath a busy industrial road, physical access to the cave has been retained.

[221] One argument presented by the Appellant was the value of the area for tourism would be affected by the establishment of the Haul Road and the mine itself. The Board cannot discuss the effects of the mine, but the Appellant must also be aware that with increased tourism comes an increase of other effects, and not all of them are positive. An increase in the number of tourists to the area can increase the amount of environmental degradation that can occur as people and vehicles stray off the pathways onto the existing wildlands. This negative impact must be considered in any complete assessment of environmental affects of development, whether for resources or eco-tourism.

[222] The Approval Holder proposed it would add viewing points to allow visitors to view the mine site, and this would compensate for the loss of access or limited access to wildlands previously accessible to the public. The suggestion that a viewing area of a highly disturbed industrial area could be appropriate compensation for the loss of access to wildland is untenable. The Board expects those individuals who would seek a wilderness area would view the mine site as a negative impact, and they would not be repeat visitors to the area. The mining operations may well be of interest to some individuals, but it would likely be a different sector than those who visit wildland areas, so in the Board's view, it cannot be considered appropriate compensation.

[223] Although public access to the area from the west will be affected by the Haul Road, this will also limit access to that wilderness area and wildlife habitat by poachers and all terrain vehicles. The Cadomin Residents expressed concerns regarding all terrain vehicles improperly using the McLeod River as an access route to other areas. The representative from Sustainable Resource Development stated they will investigate complaints and will take

whatever steps it can to prevent the misuse of the area but they also need cooperation and assistance from local residents by reporting violations.

[224] Another concern the Appellant and the Cadomin Residents raised, is the potential effect on the area if the Approval Holder stops using the Haul Road for any length of time. The Board agrees this is a concern. If the Approval Holder was to stop using the Haul Road for any length of time, which is a realistic possibility given variations in the coal market, the Board is concerned the Haul Road will permit greater access to the area for all terrain vehicles and poachers. In the Board's view, if this occurs, the Approval Holder must take steps to prevent these impacts from occurring. The Board will therefore recommend that in such a case, the Approval Holder will be required to submit a plan to the Director to control unauthorized access. The plan should address both short term measures, for a closure of more than six months, and long term measures if the closure is greater than one year.

## **IX. EFFECTS ON WATERSHED**

### **A. Submissions**

#### **1. Appellant**

[225] The Appellant stated sedimentation is a major concern and damage was already apparent.

[226] The Appellant stated the 19 dugouts along the Haul Road are each big enough to require a separate approval, but there is no evidence of the approvals being obtained. He stated by classifying the dugouts as major ponds in the Approvals, the requirements set out in the original approval would extend to the dugouts. The Appellant explained these requirements govern limits, monitoring, and reporting, and others in Alberta Environment noted monitoring for total dissolved solids only once a week was insufficient.

[227] The Appellant stated selenium is a major problem with the Luscar Project as selenium from the rock dumps, end-pit lakes, and reclaimed areas is released into the surface water and taken up by aquatic organisms and the vegetation growing in the reclaimed areas. The Appellant explained selenium can cause physical deformities in wildlife. The Appellant stated

the bedrock and fill disturbed by the Haul Road is the same material that contributes to the selenium in the water. The Appellant stated current levels of selenium released into the rivers and streams below the Luscar Project exceeds the limits set by the Canadian Council of Ministers of the Environment (“CCME”) guidelines, and the Appellant argued the Haul Road will increase those levels.

[228] The Appellant argued the Approval Holder did not explain how it determined the amount of selenium released into the aquatic system due to the Haul Road would be minor, given the Approval Holder is not planning to do any monitoring. He stated the sources of selenium have not been controlled or mitigated to manage the adverse effects, and without mitigation, the effects of selenium will likely persist for the life of the Cheviot and Luscar Projects.

[229] The Appellant stated the Joint Review Panel recognized selenium as a serious problem, and a condition was added to the original approval requiring the Approval Holder to develop and implement a plan with respect to selenium, but after three years, there is no evidence of a plan being completed or implemented. The Appellant stated mitigation strategies to reduce selenium levels in water are available, and the Approvals for the Haul Road should not have been granted until there are mitigation measures to prevent selenium contamination of the waterways.

[230] The Appellant argued the Director should have required the Approval Holder to assess how much selenium would be released from the Haul Road, the cumulative impact of the release, and how it could be mitigated.

## 2. Approval Holder

[231] The Approval Holder stated there is no evidence that construction of the Haul Road would release selenium into the environment. It argued the Appellant failed to offer any evidence that because selenium may be released from large-scale rock dumps, it will also be released as a result of road construction. The Approval Holder stated its monitoring indicates construction of the Haul Road will not release selenium.

[232] The Approval Holder argued the Appellant failed to demonstrate there are any adverse effects occurring to any biota populations as a result of elevated selenium levels

downstream of the Luscar Project and other coal mine projects in the area. It stated selenium concentrations above the CCME guideline have been found in areas unaffected by coal mining such as the McLeod River upstream of Luscar Creek. It explained that exceedances do not automatically result in adverse effects to aquatic biota and higher guideline values have been developed for other provinces and countries.

[233] It submitted the evidence provided by the Appellant regarding selenium should not be relied on.

[234] The Approval Holder stated the original design and the Haul Road design will have the same, essentially nil, impact on the quantity of flow in the local watershed. It stated runoff will be greater on the Haul Road than natural runoff, but this will be offset by storage in the sediment ponds.

[235] With respect to sedimentation compared to the original design, the Approval Holder stated the Haul Road design would "...have a smaller impact during construction, have the same to lower impact during operation, and have the same to lower impact in the abandonment phase."<sup>70</sup> The Approval Holder explained:

"The original project required approximately ten (10) times more riprap along and into the McLeod River than the Haulroad Project. The Original Project required more than 0.5 km of channel diversions of the McLeod River whereas the Haulroad project requires none. The Original Project required one bridge and two culvert crossings of the McLeod River whereas the Haulroad Project requires none....

The placement of riprap adjacent to the creek during construction of the present Whitehorse Creek crossing may have generated slightly more sediment than that for the proposed bridge in the Original Project. At Prospect Creek, the clear-span bottomless arch culvert for the Haulroad Project would have generated substantially less sediment than the three (3) conventional culverts for the Original Project....

The Haulroad Project for its section adjacent to the McLeod River, has fewer culverts than would have been required for the CN Rail and public road for the Original Project."<sup>71</sup>

[236] Therefore, according to the Approval Holder, the Haul Road would generate less sediment input into the watershed than the original design. It explained the sediment ponds will

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<sup>70</sup> Approval Holder's submission, dated September 20, 2004, at paragraph 20.

remain in place for the Haul Road, and maintenance, monitoring, and refinements will occur as required.

[237] The Approval Holder also explained the Haul Road would have less of an impact on river behaviours as the magnitude of instream works is less with the Haul Road design than the original design.

3. Director

[238] The Director stated the Joint Review Panel considered the effects of the Cheviot Project, of which the transportation and utility corridor was a specific component, on water quantity and quality and aquatic habitat and fisheries as a whole.

[239] The Director summarized the Joint Review Panel findings, stating it found that with good engineering practices, the impacts of the original design on surface flows would be negligible. The Director stated the Joint Review Panel also found the construction and operation of the original design appears unlikely to have significant adverse effects on groundwater or surface water quality, and the risk of impact can be readily reduced through prudent practices such as runoff control. The Director stated that, according to the Joint Review Panel report, the Approval Holder has an adequate spill response program to prevent or mitigate the effect of the increased risk of spills to the aquatic environment. The Director referred to the Joint Panel Review report in which it stated the development of the original design would result in a short-term alteration of fisheries habitat that could be adequately mitigated.

