ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – March 21, 2005
Date of Decision – April 29, 2005

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

-and-

IN THE MATTER OF appeals filed by Ken Smulski (on behalf of the estate of J. Smulski, S.V. Half Diamond Ranch, 267554 Alberta Ltd., and S.V. Farms Ltd.), Ward and Connie Sawatzky, Tia, Ken and Alysha Bartlett, Barry and Sharon Ziegeman, Percival and Martha Henkelman, Erich and Evelyn Marquardt, Cheryl Henkelman, Brent and Cindy Marquardt, and Sylvia and Heather Garon, with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 210-01-11 issued to Agrium Products Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Smulski et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074–082-D (A.E.A.B.).

PRELIMINARY MEETING BEFORE: Dr. William A. Tilleman, Chair,
Dr. M. Anne Naeth, Board Member, and
Dr. Steve E. Hrudey, Board Member.

APPEARANCES:

Appellants:	Mr. Ken Smulski, on behalf of the estate of J. Smulski, S.V. Half Diamond Ranch, 267554 Alberta Ltd., and S.V. Farms Ltd, represented by Mr. Gavin Fitch, Lawson Lundell; and Mr. Ward and Ms. Connie Sawatzky, Ms. Tia, Mr. Ken and Ms. Alysha Bartlett, Mr. Barry and Ms. Sharon Ziegeman, Mr. Percival and Ms. Martha Henkelman, Mr. Erich and Ms. Evelyn Marquardt, Ms. Cheryl Henkelman, Mr. Brent and Ms. Cindy Marquardt, Ms. Sylvia Garon, and Ms. Heather Garon, represented by Ms. Jennifer Klimek.
Director:	Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. Darin Stepaniuk, Alberta Justice.
Approval Holder:	Agrium Products Inc., represented by Mr. Bernard J. Roth, Fraser Milner Casgrain LLP.
Other Participants:	Mr. Kurt Stilwell, Counsel, Natural Resources Conservation Board.*
Board Staff:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer, Ms. Valerie Higgins Myrmo, Registrar of Appeals, Ms. Marian Fluker, Senior Research Officer, and Ms. Catherine Emrick, Student-at-Law.

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* Mr. Stilwell appeared as counsel on behalf of the Natural Resources Conservation Board (the NRCB). His appearance before the Environmental Appeals Board (the Board) was for the purpose of observing the proceedings and assisting the Board on matters related to the NRCB's jurisdiction and its record. Mr. Stilwell did not make submissions to the Board on any of the issues before the Board.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval under the *Environment Protection and Enhancement Act* to Agrium Products Inc. (Agrium), with respect to a fertilizer manufacturing plant, near Redwater, Alberta. The Amending Approval allowed for the expansion of the fertilizer manufacturing plant's phosphogypsum storage area. Phosphogypsum, commonly referred to as gypsum, is a by-product of manufacturing phosphorus-based fertilizers and is usually stored in a controlled area adjacent to the plant.

The Environmental Appeals Board (the Board) received nine Notices of Appeal from local residents regarding the Amending Approval. The Board held a preliminary meeting to determine whether the issues included in the appeals had been adequately dealt with by the Natural Resources Conservation Board (the NRCB), and to determine the issues to be heard at a hearing of these appeals should one be held. The Board's legislation requires that the Board dismiss an appeal if the person filing the appeal had an opportunity to participate in an NRCB hearing (full participation was conceded in this case) at which all of the issues raised in the appeal were adequately dealt with.

After hearing from the parties, the Board concluded that all of the persons who filed the Notices of Appeal participated in an NRCB hearing at which all of the matters included in the Notices of Appeal were adequately dealt. Thus, all of the appeals were dismissed and the Board did not have to determine the issues to be heard at a hearing.

The Board noted that there appeared to be renewed interest in Agrium and the local residents working together to better address a number of the concerns relating to the phosphogypsum storage area. The Board strongly encouraged this, particularly with the various studies to be conducted pursuant to the Amending Approval. Further, the Board noted that some of the concerns raised in these appeals were based on a broader land-use conflict in the area that is not within the Board's jurisdiction. The Board encouraged all of the stakeholders to work cooperatively to address this conflict.

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I. INTRODUCTION

[1] This decision addresses a preliminary jurisdictional question on nine appeals filed with the Environmental Appeals Board (the "Board") dealing with a fertilizer manufacturing plant and the expansion of the plant's phosphogypsum storage area. Phosphogypsum, commonly referred to as gypsum, is a by-product of manufacturing phosphorus-based fertilizers and is usually stored in what is referred to as a "stack" in a controlled area adjacent to the plant.[1] The appeals raised concerns about the impact of the phosphogypsum stack on surface water and groundwater quality, air quality (including particulate matter and fluorides), vegetation, wildlife, livestock, and human health. Concerns were also raised regarding odour, noise, and reclamation.

[2] Before the proceedings before this Board, the expansion of the plant's phosphogypsum storage area was the subject of a hearing before the Natural Resources Conservation Board (the "NRCB").[2] Thus, before this Board can consider the merits of the appeals, it must first address the preliminary jurisdiction question found in section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").[3] This

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[1] See: *Natural Resources Conservation Board, Agrium Products Inc., Phosphogypsum Storage Expansion, Hearing Transcript* ("NRCB Hearing Transcript"), February 23, 2004, at page 58, lines 1 to 35 and page 59, lines 1 to line 6, where Mr. Alex Watson, General Manager of the Redwater and Fort Saskatchewan Fertilizer Manufacturing Plants, Agrium Products Inc., explained:

> "The phosphate operation will take in a sulphur stream, which is typically coming down from Fort McMurray as molten sulphur and it is a byproduct from their process up there. We will take in that sulphur and create sulphuric acid with it. ...
>
> The phosphate rock, which I mentioned is brought in from [the mine in] Kapuskasing, [Ontario,] is then mixed with the sulphuric acid within our phosphate operations and from that you get the phosphogypsum, which, of course, is the topic of why we are here today, as well as a couple of different products, [such as] ... mono-ammonium phosphate or MAP, that is produced at approximately six hundred and twenty thousand (620,000) tons per year."

See also: Agrium Products Inc. Website at http://www.agrium.com/products_services/ingredients_for_growth/phosphate /monoammonium_phosphate.jsp (April 15, 2005):

> "High quality phosphate ore is mined in an open pit and processed into a fine powdered rock. The rock is reacted with water and sulphuric acid to produce a slurry of phosphoric acid and gypsum solids. The gypsum is filtered from the slurry, and the phosphoric acid is increasingly concentrated for various grades and uses."

[2] The NRCB acquired jurisdiction to hear this matter pursuant to an Order in Council, dated April 13, 2003 (O.C. 184/2003), which required Agrium Products Inc. to obtain an NRCB approval to expand its phosphogypsum storage area. The NRCB held a hearing on February 23 to 28, 2004 and on March 11 and 12, 2004, and issued Decision Report NR2004-01 in August 2004 approving the expansion of the phosphogysum storage area.

[3] Section 95(5)(b)(i) of EPEA provides: "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

section *requires* the Board to dismiss an appeal if the person filing the appeal had an opportunity to participate in a hearing held by the NRCB (full participation was conceded in this case) at which all of the issues raised in the appeal were adequately dealt with.

II. PROCEDURAL BACKGROUND

[3] Following the NRCB's decision, on November 19, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 210-01-11 (the "Amending Approval") under EPEA to Agrium Products Inc. (the "Approval Holder" or "Agrium") for a fertilizer manufacturing plant (the "Plant") near Redwater, Alberta. In particular, the Amending Approval authorized the expansion of the Approval Holder's phosphogypsum storage area.