[240] The Director explained the original *Water Resources Act* permits did not contain conditions in respect of management of surface runoff from the road or rail line. He stated the original EPEA approval implemented the decisions of the Joint Review Panel on aquatic impacts with the obligation of the Approval Holder to create Workplans on long-term groundwater and surface water quality monitoring, including appropriate biomonitoring and fisheries monitoring. The Director explained that, in addition, the original EPEA approval contains several monitoring and reporting requirements for the McLeod River, including an annual Watershed Water Quality Report which compares the results of the Approval Holder's water quality monitoring program on the McLeod River to provincial and federal guidelines.

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<sup>71</sup> Approval Holder's submission, dated September 20, 2004, Affidavit of Mr. Wim Veldman at page 3.



[241] The Director explained the Haul Road design eliminates instream work in the entire transportation and utility corridor, and therefore, it was his understanding, the Haul Road does not require an authorization from Fisheries and Oceans Canada for alteration and destruction of fish habitat. The Director stated the rail line in the original proposal was going to result in major disturbances to the McLeod River.

[242] The Director stated the rail line and upgraded Grave Flats Road in the original design presented an uncontrolled source of sediment, but under the Haul Road design, surface water management is now regulated under the EPEA Approvals and must follow the Alberta Coal Mining Wastewater Guidelines, March 1998. He explained all runoff from the Haul Road is collected in settling ponds and is included in the monitoring and reporting requirements of the original EPEA approval.

[243] The Director stated two diversions of the McLeod River required in the original design would have resulted in a temporary reduction in the productivity of aquatic biota habitat, but under the Haul Road design, these diversions would no longer be required.

[244] The Director explained that, under the Haul Road design, all impacts from erosion are limited to one side of the river, all road runoff is controlled through the sedimentation ponds, and mitigation is required in the form of rock armouring where appropriate.

[245] The Director explained the Approval Holder has a spill response plan that utilizes the earthen berms to assist in the containment of spills, and the escape of floating hydrocarbons from the settling ponds is prohibited.

[246] The Director explained the construction of the crossings for the Haul Road are required by the Code of Practice for Watercourse Crossings and are not contemplated in the *Water Act* Approval.

[247] The Director stated he was aware the Haul Road design would have impacts on the watershed, but he concluded there would be fewer impacts than the original design.

[248] The Director disagreed with the Appellant's statement that the 19 dugouts require separate approvals since the *Water Act* Approval authorizes the construction of the sedimentation ponds and the testing that is required is referenced in the original EPEA approval. In addition, the Director explained the original design would not have required any sedimentation control as

a public road is not required to address this issue, but now that the Haul Road is included within the mine permit area, the Director has the authority to regulate the road.

[249] The Director stated he did consider selenium in his decision, but "...determined the liberation of selenium is associated with large scale rock dumps and that the volumes of rock involved in the construction of the haul road are relatively minor in nature."<sup>72</sup> He referred to the Joint Review Panel report and noted the following: current water quality guidelines for selenium are conservative and even an exceedence does not mean there has been or will be an environmental impact; it is reasonable to expect selenium levels, while warranting ongoing monitoring and research, do not represent a significant risk of adverse impact on regional water quality; and the Approval Holder would be required, based on information obtained by the selenium working group, to adaptively manage the project design, construction, and operation to control or mitigate any adverse effects associated with selenium.<sup>73</sup> The Director explained the selenium working group was established five years ago and has managed and directed a number of monitoring and research studies on the source, effects, and fate of selenium, including two reports provided by the Appellant.

## **B. Discussion**

[250] The number of water crossings will be reduced with the Haul Road compared to the original design. This will result in less disturbance to the McLeod River and creeks in the area. The Board views this as a significant improvement over the original design.

[251] Sediment ponds are required along the Haul Road that were not required under the original design. These ponds will reduce sediment from reaching the McLeod River. As the sediment ponds are regulated through the Approvals, the Director has the authority to ensure the ponds are constructed and operated to effectively control sediment. Again, the Board views this as a significant improvement over the original design.

[252] Given the improvements the Haul Road design has made with respect to the impacts on the watershed, the Board sees no need to recommend changes to the Approvals on this issue.

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<sup>72</sup> Director's submission, dated September 20, 2004, at paragraph 71.

[253] The Approval Holder raised concerns regarding the testimony of Mr. Christopher Severson-Baker, one of the witnesses for the Appellant. The Approval Holder suggested the testimony of Mr. Severson-Baker was “fear mongering.” The Board does not agree with this characterization of the witness, as this witness did not represent himself as an expert on selenium and he only raised concerns for water quality. He was providing a summary of the information and articles he found on the subject that he felt was useful for the purposes of these appeals. The Board had a copy of his curriculum vitae and is capable of determining his expertise on the subject and capable of assigning the appropriate weight onto his testimony. Although the Approval Holder raised issues regarding the testimony of Mr. Severson-Baker, the Board notes the evidence provided by the Approval Holder’s witness on selenium was also not determinative of this issue.

[254] There were still uncertainties regarding the possible effect of selenium on the watershed resulting from the construction and operation of the Haul Road but the Board is prepared to leave the regulation of these marginal uncertainties to the discretion of the Director to control through the adaptive management approach.

## **X. EFFECTS OF THE NOISE AND DUST**

### **A. Submissions**

#### **1. Appellant**

[255] The Appellant argued noise from the Haul Road would be a problem in the area. He submitted it would cause a significant impact on visitors to the Whitehorse Wildland Park and those camping at the Whitehorse Wildland Recreation Area.

[256] The Appellant argued there may be an affect on wildlife in the area as pointed out by the Environment Canada, but it was not assessed.

[257] The Appellant argued the Approval Holder only assessed the potential impact of PM<sub>10</sub> and has not monitored or assessed PM<sub>2.5</sub>, and therefore, it is not possible to determine if the levels exceed the Canada-wide standards.

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<sup>73</sup> See: Director’s submission, dated September 20, 2004, at paragraph 72.

[258] The Appellant stated there have been a number of changes from the original design, and the types and locations of the sources of air emission are different in the Haul Road design. He argued, “A cumulative assessment is required to determine air quality levels with the full development scenario of the mine, road and processing plant.”<sup>74</sup>

[259] The Appellant submitted that a health study should have been done on the effects of particulate matter on people and animals, as the area adjacent to the Haul Road is a destination for recreation.

[260] The Appellant argued the control conditions with respect to dust are vague and imprecise, and it is difficult to determine what the Approval Holder must do to comply with them.

## 2. Approval Holder

[261] The Approval Holder argued the issue of noise was dealt with in its Haul Road application, and that the Appellant did not produce any evidence that the issue of noise was not appropriately assessed by the AEUB. The Approval Holder stated it complied with all applicable AEUB regulatory requirements.