[4] On December 17, 2004, the Board received a Notice of Appeal from Mr. Ken Smulski (04-074), filed on behalf of the estate of J. Smulski, S.V. Half Diamond Ranch, 267554 Alberta Ltd., and S.V. Farms Ltd (collectively the "Smulski Appellants"), appealing the Amending Approval. On December 21, 2005, the Board received Notices of Appeal from Mr. Ward and Ms. Connie Sawatzky (04-075), Ms. Tia, Mr. Ken and Ms. Alysha Bartlett (04-076), Mr. Barry and Ms. Sharon Ziegeman (04-077), Mr. Percival and Ms. Martha Henkelman (04-078), Mr. Erich and Ms. Evelyn Marquardt (04-079), Ms. Cheryl Henkelman (04-080), Mr. Brent and Ms. Cindy Marquardt (04-081), and Ms. Sylvia and Ms. Heather Garon (04-082) (collectively the "NESCR Appellants"),[4] also appealing the Amending Approval.

[5] On December 21 and 22, 2004, the Board wrote to the Smulski Appellants and NESCR Appellants (collectively the "Appellants"), the Approval Holder, and the Director (collectively the "Participants") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals.

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participate in one or more hearings or reviews ... under the *Natural Resources Conservation Board Act* ... at which all of the matters included in the notice of appeal were adequately dealt with...."

[4] The "Northeast Strathcona County Residents" Appellants. The NESCR Appellants were referred to as the NSCRG (the Northeast Strathcona County Residents Group) by the NRCB.

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

[7] The NRCB responded to the Board on January 5, 2005, advising that the NRCB had issued Decision Report NR2004-01 (the "NRCB Decision")[5] following a hearing on February 23 to 28, 2004 and on March 11 and 12, 2004 (the "NRCB Hearing"), in relation to the Approval Holder's application for an expansion of the phosphogypsum storage area at its Plant near Redwater, Alberta. The NRCB advised that all of the Appellants had participated in the NRCB Hearing. The Board forwarded a copy of this letter and the NRCB Decision to the Participants on January 13, 2005.

[8] On January 10, 2005, the Board received a letter and a copy of the Record from the Director. In his letter, the Director raised the issue of the validity of the appeals in light of the NRCB Hearing. On January 13, 2005, the Board forwarded a copy of the Record to the Appellants and the Approval Holder. In this letter, the Board advised the Participants that it would schedule a Preliminary Meeting to hear from the Participants to determine whether the issues contained in the Notices of Appeal were adequately dealt with by the NRCB and to determine the issues to be heard at a hearing of these appeals, should one be held.

[9] On February 16, 2005, the Board received a copy of additional documents from the Director in relation to the NRCB issue, entitled "NRCB Issue Only," to be included in the Record. On February 17, 2005, the Board forwarded these additional documents to the Appellants and the Approval Holder.

[10] On February 22, 2005, the Board advised the Participants that the Preliminary Hearing was scheduled for March 21, 2005. In preparation for the Preliminary Meeting, the Board received written submissions from the Participants between March 9 and March 16, 2005.

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[5] *Natural Resources Conservation Board Decision Report, Agrium Products Inc. Phosphogypsum Storage Expansion*, August 2004, NR2004-01.

III. NRCB ISSUE - SUBMISSIONS

A. Smulski Appellants

[11] The Smulski Appellants explained they are the registered owners of lands immediately adjacent to the Plant's existing phosphogypsum storage area, where they have an intensive grain and oilseed operation and a ranching operation. They alleged the existing phosphogypsum storage area has affected the groundwater under their land, and that the expansion of the phosphogypsum storage area will cause further detrimental effects by elevating water levels and causing wetter than normal conditions. They argued that the Amending Approval "...does not adequately address the mitigation of contaminants from the existing phosphogypsum ..." storage area.[6]

[12] The Smulski Appellants stated that the NRCB conducted a hearing into the expansion of the phosphogypsum storage area and they participated as an intervener. They appealed the Amending Approval on the grounds they have new information that was previously unavailable that would affect the conditions included in the Amending Approval.

[13] The Smulski Appellants stated they were not satisfied that the NRCB understood the implications of the evidence given by their experts. As a result, the Smulski Appellants retained a second hydrogeological consultant to review the impact of the phosphogypsum storage area on the local groundwater flow regimes. The Smulski Appellants also undertook additional groundwater monitoring, collecting data from 10 pre-existing wells and from 10 wells drilled after the NRCB Hearing.

[14] The Smulski Appellants brought three pieces of new information before the Board. The first was groundwater level data and the second was groundwater chemistry data, both post-dating the NRCB Hearing. The third was a report, dated November 9, 2004, from Geo-Korr Consulting Inc. (the "Geo-Korr Report"), which was also produced after the NRCB Hearing.

[15] The Smulski Appellants submitted that the new groundwater monitoring results constitutes new information that shows the existing phosphogypsum storage area has had a

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6 Smulski Appellants' submission, dated March 10, 2005, at paragraph 4.

negative impact on local groundwater quality. It was submitted that from these results it is reasonable to conclude that the expansion of the phosphogypsum storage area will have further negative impacts on local groundwater quality.

[16] The Smulski Appellants submitted the Geo-Korr Report contains new information that, among other things, indicates: it is hydraulically impossible for the phosphogypsum storage area to avoid producing increased water levels in the local area; the current phosphogypsum storage area interceptor is inadequately designed to prevent impacts in the local area; and expansion of the phosphogypsum storage area will further increase water level impacts in the local area.[7] The Smulski Appellants submitted that this was significant new information that was not before the NRCB when it made its decision and that was not before the Director when he made his decision to issue the Amending Approval. The Smulski Appellants argued this new information should cause the Board to have serious concerns about the Director's decision. The Smulski Appellants argued that since this new information post-dates the NRCB Hearing, the NRCB could not have and did not deal with these matters, adequately or otherwise, and therefore, section 95(5)(b)(i) does not take jurisdiction away from the Board to hear these appeals.

[17] Finally, the Smulski Appellants argued that:

> "... if all the NRCB did was to make recommendations to Alberta Environment with respect to appropriate conditions should an EPEA approval be issued, any failure by the Director to adopt those recommendations in the conditions he actually included in the approval is *prima facie* a new matter that was not considered by the NRCB. It is the difference between what was recommended by the NRCB and what was actually done by the Director that is a new matter. Therefore, the fact that interveners did not pursue the issue of conditions at the NRCB Hearing is irrelevant."[8]

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7 See: Smulski Appellants' submission, dated March 10, 2004, at paragraph 10.

8 Smulski Appellants' submission, dated March 16, 2005, at paragraph 6.

B. NESCR Appellants

[18] The NESCR Appellants explained they live between one to three kilometres from the Plant, and the group was formed "...to oppose the approval of any industrial project in the area that has a direct effect on them."[9]

[19] The NESCR Appellants stated that they participated fully at the NRCB Hearing. They retained several experts to review the application and appear on their behalf, they presented evidence, and they cross-examined the other parties. The NESCR Appellants stated that they did not take issue with the NRCB Decision, its findings, or its recommendations. Instead, they asked the Board to accept the NRCB Decision.

[20] The NESCR Appellants submitted that the issues raised in their Notices of Appeal are with how the Director drafted the Amending Approval in light of the NRCB's conclusions and recommendations, and accordingly they were asking the Board to review the Director's decision on how the NRCB Decision was implemented. The NESCR Appellants stated their appeals are limited to whether the recommendations set out in the NRCB Decision have been properly implemented by the Director and whether the Approval Holder's commitments should have been included in the Amending Approval.

[21] Compared with other precedents, the NESCR Appellants submitted that the Board has not considered an appeal comparable to these appeals. They stated that in previous cases where the Board has considered section 95 of EPEA, it was in circumstances where the appellant was asking the Board to alter an AEUB or NRCB decision. Nevertheless, the NESCR Appellants submitted that these cases were of assistance to the Board in coming to a decision in this matter.

[22] The NESCR Appellants submitted that the Board's purpose, pursuant to section 91 of EPEA, is to conduct appeals of the Director's decisions. They argued that the purpose of section 95(5)(b) is to prevent the duplication of hearings and only precludes the Board from reviewing appeals in limited circumstances. According to the NESCR Appellants, these

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[9] NESCR Appellants' submission, dated March 9, 2005, at paragraphs 3 and 4.

circumstances arise when an appellant asks the Board to review conclusions that the NRCB has reached after reviewing a matter. The NESCR Appellants stated this is not the case here.