[262] The Approval Holder explained dust, including PM<sub>2.5</sub> has been extensively monitored, and even though not required, it volunteered to monitor PM<sub>10</sub> and PM<sub>2.5</sub> at the Whitehorse Creek Campground and to re-activate monitoring for PM<sub>10</sub> at Cadomin. It explained PM<sub>2.5</sub> is a component of PM<sub>10</sub>, and it was PM<sub>10</sub> that was modeled for the report. The Approval Holder stated Canada did not ratify any legally enforceable PM<sub>2.5</sub> standard, and the Clean Air Strategic Alliance report entitled *Particulate Matter and Ozone Framework* states the primary reporting requirements would be for population areas over 100,000. The Approval Holder argued that, “While provision was made for populations less than 100,000, that extrapolation was reasonably not intended to include a small, seasonally occupied campground.”<sup>75</sup> It further stated it would be “...procedurally unfair to require CRC to take mitigative measures for dust control that do not also apply to traffic at the campground as well as cooking or campfires.”<sup>76</sup>

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<sup>74</sup> Appellant’s submission, dated September 13, 2004, at paragraph 90.

<sup>75</sup> Approval Holder’s submission, dated September 20, 2004, Affidavit of Mr. Peter Sagert at page 9.

<sup>76</sup> Approval Holder’s submission, dated September 20, 2004, Affidavit of Mr. Peter Sagert at page 13.

[263] The Approval Holder explained it intends to use new, larger haul trucks with a nominal coal haul capacity of about 240 tons, and by increasing the haul capacity, there would be a reduced frequency of haul trucks passing a given point on the Haul Road.<sup>77</sup>

[264] The Approval Holder stated the coal processing plant at the Luscar Project has been maintained, and some of the component parts have been replaced over time. It stated the existing facility must meet Alberta Environment's regulatory requirements for emissions. It stated the "...existing plant's emissions formed part of the baseline air quality. As such, cumulative effects for coal processing plant emissions were addressed from an air quality perspective in the 2002 application."<sup>78</sup> It stated the air quality evaluation was conservative since the baseline air quality included active mining at the Luscar Project that has now terminated.

[265] The Approval Holder explained haul truck operators want minimal road dust for operating safety reasons, and any significant dust concerns would be radioed in to dispatch a water truck if road dust becomes a visibility concern.

[266] The Approval Holder submitted the Appellant failed to provide any evidence with respect to noise and dust that justifies the Approvals being set aside or modified.

### 3. Director

[267] The Director stated modeling results from the original design showed predicted ambient concentrations of air emissions would generally meet ambient quality guidelines and objectives. He stated the Joint Review Panel expected the Approval Holder to pave the Cadomin by-pass to address dust concerns in Cadomin provided municipal authorities agreed and it did not create safety issues. The Director explained the road would be a public road and regulated under applicable highway development and traffic safety legislation.

[268] The Director identified potential differences between the Haul Road design and the original design, specifically the proposed paved bypass road would be replaced with a gravel surface haul road, primarily used by coal haul trucks, located further from the main populated area of Cadomin. The Director stated the processed coal would be shipped from the Luscar Project rather than at the proposed Cheviot Project.

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<sup>77</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Mr. Peter Sagert at page 2.

<sup>78</sup> See: Approval Holder's submission, dated September 20, 2004, Affidavit of Mr. Peter Sagert at page 3.

[269] The Director stated the Approval Holder used the latest version of the Industrial Source Complex Short-Term Model in its dispersion modeling, and as this model has been accepted by Alberta Environment, the Director viewed the method of modeling the ambient air quality predictions as acceptable.

[270] The Director stated the predicted total or cumulative PM<sub>10</sub> concentrations are at levels protective to public health and the environment, and the predicted ambient air concentrations of PM<sub>10</sub> meet the 24-hour and annual standards at the five environmental receptors. The Director stated monitoring performed in Cadomin during active mining activities at the Luscar Project showed PM<sub>10</sub> concentrations within the US Environmental Protection Agency's 24-hour and annual standards.

[271] The Director was of the opinion "...the construction and operation of [the] haul road will not result in any significant impacts in the vicinity of the Hamlet of Cadomin."<sup>79</sup>

[272] The Director explained he required the Approval Holder to implement a monitoring program for PM<sub>10</sub> and PM<sub>2.5</sub> to demonstrate the accuracy of the modeling predictions and, if necessary, take mitigative measures to ensure the ambient particulate levels meet air quality standards. He stated mitigative measures and monitoring would be expected in the main populated areas of Cadomin and the Whitehorse Creek Campground.

[273] The Director explained the Approval Holder is obligated to undertake dust suppression activities and proper mitigative measures, and the sedimentation ponds would control any runoff associated with dust suppression activities.

[274] With respect to issue of noise, the Director stated the Approval Holder must comply with AEUB noise requirements, and the EPEA Approvals do not include conditions relating to noise.

[275] The Director stated he considered particulate matter in the issuance of the Approvals. He stated PM<sub>2.5</sub> emissions are not significant for activities such as the Haul Road. He explained the Approval Holder is required to monitor PM<sub>2.5</sub> and PM<sub>10</sub> at the Whitehorse Creek Campground and PM<sub>10</sub> at Cadomin to verify the fractions of PM<sub>2.5</sub> in PM<sub>10</sub>. He stated the

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<sup>79</sup> Director's submission, dated September 20, 2004, at paragraph 82.

data would be compared to previous monitoring data to assess if PM<sub>2.5</sub> monitoring is warranted for Cadomin.

[276] In response to the Appellant's statement that a cumulative assessment is required to determine air quality levels with the full development scenario, the Director stated modeling predictions accounted for background ambient air concentrations from the mining activities at the Luscar Project, Inland Cement operations, normal vehicular traffic, and activities in Cadomin.

[277] The Director stated the issue of completing a health study on the effects of particulate matter on people and animals is a public interest determination that the Joint Review Panel did not require. The Director reiterated a monitoring program would be implemented to verify modeling predictions and assessments of ambient air concentrations of PM<sub>10</sub>.

[278] The Director submitted the Joint Review Panel fully considered the impact of noise on visitors in the area.

## **B. Discussion**

[279] With respect to noise levels, the Board accepts the AEUB guidelines are the current regulatory standard for assessing acceptable industrial noise levels in populated areas with their large variety of noise sources arising from human activity. These guidelines can be extrapolated to apply to communities the size of Cadomin. The Board recognizes the Approval Holder has an obligation to monitor noise levels in Cadomin. The Board believes that, based on the evidence presented, noise levels at Cadomin will not exceed the guidelines as established by the AEUB. Based on the data garnered through its monitoring, the Approval Holder will be able to determine whether the guidelines are adhered to, and if not, it has an obligation under the AEUB approval to modify operations to come into compliance.

[280] The AEUB noise guideline is based on average noise levels rather than intermittent noise. Average noise is a useful reference for populated areas with multiple noise sources, but average noise levels are less relevant for unpopulated areas. One key value of wilderness areas is the possibility of enjoying a quiet atmosphere. With this expectation, any substantial level of noise can distract from the enjoyment of the area. The Haul Road design will

result in a 240 tonne coal haul truck passing any given spot approximately every 11 minutes, 24 hours a day, seven days a week. This consistent intermittent noise will not be conducive to enjoying the wilderness within the region where vehicle noise from the Haul Road can be heard. Fortunately, the Community Development Conservation Officer observed that substantial areas of the Whitehorse Wildland Park will not be affected by noise from the Haul Road. However, visitors' enjoyment of the Whitehorse Creek Campground is likely to be impaired.

[281] The Board heard from the Community Development Conservation Officer that paid registrations at the Whitehorse Creek Campground dropped from an annual average of about 1400 camper/user nights during 2001 through 2003 to 379 in 2004 when the Haul Road was constructed. The lower number certainly reflects some restrictions on access that were unique to the construction period, but users of the Whitehorse Creek Campground who were surveyed by Conservation Officers did express concerns about noise and dust from the Haul Road construction.