[23] The NESCR Appellants submitted that at the NRCB Hearing, the Director and the Approval Holder argued that the conditions ultimately included in an EPEA approval are within the Director's jurisdiction and the NRCB should only make recommendations on these conditions. They stated that the NRCB accepted these submissions. The NESCR Appellants' Notices of Appeal set out in detail what they believe to be deficiencies in the Amending Approval, including: the commitments made by the Approval Holder are not included in the Amending Approval; in some situations there are no conditions; and in other situations the conditions are insufficient. The NESCR Appellants submitted that these deficiencies are either a result of the Director acting unlawfully or abusing his discretion when relying on or failing to rely on the NRCB Decision.[10] Therefore, they submitted the matters in their Notices of Appeal are clearly within the Board's jurisdiction.

[24] While the NESCR Appellants accepted that section 95(5)(b) has been interpreted to require an appellant to address their issues at an NRCB Hearing, they submitted that the section does not require an appellant to address every possibility.[11] They argued that if an appellant took the position before the NRCB that a project should not be allowed to proceed, he should not lose his right to appeal conditions in a subsequent EPEA approval if the NRCB approved the project. If the Director chooses not to impose appropriate conditions, the appellant should not be precluded from appealing that decision.

[25] The NESCR Appellants also submitted there is new evidence on the fluoride levels found in vegetation near the Plant, and the new evidence should be considered by the Board in assessing whether proper conditions were included in the Amending Approval.

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10 See: NESCR Appellants' submission, dated March 9, 2005.

11 The NESCR Appellants stated it would be absolutely impossible to raise every possible issue raised in the Notices of Appeal at the NRCB Hearing, as they "...would have to determine every possible finding of fact and every possible recommendation that would have resulted from the evidence..." and then "...would have to determine every type of condition that would arise from those possibilities." (NESCR Appellants' submission, dated March 16, 2005, at paragraph 4.) They argued to hold them to that level of submission and intervention at a hearing is "...completely onerous, impossible and impractical." (NESCR Appellants' submission, dated March 16, 2005, at paragraph 8.)

C. Director

[26] The Director submitted that the appeals must be dismissed pursuant to section 95(5)(b)(i) of EPEA. The Director explained the Amending Approval was issued following a hearing under the *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-4.

[27] The Director explained that since it was clear that the Appellants fully participated in the NRCB Hearing, the Board's jurisdiction to hear the appeals depended on whether the matters included in the Notices of Appeal were adequately dealt with by the NRCB. The Director submitted that a review of the NRCB's record showed that all of the matters raised in the Appellants' Notices of Appeal were thoroughly dealt with and, accordingly, the appeals should be dismissed.

[28] The Director further submitted that these appeals should be dismissed because the Appellants are primarily dissatisfied with the NRCB Decision. The Director stated that the matters in the Notices of Appeal amount to attacks on the NRCB's treatment of the evidence, attacks on the NRCB's discretion to address some matters by way of recommendations instead of approval conditions, or attacks on the NRCB's decision relative to the amount of detail and specificity it decided to include in the conditions it imposed. The Director submitted that section 95(5)(b)(i) prevents parties who are primarily dissatisfied with a NRCB decision from seeking redress before the Board; instead, such parties should pursue the review and appeal options available to them under the NRCB's legislation.

[29] The Director also submitted that the specifics of the Amending Approval are not a "matter" within the meaning of section 95(5)(b)(i), because the specifics of a subsequent EPEA approval are never considered during a NRCB hearing because the EPEA approval does not exist at that time. The Director explained that as a function of practicality and legal duty, the Director does not make any decision about the EPEA approval until after he has considered the NRCB decision. Accordingly, interpreting "matter" in section s. 95(5)(b)(i) to include the specifics of the EPEA approval would strip the section of all meaning, frustrate the Legislature's intention, and undermine the importance and function of AEUB and NRCB hearings. Rather, he argued "matter" must be interpreted to refer to substantive environmental issues, adequately dealt with during the NRCB's prior proceedings.

[30] The Director submitted that section 95(5)(b)(i) also precludes an appeal from proceeding where the notice of appeal raises a matter that was not specifically addressed during a NRCB proceeding and that the appellant had an opportunity to raise, but failed to do so. While acknowledging that significant new evidence on a matter may be the basis for concluding that a particular appeal matter was not adequately considered during a prior NRCB hearing, the Director submitted that an appellant cannot argue that a matter was not adequately addressed based on an appellant's failure to raise the matter during the NRCB proceeding.

[31] The Director rejected the statement by the NESCR Appellants that he argued at the NRCB Hearing that it should not impose conditions and should leave that task to him. The Director explained that the position taken was that the NRCB should consider a number of specific items relative to clarity and regulatory certainty, fully recognizing the NRCB's broad authority to impose approval conditions and make recommendations. The Director acknowledged he did make a submission to the NRCB that it would be legally safest for it to make recommendations on EPEA approval conditions rather than requiring that an EPEA approval contain specific conditions. However, the Director argued that this submission, and the NRCB's agreement with it, did not speak to the NRCB being able to impose conditions generally and with as much specificity as it saw fit, or to the NRCB's general authority to impose conditions depending on contingencies or actions by persons other than the NRCB, including the Director. The Director explained that he made a number of submissions bearing on these points at the NRCB Hearing, urging some caution but clearly recognizing the NRCB's authority to impose conditions.[12]

D. Approval Holder

[32] The Approval Holder explained that Alberta Environment determined an environmental impact assessment was required for the expansion of the Plant's phosphogypsum storage area, and by Order in Council 184.2003, the Lieutenant Governor in Council designated the expansion as a reviewable project under the *Natural Resources Conservation Board Act*.

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12 See: Director's submission, dated March 16, 2004, at paragraph 4.

[33] The Approval Holder stated that the Appellants fully participated at the NRCB Hearing and were afforded every opportunity to challenge the application in any manner they chose. According to the Approval Holder, the Appellants presented eight expert witnesses at the NRCB Hearing, who gave evidence on human health, animal health, surface water, groundwater, air emissions, naturally occurring radioactive materials, noise, and engineering. The Approval Holders stated the Appellants were given an unlimited opportunity to cross-examine the Approval Holder and its experts, as well as the government authorities who appeared at the NRCB Hearing.

[34] The Approval Holder submitted that from the NRCB's record it was clear that all of the matters raised in the Notices of Appeal were before the NRCB and that these matters were adequately dealt with. The Approval Holder submitted that the issue of whether the NRCB approval could be sustained, notwithstanding the finding of fact it made on the questions that were before it, was one of the grounds in the NESCR Appellants' application for Leave to Appeal to the Court of Appeal. Relying on the decision of the Court of Appeal to deny the Leave to Appeal,[13] the Approval Holder submitted that the Appellants were unable to raise any arguable issue as to whether the NRCB had based its decision on an insufficient evidentiary basis or insufficient fact findings.

[35] The Approval Holder further submitted that the NESCR Appellants' Notices of Appeals must be rejected because the Amending Approval, and specifically how it implements a prior NRCB or AEUB decision, has been determined in previous cases before the Board not to be a matter within the Board's jurisdiction. The Approval Holder went on to state that even if such an argument was successfully made, it was obvious from the NRCB's record that the matter of conditions that may be attached to an EPEA approval was considered by the NRCB at its hearing. The Approval Holder stated the NESCR Appellants were given the opportunity to speak to the EPEA approval conditions as part of the NRCB Hearing and chose not to; therefore, according to the Approval Holder, they do not have the right to pursue the issue of the EPEA Approval conditions before the Board.

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[13] See: *Henkelman* v. *Natural Resources Conservation Board*, 2004 ABCA 358.

[36] The Approval Holder submitted that the new information relied on in the Notices of Appeal was not only available to the Appellants at the time of the NRCB Hearing, but it was also relied on and presented to the NRCB. The Approval Holder argued that, in any event, the new information was not significant nor was it capable of substantially altering either the NRCB's or the Director's understanding of the project, and therefore the matters related to the new information were adequately dealt with by the NRCB.

IV. NRCB ISSUE - LEGISLATION

[37] Under section 95(5)(b)(i) of *EPEA*, the Board is required to dismiss an appeal, if, in its opinion, the issues raised in the appeal been adequately dealt with by the NRCB and the appellant had the opportunity to participate in the NRCB Hearing. Section 95(5)(b)(i) provides:

> "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 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...."

V. NRCB ISSUE - DISCUSSION

[38] Two basic conditions have to be met for the Board to lose jurisdiction in these appeals. First, did the Appellants receive notice of, participate in, or have the opportunity to participate in the NRCB hearing or review of the project at issue; and second, did the NRCB adequately deal with all the matters raised by the Appellants in their Notices of Appeal.

A. Did the Appellants participate in the NRCB Hearing?

[39] The Smulski Appellants[14] and the NESCR Appellants[15] conceded that they fully participated in the NRCB Hearing relating to the Approval Holder's expansion of the

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[14] See: Smulski Appellants' submission, dated March 10, 2005, at paragraphs 5 and 6:

"The Smulski Appellants participated as a registered intervener at the NRCB Hearing. They were not represented by legal counsel. Rather, Mr. Smulski personally represented them. At the NRCB Hearing, the Smulski Appellants put forward expert evidence from a hydrologist, Dr. David Y.F. Ho, Ph.D., of AN-GEO Environmental Consultants Ltd.; from a geotechnical engineer, Mr. Paul Machibroda, of P. Machibroda Engineering Ltd.; and from Mr. M.F. Fields of Gladstone Services Ltd., with respect to construction issues."

[15] See: NESCR Appellants' submission, dated March 9, 2005, at paragraphs 11 and 12:

phosphogypsum storage area. The Appellants retained expert witnesses that appeared at the NRCB Hearing on their behalf, they presented evidence, and they cross-examined the other parties. Thus, the answer to this first question is yes.

B. Did the NRCB adequately deal with all of the matters raised in the appeals?

[40] In a previous decision, *Carter Group* v. *Director of Air and Water Approvals, Alberta Environment Protection,*[16] the Board noted that what is now section 95(5)(b)(i) was intended to avoid duplication in the hearing process. The Board stated:

> "The jurisdiction of this Board to become involved in a 'review' of [Energy Resources Conservation Board ("ERCB") (now AEUB)] decisions that led to approvals which are eventually appealed here is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence."[17]

The Board also stated: "The Board interprets section 87(5)(b)(i) [(now section 95(5)(b)(i))] of the *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually."[18] The Board concluded that: "...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB [(now AEUB)]."[19]

[41] As the Board stated when considering section 95(5)(b)(i) in the *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection,*[20] the Board is mindful of the judgment of the Alberta Court of Queen's Bench in *Slauenwhite* v.

> "The NESCR [Appellants] participated fully at the hearing. They retained several experts to review the application and appear on their behalf. They presented evidence and cross-examined other parties.... The experts provided evidence with respect [sic]: a) fluoride emissions; b) particulate matter; c) heavy metals; d) radioactivity emissions; e) water; f) noise; g) health effects; and h) social impacts."

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

17 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 6.

18 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 7.

19 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.), at page 7.

Alberta Environmental Appeal Board.[21] In *Slauenwhite,*[22] Justice Wilkins emphasized that subsection 6(1) of the *Approvals Procedure Regulation*[23] imposed a duty on the Director in his approval decision to consider the environmental impacts of the entire project in question. Justice Wilkins stated that it would be patently unreasonable for the Board to conclude that it was precluded from determining whether the environmental impacts of the whole project had been weighed in accordance with EPEA and the regulations.

[42] As in *Graham,*[24] the Board believes that it was correct in its interpretation of what is now section 95(5)(b)(i) in the *Carter Group*[25] decision and, notwithstanding the substantive result in *Slauenwhite*, this approach is consistent with that case on the basis of a full reading of Mr. Justice Wilkins' decision. In *Slauenwhite,*[26] the Court concluded that the environmental impacts of a significant part of the natural gas processing facility in question had not been considered by either the ERCB or the Director. Unlike *Slauenwhite,*[27] there is no similar question here of failure of the NRCB or the Director to assess environmental impacts of a significant physical component of the Approval Holder's expansion.

[43] The Appellants have not argued that the matters before the NRCB at the time of the hearing were not adequately dealt with by the NRCB.[28] Rather, the Appellants argued that

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

21 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.), ("*Slauenwhite*").

22 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

23 *Approvals Procedure Regulation*, Alta. Reg. 113/93.

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

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

26 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

27 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

28 See: NESCR Appellants' submission, dated March 9, 2005, at paragraphs 24 and 39: The NESCR Appellants do "...not take issue with the [NRCB] Decision, its findings or its recommendations..." and the NESCR Appellants are "... not asking the [Board] to rehear what was before the NRCB. In fact, they are asking the Board to accept the Decision of the NRCB."

See: Smulski Appellants' submission, dated March 10, 2005, at paragraphs 24 and 25:

"...it is submitted that section 95(5)(b)(i) does not take away from the Board the jurisdiction it would otherwise have to hear these appeals. The reason is that section 95(5)(b)(i) clearly states that the NRCB in its hearing must have adequately dealt with 'all of the matters included in the

the matters in their Notices of Appeal are new matters that were not before the NRCB and therefore could not have been adequately dealt with by the NRCB.

[44] The Appellants argued that the matters in their Notices of Appeal were new in that these matters arise from new information that was not available at the time the NRCB made its decision. Further, the NESCR Appellants submitted that the matters in their Notices of Appeal relate to a breach of the Director's duty to consider the NRCB Decision as required by section 68(4)(a)[29] of EPEA. The NESCR Appellants argued that section 63[30] of EPEA, when read with section 68(4)(a), prohibits the Director from issuing an approval until after the NRCB has issued its decision, and therefore any matter arising from the issuance of the Director's approval is *prima facie* a new matter that was not considered by the NRCB.[31]

C. Does the Board have jurisdiction to hear an appeal when there is new information that was not available at the time the NRCB Decision?

[45] The Board has previously set out the circumstances where a Director's approval, made in reasonable reliance on an earlier ERCB decision in accordance with its mandate, may be appealed to the Board:

> "An appellant may raise matters which have arisen between the time the ERCB [(now AEUB)] decision was first reached and the appeal filed. Such matters could include changes in statutes or regulations, changes in material facts that would affect conditions in an approval, or matters based on the development of previously unavailable evidence. Conversely, an appellant cannot raise as a

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Notice of Appeal.' As indicated above, two of the matters included in the Smulski Appellants' Notice of Appeal are the requests that the Board consider the new information relating to current data from the groundwater monitoring program and the November 2004 Geo-Korr Report. Obviously, both of these matters post-date the NRCB Hearing. Therefore, the NRCB could not have and did not in fact deal with those matters, adequately or otherwise. This also holds true in respect of the Director's decision to issue the approvals; the decision was made without the benefit of this new information. Consistent with the Board's decision in [*Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.)] it is submitted that where an appellant brings forth new information, not previously reviewed in some other hearing, section 95(5)(b)(i) cannot operate so as to strip the Board of its jurisdiction to hear the appeal."

29 Section 68(4)(a) of EPEA provides: "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 ... Natural Resources Conservation Board in respect of the subject-matter of the approval...."

30 Section 63 of EPEA provides: "Unless the regulations provide otherwise, the Director may not issue an approval or registration unless the Director is of the opinion that Division 1, if applicable, has been complied with."