[282] The Board notes that Community Development has found it necessary to consider moving the campground.<sup>80</sup> The Board does not agree with the Approval Holder's noise expert when he referred to campgrounds being universally noisy because of major transportation routes, rail lines, ghetto blasters, and creeks.<sup>81</sup> Although there are many campgrounds in this province

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<sup>80</sup> See: Transcript, January 25, 2005, at page 255, lines 3 to 18. When questioned by counsel for the Appellant, the Community Development Conservation Officer responded:

"Ms. Klimek: Is one of the proposed mitigations, would it be moving the park or the campground?"

Mr. McCracken: That is a consideration.

Ms. Klimek: Have you looked at where that could be moved and who would pay for that?"

Mr. McCracken: Yes, we have.

Ms. Klimek: Where would that be?"

Mr. McCracken: We don't know at this time. There is a lot of factors that we have to take into consideration such as grizzly bears. If you have heard, the other thing is the reality of the actual feedback from the public as this road happens. This is the first operating year so, from that, we will have a good determinator but we have been doing some exploration on some potentials."

<sup>81</sup> See: Transcript, January 25, 2005, at page 355, lines 6 to 16. When questioned by counsel for the Appellant, the Approval Holder's noise expert witness responded:

"Ms. Klimek: And I know you didn't assess the campground, but would you agree with me that, generally, campgrounds are a quiet background noise, right?"

Mr. Whicker: No, I would not agree with you on that. There are many campgrounds that are near major transportation routes, there are campgrounds that are near rail lines, there are campgrounds that are near noisy creeks, and there are also most campgrounds I have been in almost invariably has one or more people with ghetto blasters seeming to think that everybody should enjoy their music."



that are near major highways, the Whitehorse Creek Campground was not one of them. Comparing the sound of water flowing in a mountain stream with transportation noise is not relevant for judging the impact of the Haul Road on the Whitehorse Creek Campground.

[283] The Approval Holder conceded access to some areas frequented by tourists and residents will be restricted or less convenient. Community Development acknowledged this was an impact of the Haul Road design. To help compensate for the impact on access to these areas, the Board considers it appropriate for the Approval Holder to consider funding the re-location of the campground in consultation with Community Development. In these circumstances, the taxpayers of Alberta should not be burdened with the costs of relocating the campground site. By bearing the costs of relocating the campground, the Approval Holder will be compensating those who use the area for limitations on access created by the Haul Road operations. This would also demonstrate the Approval Holder's willingness to listen to the concerns of the residents of the area, to be a good corporate citizen, and to accept its social responsibility.

[284] Neither the Appellant nor the Cadomin Residents offered expert evidence regarding dust control or air quality, specifically fine particulate matter. Although the Cadomin Residents observed plumes of dust during construction of the Haul Road in the summer of 2004, they were not able to establish any likelihood that dust would pose any problem in Cadomin during the operation of the Haul Road.

[285] The Appellant argued the Approval Holder only assessed the potential impact of PM<sub>10</sub> and has not monitored or assessed PM<sub>2.5</sub>. The Appellant also submitted a health study should have been done on the effects of particulate matter on people and animals, because the area adjacent to the Haul Road is a destination for recreation. No evidence was provided by the Appellant to support an expectation that fine particulate emissions or dust from the Haul Road would pose a health risk to humans or animals.

[286] EPEA Approval 46972-00-01 requires the Approval Holder to develop a Cheviot Haul Road Emissions Monitoring Plan and to implement that monitoring plan when authorized in writing by the Director. The scope of these conditions is sufficient to allow the Director to determine whether dust or fine particle emissions from the Haul Road exceed air quality criteria.

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In the absence of such evidence from the monitoring program, the Director was justified in expecting that normal dust control measures by the Approval Holder for the Haul Road will be sufficient to avoid associated air quality problems.

## **XI. LEGAL STATUS OF THE APPROVAL**

### **A. Submissions**

#### **1. Appellant**

[287] The Appellant stated the approval for the original design required the construction of the pre-development activities be commenced by December 31, 2001. He stated this was not done and no amendment was granted. The Appellant argued the Approvals should not have been granted until the breach was explained and an amendment of the approval obtained.

[288] At the Hearing, the Appellant conceded there was an amendment of the original approval extending the expiry period, and therefore, he did not pursue this issue further.

#### **2. Approval Holder**

[289] The Approval Holder submitted the Appellant failed to establish the legal status of EPEA Approval No. 46972-00-00 was such that it could not be amended. The Approval Holder explained that on December 21, 2001, it obtained an extension of the time limit to December 31, 2003, and therefore, it was in compliance at the time of the amendment.

#### **3. Director**

[290] The Director stated EPEA Approval No. 46972-00-00 was issued to the Approval Holder on September 29, 1998, for pre-development activities. According to the Director, Clause 3.1.1 listed December 31, 2001, as a deadline for the commencement of construction, but the clause expressly provided for modification of the deadline by written authorization of the Director. The Director stated he issued a written authorization on December 21, 2001, modifying the commencement date to December 31, 2003.

[291] The Director stated he issued Amending Approval No. 46972-00-01 to the Approval Holder on December 5, 2003, amending Approval 46972-00-00, including modifying Clause 3.1.1 to December 31, 2006, as the deadline for construction commencement.

[292] Therefore, according to the Director, EPEA Approval No. 46972-00-00 was in full force and effect at the time of the amendment.

## **B. Discussion**

[293] At the Hearing, the Appellant conceded EPEA Approval No. 46972-00-00 had been amended previously to extend the expiry date to December 31, 2003, and was therefore a valid approval at the time the Haul Road applications were approved.

[294] The Director stated EPEA Approval No. 46972-00-00 was issued to the Approval Holder on September 29, 1998, for pre-development activities and it had an expiry date of December 31, 2001. The Director issued a written authorization on December 21, 2001, modifying the commencement date to December 31, 2003.<sup>82</sup>

[295] The Approval Holder made its application for the amendments to allow for the Haul Road on August 2, 2002 (received by Alberta Environment on August 16, 2002). As the expiry date of the approval had been extended to December 31, 2003, the Approval Holder requested the amendments well before the expiration of the approval.

[296] Therefore, the Board agrees with the Parties that EPEA Approval No. 46972-00-00 was in full force and effect at the time of the amendment. There is no further issue to determine regarding the validity of the Approvals.

## **XII. WORKPLANS**

[297] These are the first Approvals of this type that have appeared before the Board in that the iterative process, in this case the Workplans, are included in the Approvals. What concerns the Board is the ability of the Director to amend the Approvals based on information garnered through the Workplans. Under section 70(3) of EPEA, the Director can amend the

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<sup>82</sup> See: Director's Record.

Approval if any reasonably unforeseen adverse effects become apparent at a later date. Specifically, section 70(3) provides:

“If the Director considers it appropriate to do so, the Director may on the Director’s own initiative in accordance with the regulations

- (a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval
  - (i) if in the Director’s opinion an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur,
  - (ii) if the term or condition relates to a monitoring or reporting requirement,
  - (iii) where the purpose of the amendment, addition or deletion is to address matters related to a temporary suspension of the activity by the approval holder, or
  - (iv) where the approval is transferred, sold, leased, assigned or otherwise disposed of under section 75,
- (b) cancel or suspend an approval or registration, or
- (c) correct a clerical error in an approval or registration.”