31 See: Appendix A.

challenge to an approval, arguments which are available to the appellant when the ERCB heard the evidence and made its decision; nor can the appellant challenge the approval with evidence which arose but was not available to the appellant because of its decision not to participate during the ERCB hearings."[32]

[46] In *Graham*,[33] the Board also considered the relationship between new information and the word "matters" in section 95(5)(b)(i). The Board stated:

> "The Board interprets 'matter' in this context to mean subject matter or issues raised in the proceedings before the NRCB and before this Board. But it cannot encompass generic subject matters, such as air pollution, generally. Nor is 'matter' a static concept so that a subject matter once raised before the NRCB can never be the subject of appeal to this Board. Mr. McDonald, counsel for the Director, acknowledged that new information that substantially alters one's previous understanding of the facility may be a new matter.
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> To conclude otherwise is inconsistent with the duty of this Board under [EPEA] to provide a full and fair appeal on the merits, including consideration of new evidence. This is the reason for section 87(2)(d) [(now section 95(2)(d))] of [EPEA] which requires the Board to consider, in determining which matters will be included in hearings, whether new information will be presented to the Board, and for section 85 [(now section 92)] which authorizes the Board to require submission of additional information. The legislature could not have intended to remove the right of appeal, notwithstanding significant new information concerning a subject matter relevant to the appeal, merely because the general subject matter could be said to have arisen at an earlier NRCB or ERCB [(now AEUB)] hearing.
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> Furthermore, such an inflexible view of 'matter' is inconsistent with the fundamental purposes of [EPEA]. ... An inflexible interpretation of matter is fundamentally inconsistent with these purposes because new information may raise a serious risk that 'adverse effects', as defined in section 1 of [EPEA], could result in serious environmental harm. If an inflexible approach to interpretation of 'matter' is taken, the result may be that the Board's appeal process could not be invoked by persons directly affected with a view to achieving environmental protection. This result would be inconsistent with a liberal interpretation of the purposes of [EPEA] – and the Alberta Courts have stressed the need to encourage a liberal interpretation of the purposes of the Act."[34]

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

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

[34] *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.), at pages 10 and 11.

[47] The Smulski Appellants argued that the groundwater monitoring results for both water levels and water chemistry, discussed in more detail below, post-date the NRCB Decision and are therefore new information. The Board agrees that from a temporal perspective, data gathered after the NRCB Decision are new, but something more is required:

> "Administrative consideration of evidence...always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] .... If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that an administration process could ever be consummated in an order that would not be subject to reopening."[35]

[48] The test for new information arising from the Board's decisions in *Carter Group* and *Graham*[36] is that the new information must not have been before the NRCB or the Director when their respective decisions were being made, *and* the new information must have the potential to significantly influence those decisions. New information will have the potential to significantly influence decisions when it raises a serious risk of adverse effects *that were not previously dealt with* by the decision maker, or when it changes a material fact that, if known at the time of the decision, would have, in the opinion of the Board, affected the conclusions and recommendations in that decision.

[49] The "new information" brought before the Board by the Smulski Appellants relates to groundwater issues that were extensively dealt with by the NRCB. The case for considering this information "new" stands primarily on three matters: the water chemistry data presented for new monitoring wells; water level data reported for new monitoring wells; and the opinion evidence contained in the Geo-Korr Report.

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[35] United States Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *N.R.D.C.*, 435 U.S. 519, at pages 554 and 555, quoting *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, at pages 514 and 515.

[36] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.). *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.).

1. New Water Chemistry Data

[50] After the NRCB Decision, the Smulski Appellants drilled 10 additional monitoring wells, bringing their total number of monitoring wells to 20. From May to October 2004, groundwater level data and groundwater samples for chemical analysis were gathered from these wells. The Board agrees that from a purely temporal perspective, these are new data. However, the question before the Board is whether the new data meets the test for new information allowing the Board to retain its jurisdiction under section 95.

[51] In the Smulski Appellants' submission to the Board, two sets of data were presented as new information: a four page "Summary of Selected Groundwater Chemical Analysis Results" and a 20 page "Summary of Well Monitoring Results."[37] In his Affidavit, Mr. Smulski stated that, since the time of the NRCB Decision, "... we have drilled an additional ten (10) groundwater monitoring wells on my land. These wells, together with the pre-existing wells, have been monitored for both groundwater levels and chemistry."[38] Despite the availability of more data on the chemical composition of the water, which Mr. Smulski confirmed exists, the data selected by the Smulski Appellants and put before the Board included the results from only three of the 20 wells.[39] The Board is of the view that providing such a small subset of the available data *significantly* diminishes the value of those data. This is particularly so when the Board considers that the Approval Holder has collected water level and hydrochemical data from five nests of four monitoring wells since 1992.[40] These data were shared with Alberta Environment and discussed in detail before the NRCB.[41]

[52] The water chemistry data provided to the Board purported to show that elevated sulphate levels in the selected monitoring wells provided evidence of contaminant migration

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37 See: Smulski Appellants' submission, dated March 10, 2005, Affidavit of Mr. Smulski, Tab 1, Exhibit B.

38 Smulski Appellants' submission, dated March 10, 2005, Affidavit of Mr. Smulski, Tab 1, at paragraph 16.

39 See: Preliminary Meeting Transcript, at page 125, lines 1 to 10, which provides:

"Dr. Naeth: Okay, I remember you talking earlier about, what was chemical data. Well, EC and pH certainly could be considered chemical data. Let me rephrase my question: As far as the sulphate data, are there sulphate data from more than those three wells?

Mr. Fitch: Mr. Smulski advises me he believes that there is, not for all of them, but for some. And so, I mean, I think this is to some extent speculation." (Edited for clarity.)

40 See: NRCB Decision, at page 44.

41 See: NRCB Decision, at page 44.

from the phosphogypsum storage area. The NRCB heard evidence entered by the Director that sulphate levels on the west side of the Approval Holder's property were elevated, indicating that the existing phosphogypsum storage area interceptor was not functioning as intended. As a result, the Director included conditions in the Amending Approval to improve the performance of this interceptor. Evidence was also presented at the NRCB Hearing that contaminant seepage from the phosphogypsum storage area would be characterized by low pH, high fluorides, and high phosphates, in addition to high sulphates.

[53] The water chemistry data provided by the Smulski Appellants suggested the possibility that sulphates are indicative of contamination from the phosphogypsum storage area, but none of the other parameters are consistent with such contamination.[42] The sulphate issue was addressed at the NRCB Hearing, so there is no evidence that these data provide a substantive new issue.

[54] For these reasons, the Board is unable to find that the new chemical analysis data either raises a serious risk of adverse effects that were not previously dealt with by the NRCB, or changes a material fact in such a way that it would have affected the conclusions and recommendations in the NRCB Decision. As a result, the Board concludes that this issue was adequately dealt with by the NRCB.

2. New Water Level Data

[55] The water level data presented to the Board were not presented with any coherent message. There was no evidence that the water level data provided any insights beyond the case

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[42] See: Smulski Appellants' submission, dated March 10, 2005, Tab 1, Affidavit of Mr. Smulski, Exhibit B, Water Chemistry Data:

Well	Sulphate (mg/L)	Orthophosphate (mg/L)	Fluoride (mg/L)	PH
BH7A	2,261	0.06	<0.1	7.4
BH7A (dup.)	2,215	0.09	<0.1	7.3
AGW6	1373	0.07	<0.1	7.4
BH3	869.2	0.02	<0.1	7.4
Background	20-1,100	<0.1 – 2	<0.1 – 2.7	7.0 – 9.5

already thoroughly made by the Smulski Appellants to the NRCB that the existing phosphogypsum storage area was raising water levels on their property.

[56] At the NRCB Hearing, the Smulski Appellants presented groundwater level monitoring data from their land from 1992, 1994, and 1996.[43] Dr. Ho, a hydrologist, who gave the evidence, commented on these findings over time:

> "...we were asked to go back in 1994 again to do another round of groundwater assessment on Mr. Smulski's property. And again what we have observed was very much the same as 1992. We were asked to go back again in 1996 and likewise [sic] 1996 the findings were exactly the same. Not much has changed at all."[44]

[57] The NRCB Decision sets out the conclusions drawn from the Smulski Appellants' groundwater evidence:

> "Mr. Smulski expressed two fundamental concerns related to the existing and proposed phosphogypsum stacks. His first concern was that existing and proposed stacks would change the nature of the groundwater flow across Mr. Smulski's land, which is located immediately west of the stacks. He explained the tremendous weight of the gypsum stacks will compress the soil beneath the stacks and the compressed soil will redirect groundwater flow. He called this a damming effect.
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> Their second concern was that over time, as phosphogypsum stacks compress by their own weight, the 15 to 20 percent water contained within the stacks would add to seepage coming out of the stacks. Mr. Smulski stated this seepage would merge with and add to the groundwater flow passing through the Smulski lands. Mr. Smulski said that in addition to changing the nature of the groundwater flow, it would also affect the quality of the groundwater and soil on the Smulski lands."[45]

[58] Dr. Ho's analysis of the new well monitoring data was not provided to this Board. In his Affidavit Mr. Smulski stated:

> "These results have been interpreted for me by Dr. Ho. I am advised by Dr. Ho and do believe that the results show that the existing phosphogypsum stack has had negative impacts on the groundwater under my lands and that it is reasonable to conclude that the proposed northern expansion of the stack will result in further impacts. If the Board agrees to hear our appeals, it is my intention to file with the

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43 See: NRCB Hearing Transcript, February 27, 2004, at page 236, lines 4 to 15.

44 NRCB Hearing Transcript, February 27, 2004, at page 240, lines 18 to 23.

45 NRCB Decision, at page 52.

Board a report from Dr. Ho setting forth his interpretation of the current groundwater monitoring results."[46]

[59] It is apparent to the Board that the conclusions being drawn from the new groundwater monitoring data are the same conclusions as those reached by Dr. Ho from the 1992, 1994, and 1996 groundwater assessments and presented to the NRCB. This is consistent with Dr. Ho's evidence that the groundwater level findings have not changed over time.

[60] In its consideration of the evidence on groundwater, the NRCB "...satisfied itself that Agrium is committing an appropriate level and caliber of resources to continue to address groundwater mitigation measures for the entire facility, as well as proceed with the ongoing hydrogeological monitoring and assessment activities."[47] The NRCB also found that "...Alberta Environment, as the regulator, has been diligent in assessing Agrium's actions in this area and believes that the remediation and proactive protection of the groundwater resources at this facility is appropriate."[48] Moreover, Section 4.4 of the Amending Approval requires the Approval Holder to continue with groundwater monitoring and mitigation efforts.

[61] On this basis, the Board is unable to find that the new water level data either raise a serious risk of adverse effects that were not previously dealt with by the NRCB, or change a material fact in such a way that it would have affected the conclusions and recommendations in the NRCB Decision. As a result, the Board concludes that this issue was adequately dealt with by the NRCB.

3. The Geo-Korr Report

[62] The Smulski Appellants provided the well monitoring data that post-dated the NRCB Decision to Mr. Korol, the author of the Geo-Korr Report. However, the Smulski Appellants could not confirm that these new data were actually used by Mr. Korol in his analysis. As stated by the Smulski Appellants, the Board is left to interpret the evidence that has been filed and draw its own conclusion on whether the data used in the Geo-Korr Report is new from even a temporal perspective.

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46 Smulski Appellants' submission, dated March 10, 2005, Tab 1, Affidavit of Mr. Smulski, at paragraph 17.

47 NRCB Decision, at page 86.

48 NRCB Decision, at page 86.

[63] After careful review of the filed evidence, the Board is of the view that the analysis in the Geo-Korr Report relied on the same data previously analyzed by Dr. Ho, the Smulski Appellants' hydrologic expert at the NRCB Hearing. In particular, the Board agrees with the Approval Holder that the plotting of Measured Water Levels in Figure 1 of the Geo-Korr Report does not appear to be based on the 2004 data collected after the NRCB Decision.[49] In addition, Figure 2 of the Geo-Korr Report does not include wells with the "AG" designation that identifies the new wells drilled in 2004.[50] The Board acknowledges that wells that were re-drilled in 2004 would retain their earlier designation, however, on balance, the fact that there are no "AG" designated wells identified in the report, suggests to the Board that the 2004 data were not incorporated into Mr. Korol's analysis. Thus, there is no indication and substantial counter-indication that these new data formed any part of the Geo-Korr Report.

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[49] See: Preliminary Meeting Transcript, at page 172, lines 4 to 6, and page 173, lines 1 to 17, which provides:

"Mr. Roth: But I just took the groundwater levels in Exhibit B and compared them to the groundwater levels in a map by Mr. Korol in Exhibit 1 of his report.

You cannot do it with all of them because in some respects, new groundwater levels appearing in Exhibit B are close to what they were in 1996 for some individual wells, but they are certainly not for others. What you will find, and I produced for you, the 1996 numbers from NRCB in my submission, at Tab 3, this is where I am getting the data. I will just give you the results.

On Figure 1, that is Figure 1 on Mr. Korol's work, you have a BH5 well, and the lowest level reported in Exhibit B is 631.5 meters, and the 1996 level is 631.19.

And I in cross-examination of Mr. Smulski suggested the evidence, suggested in argument, that plotting of the water level is certainly closer to the 631.19 number in 1996 versus this 631.5.

It becomes more apparent when you look at BH8 where the lowest number in BH8 in the Exhibit B data is 632.52 meters. You can see BH8 is plotted under 632.

I would suggest to you the reason it is plotted under 632 is the 1996 figure gave a water level of 631.94, which is slightly less than 632. That is where he has got it plotted.

With respect to the BH7A well, you will see that Mr. Korol has the X there just under the 630 level.

The new data has the lowest level reported for new data, in October, in Exhibit B is 633.48, which is over 630. For 1996, it happened to be 629.3. Again, the plotting is consistent with the 1996 data.

Finally, one of the biggest discrepancies is with respect to BH4, which is on the left-hand side inside of that red semicircle there, of 635. There, it is in Exhibit B as a groundwater level of 636.46. It is half a meter over 636. Here there is no 636 contour, but the mapping is consistent with groundwater elevation in 1996 of 635.87.

So to me, it is manifesting the obvious, that none of the new water levels were used by Mr. Korol in his mapping. This can be shown just by carrying his mapping to the actual so-called new evidence in Exhibit B." (Edited for clarity.)

[50] See: Preliminary Meeting Transcript, at page 48, lines 26 to 27, which provides:

"Mr. Smulski: The new wells from 2004 would be starting with the prefix AG."

[64] The Geo-Korr Report offered the opinion that the existing phosphogypsum storage area interceptor was inadequately designed to prevent impacts on the adjacent lands. This issue was fully canvassed by the Smulski Appellants' experts at the NRCB Hearing and considered by the NRCB in its decision.[51] For these reasons, the Board finds that the Geo-Korr Report does not provide sufficient grounds to conclude that these issues were not adequately dealt with at the NRCB Hearing.

[65] The Board understands that the Smulski Appellants have declined an offer from the Approval Holder to establish a groundwater monitoring program on their land. That is their choice. However, the Board encourages the Smulski Appellants to share the full results from their well monitoring program with the Director so that the groundwater data from the land directly adjacent to the Plant can be fully considered as groundwater mitigation measures are implemented and assessed for the existing Plant and the expansion of the phosphogypsum storage area.

[66] The Board concludes that the issues raised in the Geo-Korr Report were adequately dealt with by the NRCB.

4. Vegetation Sampling

[67] The new information brought before the Board by the NESCR Appellants relates to vegetation issues that were extensively dealt with by the NRCB. The case for considering this information as being "new" stands on a progress report for a 2004 vegetation study undertaken by the Approval Holder.