[298] Should the results of the Workplans demonstrate an adverse effect, the Director should have the ability to amend the Approvals. However, the Board would be concerned if the Approval Holder chose to argue that the Director cannot claim an issue was unforeseen if he required a Workplan to investigate that issue.

[299] The Workplans allow the Approval Holder some flexibility in developing a response to approval requirements because any requirements developed from Workplans effectively arise from experience gained operating under the approval. On the other hand, approval holders seek certainty in their approvals so they know what is expected for the 10-year life of an approval. The benefit of flexibility must be balanced with the desire for certainty. Meanwhile, the Director clearly must be able to retain the authority to implement findings from Workplans if they are necessary to protect the environment, even if the Approval Holder does not wish to implement such adaptive measures. When concerns arising from this scenario were presented to the Approval Holder, its counsel assured the Board the Director’s ability under the legislation to amend the Approvals has not been eroded by the incorporation of Workplans into the Approvals.

“Dr. Hrudey: I guess Mr. McDonald made the observation that the Director has the authority under EPEA to enforce insights that might arise from the work plan efforts by issuing a unilateral amendment and I guess my concern is it seems like a logical response of the approval holder, if they didn’t like what that amendment was, was to say, well, gee, this arose from the work plan that we have all been engaged in here so how can you tell us that, you know, this is [un]foreseeable.

Mr. Ignasiak: Mr. Chairman, before I address that one point, first, the existence of the work plans does not, in any way, remove the Director’s jurisdiction to, at any time, open up and approve them. That is a right the Director has. The work plans essentially provide a framework where everyone can work together to arrive at any changes that ought to be made, and I think that the evidence about the history of CRC and the operations and the impact on wildlife for 30 years without a grizzly fatality, for instance, is something that should be taken into account and certainly the Director has the authority to respond, whether there is work plans or not, to respond to the events that are occurring, environmental effects that are occurring, and talk to an approval holder but what has to happen is direct an approval holder. That is part of being a regulated industry.”<sup>83</sup>

[300] The Board considers the implementation of the Workplans as the mitigation measures of the Approvals. Essentially, if the Director was not able to determine with certainty the needs for and best measures to achieve mitigation at the time of writing of the Approvals he may resort to the development of Workplans as a means to identify the needs for mitigation and the best measures for implementing mitigation. If, as a result of the investigations by the Approval Holder performed for the Workplans, the Director finds the effect arising from the Workplans significant enough to warrant an amendment of an Approval, then it would seem reasonable, by definition, to consider the need for an amendment was unforeseeable at the time the Approval was issued. The Director must retain the ability to enforce these strategies in order to protect the environment.

[301] The Workplans included in the Approvals allow the Director to amend the Approvals based on the results of the Workplans. The inclusion of the Workplans allows for adaptive management, something he considered appropriate and necessary for this project.

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<sup>83</sup> Transcript, January 25, 2005, at page 420, lines 34 and 35 and at page 421, lines 1 to 26.

However, there is a concern that drafting the Approvals in this manner essentially does not require mitigative measures to be in place before the Approvals were issued.

[302] The Board recognizes the Workplans may be effective for achieving an adaptive management approach, provided this approach does not result in waiting for damage to be demonstrated before mitigation measures are implemented. The Approval Holder stated it would consider mitigative measures when a pattern is identified. It is unclear what time span is required to identify a pattern, and in the case of grizzly bears, one death would be a concern. Waiting to see if more deaths occur in a particular area would not be in the best interest of the grizzly bear population. It is hoped the Approval Holder will continue to upgrade its Workplans and include as many mitigation measures as possible in the plans from the start. As more information is obtained, the Workplans can be modified, but when the need arises, it would hopefully be very easy for the Approval Holder to implement the best mitigative strategies. It would be inappropriate to identify a problem and then require additional time to strategize about mitigative options. The Approval Holder needs to have those options identified and ready to implement.

[303] The main element missing from the Workplans is public involvement. The Board will recommend the Approval Holder implement a mechanism to inform the public, including the Cadomin Residents, of actions arising out of Workplans. The Board also encourages the Approval Holder to involve local residents, including the Cadomin Residents, in developing its Workplans as appropriate.

### **XIII. CONCLUSIONS**

[304] The primary concerns that were expressed by the Appellant and the Cadomin Residents were:

1. inadequate assessment of the environmental impacts generally;
2. no consideration of cumulative effects;
3. Workplans should have been completed and mitigation strategies implemented prior to the Approvals being issued;
4. concerns about the clarity of the conditions in the Approvals regarding dust and noise;

5. insufficient monitoring of water and sediment management in dugouts;
6. no specific conditions regarding selenium release from the Haul Road;
7. incomplete answers to Alberta Environment's supplemental questions;
8. increased land disturbances and potential impacts on Grave Flats Road due to flooding and washouts;
9. potential impacts on the McLeod River as a result of pollution from salt;
10. impacts of noise, particularly noise spikes, on the Whitehorse Creek Campground and Cadomin;
11. impacts of dust on the Whitehorse Creek Campground and Cadomin;
12. restrictions on public access, impacts on tourism, and loss of recreational opportunities;
13. the possibility the Approval Holder stops using the Haul Road and does not reclaim it;
14. inadequate assessment of the impacts of the Haul Road on wildlife, particularly indicator species such as grizzly bear and Harlequin ducks; and
15. negative impact of the linear disturbance on wildlife, particularly with regard to wildlife mortality.

[305] The Haul Road design does have different environmental impacts from the original design previously approved by the Joint Review Panel. Many of the specific differences are positive, some are negative and a few are uncertain regarding their impact on the environment.

**A. The Effect on Wildlife**

[306] With respect to the effect of the Haul Road on wildlife, the principal concerns are wildlife mortality and the impact on wildlife movement across the Haul Road corridor. The lower vehicle speeds, improved sight lines, and trained drivers are clearly beneficial for reducing wildlife mortality from vehicle collisions on the Haul Road. In contrast, the wider road surface, around-the-clock use, and the addition of a berm between the Haul Road and the adjacent Grave Flats Road may create a greater barrier to wildlife crossing and may increase the chances of vehicle collisions. On balance, some uncertainty remains and further measures to reduce the

chances of vehicle collisions with critical wildlife species, like grizzly bear, are desirable. The Board will make recommendations to take reasonable steps to mitigate these impacts.

**B. The Effect on Public Access**

[307] With respect to the effect of the Haul Road on public access, the Board agrees that the Haul Road clearly restricts public access to wilderness areas and tourist sites on the west side. The Haul Road is now included in a Mineral Surface Lease for its entire length and the Approval Holder is authorized to restrict any public access to this industrial site. The Approval Holder advised that upon completion of the Haul Road construction phase, the Mineral Surface Lease will be restricted to the footprint of the Haul Road, so access to the McLeod River on the east side of the Haul Road will be returned to the public. The Approval Holder has constructed a culvert underpass to access the Cadomin Cave, a culvert access and new parking lot for the Prospect Creek trail head and an underpass for public access to the Whitehorse Creek Campground and trail head for the Whitehorse Wildland Park. These measures are not equivalent to the access previously enjoyed by the Appellant for his eco-tourism business or for the Cadomin Residents. The proximity of the Haul Road and the regular industrial traffic inherently detract from the wilderness experience within visual and hearing range of the Haul Road. In contrast, the original design involved a transportation and utility corridor, and called for construction of a new coal processing plant at the Cheviot Project, which would create another industrial facility on the wilderness landscape that would also detract from landscape appeal.