[68] The significance of the NESCR Appellants new vegetation sampling data must be considered in light of the findings in the NRCB Decision:

> "The Board finds that both the vegetation data collected by Agrium and the [NESCR Appellants] identifies the need for further quantification and the fate of fluoride that is being emitted from Agrium's facility. The Board finds the data indicates that fluoride is being taken up by vegetation in the surrounding area, but that neither the magnitude nor the impact of the uptake is well understood. Based on the evidence presented, the Board does not believe that the presence of fluoride in the concentrations measured represent an immediate environmental risk;

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51 See: NRCB Decision, at pages 86 to 87.

> however, the Board believes that Agrium needs to more fully investigate feasible reductions in fluoride emissions from the facility and understand the impact of the fluoride emissions on receptors. The Board concurs with Alberta that an appropriate EPEA approval condition would include the requirement to conduct further investigation of vegetation impacts. The Board recommends that the vegetation fluoride monitoring program make provision for the analysis of locally grown produce and forage. Additionally, the Board recommends that the further vegetation assessments be designed using recognized scientific protocols."[52]

[69] The new data presented by the NESCR Appellants is a December 6, 2004 progress report on the Approval Holder's vegetation study. The vegetation samples were collected on two days and included samples from several sites near the Plant. The sampling was undertaken as part of the vegetation testing program recommended by the NRCB and incorporated into the requirement for a "Vegetation Study" in Condition 4.1.28 in the Amending Approval. In light of the NRCB's conclusion that the presence of fluoride in the concentrations measured at the time of its decision did not represent an immediate environmental risk, and that neither the magnitude nor the impact of the uptake is well understood, the Board agrees that the new vegetation sampling information is temporally new. However, it is not new information of the nature to significantly influence the decisions made by either the NRCB or the Director. Accordingly, it does not provide the Board with sufficient ground to conclude that this issue was not adequately dealt with at the NRCB Hearing.

[70] At this stage in the analysis, the Board believes it is appropriate to comment that the Approval Holder's approval must be renewed by the Director in 2007. The timing of the renewal of the approval is not a basis on which the Board grounds this decision; however, because of the relatively unique nature of the NRCB Decision, the Board believes it is appropriate to comment on its findings on this "new" information in light of the upcoming approval renewal.

[71] The NRCB Decision is clear that there are concerns with some of the estimates underlying the Approval Holder's environmental and health risk assessments:

> "The Board finds that Agrium's predictions of ambient fluoride concentrations and deposition rates were not transparently conservative, as the Board would expect of values to be employed in environmental and health risk assessments.

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52 NRCB Decision, at page 88.

> This is not to say that the Board finds Agrium's estimates were not conservative. Rather, the Board cannot be sure that they are conservative due to uncertainties, omissions, and other methodological problems with the modeling. The Board finds that any comparison of Agrium's predicted ambient fluoride concentrations with ambient guidelines is premature and potentially misleading until Agrium resolves the considerable uncertainty surrounding its estimates of fluoride flux from the phosphogypsum stacks (Section 5.2.3.). The Board's lack of comfort with these estimates also means that it is not prepared to rely on the environmental and health risk assessments built upon them."[53]

Ultimately, the NRCB found that the expansion of the Approval Holder's phosphogypsum storage area was in the public interest, subject to conditions and recommendations that included a number of studies to improve the Approval Holder's understanding of the environmental and health risks. These studies are to be conducted to the satisfaction of the Director. Many of these studies will be completed over the next two years with the results available before the renewal of the Approval Holder's approval in 2007. It is possible for the results of these studies to meet this Board's test for significant new information at that time. The Board's decision to decline jurisdiction is based on the information before the Board today; it does not prevent the Board from determining whether future information constitutes new information. If that is the case, the Board believes it has the jurisdiction to hear an appeal (from either directly affected parties or the Approval Holder) from the Director's decision at that time.

5. Summary

[72] In *Graham*[54] the Board determined that two matters that were considered in a broad sense by the NRCB were new matters and therefore within the jurisdiction of the Board. These matters involved changes in material facts or were significantly changed because of new evidence that was not available to the NRCB. In that case, the Board found that PCB fugitive emissions 25 times greater than the levels projected in the application before the NRCB constituted new information that could potentially lead to conclusions and recommendations different from those reached by the NRCB. The Board also found that a change in the process for surface water to permit off-site discharge of surface water when the NRCB, noting that the

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53 NRCB Decision, at page 85.

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

whole process was designed to prevent contaminants from escaping the site of the plant, gave its approval concerning surface water on the basis that there would be no runoff directly into the environment outside the plant was a new fact. Accordingly, the Board held that these matters were not considered by the NRCB as contemplated by then section 87(5)(b)(i), now section 95(5)(b)(i) of EPEA and therefore within the Board's jurisdiction.

[73] In the current appeal, the Board has carefully reviewed the new well monitoring data including the chemical analysis, the Geo-Korr Report, and the updated vegetation study in the context of the evidence heard and decisions made on these matters when, as the Appellants concede, these matters were considered by the NRCB. None of these new data brought to light any deficiencies in the information that was before the NRCB that are even remotely close to the substantive deficiencies found by the Board in *Graham.*[55] The Board is of the view that these new submissions do not hold the potential to lead to conclusions and recommendations different from those reached by the NRCB. For all of the foregoing reasons, and in the absence of further studies recommended by the NRCB and required by the Director, the Board concludes that all of the matters in the Smulski Appellants' Notice of Appeal, and the portion of the NESCR Appellants' Notices of Appeal in relation to the vegetation study, were adequately dealt with by the NRCB and must, as required by EPEA, be dismissed in accordance with section 95(5)(b)(i).

D. Is the Director's compliance with the section 68(4)(a) requirement of EPEA a matter that was not adequately dealt with by the NRCB?

[74] The NESCR Appellants stated they do not take issue with the NRCB Decision, and they agree that the matters raised in their Notices of Appeal were in a broad sense addressed by the NRCB. The issue the NESCR Appellants have put before the Board is whether the Director has complied with his duty to consider the NRCB Decision in accordance with section 68(4)(a). This section provides:

> "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 ... or the Natural Resources Conservation Board in respect of the subject-matter of the approval or registration...."

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

[75] The Board agrees with the NESCR Appellants that, according to the Court's decision in *Slauenwhite,*[56] the Board has an obligation to determine whether the Director has discharged his duties under EPEA. This is consistent with the Board's decision in *Carter*:

> "In addressing section 87(5)(b)(i) [(now 95(5)(b)(i))], where there is no new evidence and no new matters, our Board will not lightly allow an appellant to effectively re-open an ERCB decision.... Assuming an appeal is otherwise valid, there may be circumstances where this Board would look closely at factual matters already decided by the ERCB, even when there is no new evidence. This would involve an exceptional case; for example, if the Director's decision was not clearly linked to the ERCB's evidence...."[57]

[76] Section 95(2) of EPEA permits the Board, at a preliminary stage, to determine what matters included in a notice of appeal are to be included in the hearing of an appeal. In making that determination the Board may consider, among other things, "...whether the Director has complied with section 68(4)(a)...."

[77] Section 95(2) only comes into play for "...matters included in a *notice of appeal properly before it....*" (Emphasis added.) To get to section 95(2), the Board must first have jurisdiction to hear the appeal. However, when the Director's duty to consider section 68(4)(a) is at issue in the context of a section 95(5)(b)(i) jurisdiction question, the inquiry the Board is obligated to make to form its opinion on the matter is, by its very nature, a *similar* inquiry as that under section 95(2).