[308] The restricted public access is certainly a benefit for wildlife in effectively eliminating the free access of all terrain vehicles and poachers to the west side of the Haul Road. On balance, the public access to the adjacent wilderness areas has been reduced in both quantity and quality. These negatives are compensated by the points of access constructed by the Approval Holder and the clear benefit of reduced all terrain vehicle and poacher access to this sensitive wildlife area. The Board is also of the view that Community Development may find there is a need to relocate the Whitehorse Creek Campground. If Community Development makes this determination, the Board encourages the Approval Holder to assist with this project to help mitigate the impacts of the Haul Road.



**C. The Effect on the Watershed**

[309] With respect to the local watershed, the Haul Road has substantially less impact than the original design. This weighs heavily in favour of the Approval being confirmed. The new design involved no crossing, disturbance or instream work on the McLeod River in comparison with a new rail bridge crossing, 580 m of channel restoration, 165 m of river realignment and substantial bank stabilization for the original design corridor. For both Whitehorse Creek and Prospect Creek, clearspan culverts were used for the Haul Road design to eliminate instream work that was required for the original design. Furthermore, the Haul Road design has extensive sediment controls governed by the Approvals, whereas there would have been no Alberta Environment controls on sediment for the original design. Possible impacts from increased selenium release from the Haul Road was raised by the Appellant, but no case was made to suspect that selenium problems would be increased by the Haul Road. In any case, the Workplans in Approval 46972-00-01 address the issue of selenium impacts on regional water quality.

**D. The Effect on Noise and Dust**

[310] With respect to dust and noise, around the clock use of the Haul Road raises the prospects of a greater noise impact from the Haul Road upon the Whitehorse Creek Campground and the Board believes steps may be necessary to mitigate the impacts by moving the campground. However, no evidence of a credible noise impact on the Town of Cadomin was established. The Haul Road design and use present the potential for dust emissions, but the likelihood of dust control measures to be successful and the requirements for air quality monitoring are sufficient to assure that any problems from dust arising from the Haul Road can be identified and addressed.

**E. Overall**

[311] Some of these impacts negatively affect the Appellant and the Cadomin Residents in terms of their use and enjoyment of the local wilderness areas. The Joint Review Panel

considered a wide range of such interests and made the determination that the Cheviot Project was in the public interest. Subsequently, the AEUB further made a similar public interest determination for the Haul Road proposal. This Board finds that there are environmental benefits to the Haul Road proposal, most notably with regard to the reduced impact on the local water shed and the improved control of human access to the wilderness areas to the west of the Haul Road which should reduce illegal hunting in the area. As long as the potential for wildlife mortality on the Haul Road can be minimized, the Haul Road should have a net benefit for the environment in comparison with the original design of the project.

[312] While the Board believes the Appellant was very well represented, the Board is disappointed the Appellant did not do more to assist the Board in considering other mitigation measures to address his concerns. With respect to the Cadomin Residents, they were thoroughly prepared for the Hearing and presented their case well. Their intervention assisted the Board in understanding the issues in relation to local residents.

[313] Based on all of the evidence received in these appeals, the Board has concluded and will recommend that the Approvals should be confirmed subject to the following variations, as detailed below.

1. All Parties speaking to the issue agreed the use of salt on the Haul Road could serve to attract wildlife to the Haul Road and thereby increase the risk of vehicle collisions with wildlife. The Approval Holder advised the Board that it had no intention of using salt on the Haul Road. Therefore, this intention should be formalized by directing that salt shall not be used on the Haul Road without seeking the written permission from the Director. Such a request would have to be accompanied by an assessment of the negative impacts that salt use would pose for wildlife and a justification for choosing salt over other available alternatives. The Director should refer this assessment to Sustainable Resource Development for review and recommendations before responding to any such request from the Approval Holder.

2. All of the Parties agreed that human-caused wildlife mortality is a critical issue for vulnerable species. Therefore, in addition to any other reporting obligations, the Approval Holder should report any human-caused mortality of critical wildlife species (i.e. grizzly bear, lynx, wolf, or wolverine) occurring in relation to their operation within 24 hours of the occurrence. A written report should be provided to the Director within 30 days providing a detailed analysis of the circumstances surrounding the incident and making specific recommendations for measures to be implemented to prevent future mortality by similar causes. The Director should refer this report to Sustainable Resource Development for review and recommendations to the Director concerning any preventive measures to be implemented.

3. The concern for collisions with wildlife is greatest during periods of poor lighting, dusk, dawn and overnight and the new Haul Road involves 24-hour travel of vehicles. Therefore, the Approval Holder should prepare a report investigating the feasibility of installing peripheral lighting on vehicles used by the Approval Holder on the Haul Road to illuminate the margins of the Haul Road to further improve the peripheral field of view of vehicle operators. As with fog lamps, it should be possible to aim such lighting low enough that it does not interfere with oncoming traffic. This report should be referred to Sustainable Resource Development for review and recommendations on the merits of implementing the most effective lighting measures for reducing the chances of collision with wildlife. The report should also examine whether there are any legal restrictions to the use of such lighting.

4. The approach advocated by the Approval Holder for eliminating vehicle collisions with wildlife relies substantially on effective training of vehicle operators. Therefore, the Approval Holder should prepare an annual report on the training of its coal haul truck operators and other employees using the Haul Road detailing the degree, specific content and verification of training provided to ensure the employees will be effective at avoiding collisions with wildlife. This

report should be referred by the Director to Sustainable Resource Development for review and recommendations to the Director on any additional training measures that may be necessary.

5. Many of the details of the mitigation of the negative environmental impacts will emerge from the Workplans that were required by the Approvals. However, there is no provision for informing the public of the progress of these Workplans. Therefore, the Approval Holder should prepare a plan for informing, at least twice per year, the affected public (including the Appellant and the Cadomin Residents) about the mitigative measures that have been developed. The Board also encourages the Approval Holder to involve the public in the development of these mitigation measures where appropriate.

6. While restriction of public access across the Haul Road can likely provide some protection for wildlife against illegal hunting, this protection would be lost if the Haul Road is not used for any extended period, unless other measures are taken to control unauthorized access. Therefore, in the event the Approval Holder does not use or does not plan to use the Haul Road for the hauling of coal for more than 30 days, the Approval Holder shall within 60 days, provide a plan addressing short-term measures (for closures of up to 6 months) and long-term measures (for closures of more than 6 months) in order to prevent unauthorized use of the Haul Road. These measures should include mechanisms to prevent access by all terrain vehicles and to prevent illegal hunting. Long-term measures should include physical alterations of the Haul Road to restrict access where appropriate. Where required to do so in writing by the Director, the Approval Holder shall implement these plans.

7. The Approval Holder stated it was still involved in the Foothills Model Forest Management Plan for Grizzly Bears and identified this as one of the mitigation measures with respect to wildlife. Therefore, the Approval Holder should be required, as part of the Approvals, to continue to participate in the

study. One of the purposes of this study is try to identify areas where grizzly bears are most likely to be found in the area. The Board encourages the Approval Holder to use this information in developing its mitigation strategies, including providing this information to its haul truck drivers.

#### **XIV. RECOMMENDATIONS**

[314] In accordance with section 99 of EPEA, the Board recommends the Minister confirm EPEA Amending Approval 117672-01-02 and *Water Act* Approval 00188589-00-00.

[315] In accordance with section 99 of EPEA, the Board recommends the Minister confirm EPEA Amending Approval 46972-00-01, subject to the following variations:

1. Salt shall not be used on the Haul Road without the written permission of the Director. Any request to use salt on the Haul Road must be accompanied by a detailed analysis of the potential impacts on wildlife and a justification for using salt over other available alternatives.
2. In addition to any other reporting obligations, the Approval Holder must report any human-caused mortality of grizzly bear, lynx, wolves, wolverine, and other species specified by the Director in writing, occurring in relation to the Approval Holder's operation to the Director within 24 hours of occurrence. A written report shall be provided to the Director within 30 days providing a detailed analysis of the circumstances surrounding the incident and providing specific recommendations for measures to be implemented to prevent future mortality by similar causes. Where directed to do so in writing by the Director, the Approval Holder shall be required to implement these measures.
3. The Approval Holder shall prepare a report investigating the feasibility of installing peripheral lighting on vehicles used by the

Approval Holder on the Haul Road to illuminate the margins of the Haul Road to further improve the peripheral field of view of vehicle operators. The report should include an examination of any legislation that may restrict the use of such peripheral lighting. The report shall be provided to the Director no later than July 1, 2005 and where directed to do so in writing by the Director, the Approval Holder shall be required to implement the measures detailed in the report.

4. The Approval Holder shall prepare an annual report detailing its training program for coal haul truck operators and other employees using the Haul Road identifying the degree, specific content and verification of training provided to ensure these vehicle operators will be effective at avoiding collisions with wildlife. Where the Director identifies in writing any needs for improvement in the training program, the Approval Holder shall develop and implement these improvements. This annual report shall be provided no later than July 1st in every calendar year.
5. The Approval Holder shall prepare and submit to the Director a plan for informing, at least twice per year, the affected public (including the Appellant and the Cadomin Residents) about the mitigative measures that have been developed by the Workplans. The plan shall be submitted to the Director by July 1, 2005. Where directed to do so in writing by the Director, the Approval Holder shall implement the plan.
6. In the event the Approval Holder does not use or does not plan to use the Haul Road for the hauling of coal for more than 30 days, the Approval Holder shall within 60 days, provide a plan addressing short-term measures (for closures of up to 6 months) and long-term measures (for closures of more than 6 months) in order to prevent unauthorized use of the Haul Road. These measures should include mechanisms to prevent access by all terrain vehicles and to prevent

illegal hunting. Long-term measures should include physical alterations of the Haul Road to restrict access where appropriate. Where required to do so in writing by the Director, the Approval Holder shall implement these plans.

7. The Approval Holder should continue to participate in the Foothills Model Forest Management Plan for Grizzly Bears.
8. Should Community Development make the determination that the Whitehorse Creek Campground must be relocated, the Board encourages the Approval Holder to assist with this project to help mitigate the impacts of the Haul Road.

[316] Attached for the Minister's consideration is a draft Ministerial Order implementing these recommendations.

[317] Finally, with respect to sections 100 and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and any decision by the Minister, be sent to the following parties:

1. Ms. Jennifer Klimek, on behalf of Mr. Ben Gadd;
2. Mr. Dennis R. Thomas, Q.C., and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP, on behalf of Cardinal River Coals Ltd.;
3. Mr. William McDonald and Mr. Darrin Stepaniuk, Alberta Justice, on behalf of Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment;
4. Ms. Karin Buss, Ackroyd Piasta Roth and Day, on behalf of the Cadomin Residents;
5. Ms. Janice Melnychuk;
6. Mr. Edd Vass;
7. Ms. Helen Ready;
8. Ms. Barbara Higgins;
9. Ms. Joyce Wilkins and Mr. Roger Wilkins;
10. Mr. Andrew Stanton, on behalf of the Yellowhead County;
11. Mr. Quentin Bochar, on behalf of the Alberta Fish & Game Association;
12. Mr. Robin Campbell, on behalf of the United Mine Workers of America;
13. Mayor Glenn Taylor, on behalf of the Town of Hinton;

14. Mr. Robin Campbell, on behalf of the Alberta Council for Sustainable Communities and the Environment; and

15. Mr. Brian Meagher, on behalf of Trout Unlimited.

**XV. COSTS**

[318] Before the close of the Hearing, the Board received notice from the Appellant and the Approval Holder that they may wish to make an application for costs. The Board requests that should the Appellant or Approval Holder wish to apply for costs, then any application for costs be provided to the Board within two weeks of the date of the Minister's Order with respect to this Report and Recommendations. The Board will then provide the Parties with an opportunity to respond to any such applications before making its decision.

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

*“original signed by”*

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Dr. Steve E. Hruddy,  
Panel Chair and Board Member

*“original signed by”*

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Mr. Ron V. Peiluck,  
Board Member

*“original signed by”*

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Mr. Al Schulz,  
Board Member



**XVI. DRAFT MINISTERIAL ORDER**

**Ministerial Order**

/2005

*Environmental Protection and Enhancement Act*  
R.S.A. 2000, c. E-12

*Water Act*  
R.S.A. 2000, c. W-3

*Water Ministerial Regulation*  
A.R. 205/98

**Order Respecting Environmental Appeals Board  
Appeal Nos. 03-150, 151, and 152**

I, Guy Boutilier, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, section 14 of the *Water Act*, and section 12 of the *Water (Ministerial) Regulation*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 03-150, 151, and 152.

Dated at the City of Edmonton, in the Province of Alberta this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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Guy Boutilier  
Minister of Environment

Draft Appendix

With respect to the decision of Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment (the "Director"), to issue Approval No. 00188589-00-00 dated December 9, 2003, under the *Water Act*, and Amending Approval Nos. 11767-01-02 and 46972-00-01 dated December 5, 2003, under the *Environmental Protection and Enhancement Act*, to Cardinal River Coals Ltd. (the "approval holder"), I, Guy Boutilier, Minister of Environment, order that:

1. The decision of the Director to issue *Environmental Protection and Enhancement Act* Amending Approval 117672-01-02 is confirmed.
  2. The decision of the Director to issue *Water Act* Approval 00188589-00-00 is confirmed.
  3. The decision of the Director to issue *Environmental Protection and Enhancement Act* Amending Approval 46972-00-01 is confirmed subject to the following variations.
  4. *Environmental Protection and Enhancement Act* Amending Approval 46972-00-01 is amended by adding the following section immediately after condition 2.4.12:
    - "2.4.13 (a) The approval holder shall not use salt on the haul road without the written permission of the Director.
    - (b) Any request by the approval holder to use salt on the haul road shall be accompanied by a report, satisfactory to the Director, providing a detailed analysis of the potential impacts on wildlife and a justification for using salt over other available alternatives.
- 2.4.14 (a) In addition to any other reporting requirement, the approval holder shall report any human-caused mortality of grizzly bear, lynx, wolves, wolverine, and other species specified by the Director in writing, occurring in relation to the approval holder's operation, to the Director within 24 hours of the occurrence.
- (b) Where there is an occurrence as specified in condition 2.4.14(a), the approval holder shall provide a written report to the Director, to the satisfaction of the Director, within 30 days of the occurrence, providing a detailed analysis of the circumstances surrounding the incident and providing specific recommendations for measures to be implemented to prevent future wildlife mortality by similar causes.

- (c) Where directed to do so in writing by the Director, the Approval Holder shall implement any measures identified by the Director to prevent wildlife mortality.
- 2.4.15
  - (a) The approval holder shall prepare a report, satisfactory to the Director, investigating the feasibility of installing peripheral lighting on vehicles used by the approval holder on the haul road to illuminate the margins of the haul road to improve the field of view of vehicle operators.
  - (b) The report prepared in accordance with condition 2.4.15(a) shall include an examination of any legislation that may restrict the use of such peripheral lighting.
  - (c) The report prepared in accordance with condition 2.4.15(a) shall be provided to the Director no later than July 1, 2005, and where directed to do so in writing by the Director, the approval holder shall implement the measures detailed in the report as required by the Director.
- 2.4.16
  - (a) The approval holder shall prepare an annual report, satisfactory to the Director, detailing its training program for coal haul truck operators and other employees using the haul road identifying the degree, specific content and verification of training provided to assure that the vehicle operators will be effective at avoiding collisions with wildlife.
  - (b) Where the Director identifies in writing any needs for improvement in the approval holders training program for operators of vehicles used on the haul road, the approval holder shall develop and implement these improvements.
  - (c) This annual report required in condition 2.4.16(a) shall be provided no later than July 1st in every calendar year.
- 2.4.17
  - (a) The approval holder shall prepare and submit to the Director a plan, satisfactory to the Director, for informing, at least twice per year, the affected public about the mitigative measures that have been developed by the work plans.

- (b) The plan required in condition 2.4.17(a) shall be submitted to the Director by July 1, 2005 and where directed to do so in writing by the Director, the approval holder shall implement the plan.
  
- 2.4.18
  - (a) In the event that the approval holder does not use or does not plan to use the haul road for the hauling of coal for a period of more than 30 days, the approval holder shall within 60 days, provide a plan to the Director, to the satisfaction of the Director, addressing short-term measures (for closures of up to 6 months) and long-term measures (for closures of more than 6 months) in order to prevent unauthorized use of the haul road.
  
  - (b) These measures included in the plan required in condition 2.4.18(a) shall include mechanisms to prevent access by all terrain vehicles and illegal hunters in the area of the haul road, and long term measures should consider physical alteration of the haul road where appropriate.
  
  - (c) Where required to do so in writing by the Director, the approval holder shall implement the plan required in condition 2.4.18(a).
  
- 2.4.19 The approval holder should continue to participate in the Foothills Model Forest Management Plan for Grizzly Bears to the satisfaction of the Director.”



ALBERTA ENVIRONMENT

*Office of the Minister*

**Ministerial Order**

*12* /2005

*Environmental Protection and Enhancement Act*

R.S.A. 2000, c. E-12

*Water Act*

R.S.A. 2000, c. W-3

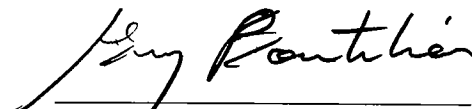
*Water Ministerial Regulation*

A.R. 205/98

**Order Respecting Environmental Appeals Board  
Appeal Nos. 03-150, 151, and 152**

I, Guy Boutilier, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, section 14 of the *Water Act*, and section 12 of the *Water (Ministerial) Regulation*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 03-150, 151, and 152.

Dated at the City of Edmonton, in the Province of Alberta this 8<sup>th</sup> day of April, 2005.

  
\_\_\_\_\_  
Guy Boutilier  
Minister of Environment

## Appendix

With respect to the decision of Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment (the "Director"), to issue Approval No. 00188589-00-00 dated December 9, 2003, under the *Water Act*, and Amending Approval Nos. 11767-01-02 and 46972-00-01 dated December 5, 2003, under the *Environmental Protection and Enhancement Act*, to Cardinal River Coals Ltd. (the "approval holder"), I, Guy Boutilier, Minister of Environment, order that:

1. The decision of the Director to issue *Environmental Protection and Enhancement Act* Amending Approval 117672-01-02 is confirmed.
2. The decision of the Director to issue *Water Act* Approval 00188589-00-00 is confirmed.
3. The decision of the Director to issue *Environmental Protection and Enhancement Act* Amending Approval 46972-00-01 is confirmed subject to the following variations.
4. *Environmental Protection and Enhancement Act* Amending Approval 46972-00-01 is amended by adding the following section immediately after condition 2.4.12:
  - "2.4.13 (a) The approval holder shall not use salt on the haul road without the written permission of the Director.
  - (b) Any request by the approval holder to use salt on the haul road shall be accompanied by a report, satisfactory to the Director, providing a detailed analysis of the potential impacts on wildlife and a justification for using salt over other available alternatives.
- 2.4.14 (a) In addition to any other reporting requirement, the approval holder shall report any human-caused mortality of grizzly bear, lynx, wolves, wolverine, and other species specified by the Director in writing, occurring in relation to the approval holder's operation, to the Director within 24 hours of the occurrence.

- (b) Where there is an occurrence as specified in condition 2.4.14(a), the approval holder shall provide a written report to the Director, to the satisfaction of the Director, within 30 days of the occurrence, providing a detailed analysis of the circumstances surrounding the incident and providing specific recommendations for measures to be implemented to prevent future wildlife mortality by similar causes.
- (c) Where directed to do so in writing by the Director, the Approval Holder shall implement any measures identified by the Director to prevent wildlife mortality.

2.4.15

- (a) The approval holder shall prepare a report, satisfactory to the Director, investigating the feasibility of installing peripheral lighting on vehicles used by the approval holder on the haul road to illuminate the margins of the haul road to improve the field of view of vehicle operators.
- (b) The report prepared in accordance with condition 2.4.15(a) shall include an examination of any legislation that may restrict the use of such peripheral lighting.
- (c) The report prepared in accordance with condition 2.4.15(a) shall be provided to the Director no later than July 1, 2005, and where directed to do so in writing by the Director, the approval holder shall implement the measures detailed in the report as required by the Director.

2.4.16

- (a) The approval holder shall prepare an annual report, satisfactory to the Director, detailing its training program for coal haul truck operators and other employees using the haul road identifying the degree, specific content and verification of training provided to assure that the vehicle operators will be effective at avoiding collisions with wildlife.

- (b) Where the Director identifies in writing any needs for improvement in the approval holders training program for operators of vehicles used on the haul road, the approval holder shall develop and implement these improvements.
  - (c) This annual report required in condition 2.4.16(a) shall be provided no later than July 1st in every calendar year.
- 2.4.17
  - (a) The approval holder shall prepare and submit to the Director a plan, satisfactory to the Director, for informing, at least twice per year, the affected public about the mitigative measures that have been developed by the work plans.
  - (b) The plan required in condition 2.4.17(a) shall be submitted to the Director by July 1, 2005 and where directed to do so in writing by the Director, the approval holder shall implement the plan.
- 2.4.18
  - (a) In the event that the approval holder does not use or does not plan to use the haul road for the hauling of coal for a period of more than 30 days, the approval holder shall within 60 days, provide a plan to the Director, to the satisfaction of the Director, addressing short-term measures (for closures of up to 6 months) and long-term measures (for closures of more than 6 months) in order to prevent unauthorized use of the haul road.
  - (b) These measures included in the plan required in condition 2.4.18(a) shall include mechanisms to prevent access by all terrain vehicles and illegal hunters in the area of the haul road, and long term measures should consider physical alteration of the haul road where appropriate.
  - (c) Where required to do so in writing by the Director, the approval holder shall implement the plan required in condition 2.4.18(a).
- 2.4.19 The approval holder should continue to participate in the Foothills Model Forest Management Plan for Grizzly Bears to the satisfaction of the Director.”