[78] The section 95(5)(b)(i) jurisdictional question for the Board is whether the matters included in the Notices of Appeal were adequately dealt with by the NRCB. When the NRCB has otherwise adequately dealt with matters by making recommendations to the Director, and those recommendations are on the face of his decision evidently considered by him as required by section 68(4)(a), then the Board must find that the NRCB has adequately dealt with the matters. However, if the Director failed to consider the NRCB decision under the scrutiny required by EPEA,[58] then that may not be the case. In those circumstances, the Board must ask

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[56] *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

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

[58] The purposes of *EPEA* and of environmental assessment are set out in EPEA, sections 2 and 40 respectively. In contrast to section 2 of the *Natural Resources Conservation Board Act*, which sets out that the

itself what the NRCB might have done had the NRCB known that the Director was not going to comply with his statutory duty. In circumstances where recommendations to the Director are an important element of the NRCB's decision, it is open to the Board to conclude that the NRCB was unable, through no fault of its own, to adequately deal with the matter for purposes of section 95(5)(b)(i).

[79] As discussed earlier in this decision, the NRCB Decision that is before the Board is relatively unique. It is unique as it is the first case before the Board where the Appellants' main concern is how the Director implemented the NRCB Decision and it is also unique as the NRCB had to deal with a number of arguably tenuous conclusions found in the underlying

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NRCB is to determine whether projects are in the public interest, having regard to the social, economic and environmental effects of the project, *EPEA* requires the Director and the Board to support and promote the protection, enhancement and wise of the environment while recognizing that there are many issues that need to be addressed when doing so. Section 2 of EPEA provides:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
> (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 40 of EPEA provides:

> "The purpose of the environmental assessment process is
>
> (a) to support the goals of environmental protection and sustainable development,
> (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,
> (c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and

environmental impact assessment. The NRCB's determination that the expansion of the Approval Holder's phosphogypsum storage area was in the public interest is subject to many conditions and recommendations, including studies to improve the Approval Holder's understanding of the environmental and health risks.[59] The NRCB Decision specifically comments on the Director's participation at the hearing and its consideration of the statutory relationship between the NRCB and the Director:

> "Throughout the hearing, the role and contributions of [the Director's] panels and counsel were much appreciated by the Board. The Board understands that section 68(4) of EPEA directs the regulatory authority, [the Director,] to consider a written decision such as this one when considering an approval. The Board agrees with [the Director] that the Board's role, if it decides that an Approval should be granted for a project, is to make recommendations on any terms or conditions that it considers appropriate should an EPEA approval be issued. Proceeding in this manner assures coordination between the NRCB approval and subsequent EPEA approvals.
>
> The Board appreciates the specific information contained in [the Director's] final arguments regarding potential conditions that [the Director] would consider in an approval that might be issued to Agrium for an extension of the existing phosphogypsum facility and has incorporated comments on those potential conditions within the relevant portions of Section 11 [Views of the Board]." [60]

[80] The NESCR Appellants' Notices of Appeal set out eleven areas where they believe the Director was deficient in considering the NRCB Decision. In conducting its preliminary review of the Director's consideration of the NRCB Decision for the purposes of section 95(5)(b)(i), the Board considered the evidence presented at the Preliminary Meeting, the NESCR Notices of Appeal, the NRCB Decision, the Amending Approval, and the Record provided by Director, including the tabular summary of the Director's responses to the recommendations in the NRCB Decision.[61]

(d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities."

59 See: Decision, at page 93.

60 NRCB Decision, at page 81.

61 See: Director's Record, NRCB Related Only, Director's Response to NRCB Hearing Report Recommendations, October 15, 2004, Tab 11.

1. The Approval Holder's Commitments

[81] The NESCR Appellants' Notices of Appeal state that the Approval Holder's commitments to the NRCB set out in Schedule B of the NRCB Decision were not included in the Amending Approval and are therefore unenforceable. In fact, these commitments were incorporated into the NRCB Decision through its Condition 1, which sets out that the Application and descriptive supporting material "*...including the undertakings of the Applicant...*" are approved. [62]

2. Fluoride and Other Air Emissions

[82] The NESCR Appellants set out a number of very specific issues with the fluoride and other air emissions monitoring set out in Table 4.1.3 and Condition 4.1.26 of the Amending Approval. Some of the issues set out by the Appellants do not reflect the terms of the Amending Approval.

[83] The NESCR Appellants' concerns for the requirements in Table 4.1.3, including monitoring in accordance with the Air Monitoring Directive and the requirement for only a single site for monitoring hydrogen fluoride and particulate fluorides, fails to take into consideration other sections of the Amending Approval which reflects the broader context of the NRCB Decision. For example, for fluoride emissions, the NRCB acknowledged that there are difficulties that must be resolved to effectively regulate these emissions:

> "The Board recommends that Alberta Environment assume regulatory oversight of Agrium's efforts [to seek a greater understanding of the relationship between the state of the surface – dry moist or ponded – and fluoride emission rates and to apply that understanding in designing means to mitigate emissions from the phosphogypsum stack] with a view to assessing the feasibility of regulating the phosphogypsum stack fluoride emissions. The Board understands that these emissions are not currently regulated at least in part because they are hard to quantify, which makes it difficult to establish a reasonable approval limit, and to assure compliance once a limit has been established. The Board believes this impediment to regulation must be overcome because this unregulated ground-level source area is larger and is expected to have a stronger effect on local

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62 NRCB Decision, Appendix B: Form of Approval, at page B-2, emphasis added.

fluoride concentrations (see Section 5.2.3) than the regulated process stack point sources."[63]

[84] In response to this recommendation, Conditions 4.1.22 through 4.1.24 in the Amending Approval set out detailed requirements for the development of an Enhanced Ambient Air Monitoring Program ("EAAMP"), and Conditions 4.1.26 and 4.1.27 require the Approval Holder to undertake a Fugitive Fluoride Emissions Study to better understand the mechanisms leading to fugitive fluoride emissions from the phosphogypsum stack.

[85] Among other things, the EAAMP must include, pursuant to Condition 4.1.22, the results of an investigation of continuous monitoring instrumentation available for ambient hydrogen fluoride and the suitability of its implementation, and "...programs to determine and obtain ambient concentrations of [hydrogen fluoride] and particulate fluorides, at a second location near the plant, which shall be proposed by the approval holder, during the periods between May 1 and October 31 each year." These sections deal specifically with the NESCR Appellants' concerns.

[86] Other special reporting requirements are found in Conditions 4.1.32 to 4.1.38, including a requirement to report the results of silicon tetrafluoride monitoring undertaken by the Approval Holder in 2004. This specifically addresses the NESCR Appellants' concern in paragraph 11 of their Notices of Appeal that Table 4.1.3 does not provide for the measurement of silicon tetrafluoride from the phosphogypsum stack.

[87] The Board accepts the argument of the Approval Holder and the Director that in certain matters, the NESCR Appellants are effectively taking issue with the NRCB Decision. For example, the NESCR Appellants at paragraph 14 of their Notices of Appeal, state that the Amending Approval "...should provide for an external review of the fugitive fluoride emission study...," yet the NRCB Decision does not require such a review. While an external review may be useful, it is not a matter that relates to the Director's consideration of the NRCB Decision.

[88] In some cases, the NESCR Appellants have taken issue with the Director's use of the exact words used in the NRCB Decision. The NESCR Appellants' Notices of Appeal at paragraph 13 states that: Condition "... 4.1.2(c) and (e) requires Agrium to provide an

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63 NRCB Decision, at page 85.

'understanding' of many of the factors listed. This term is vague and is difficult to ascertain or measure." In fact, the requirements in the Amending Approval reflect the exact words used in the NRCB Decision:

> "Agrium shall undertake or commission studies to *improve its understanding of the factors*, including but not limited to moisture content and temperature, that determine the chemical composition and quantity of fluoride emissions from all parts of the existing phosphogypsum stack and shall develop a statistically credible procedure to estimate fluoride emissions for the current and extended phosphogypsum stacks. This work shall be conducted to the satisfaction of Alberta Environment and shall be completed on a timeline determined by Alberta Environment to assist them with establishing long-term licensing requirements."[64] (Emphasis added.)

[89] Finally, all of these concerns must be considered in the context of the ability of the Director to impose additional monitoring conditions at anytime under EPEA.[65] As a result, if it becomes apparent that additional monitoring is required, the Director has the ability to impose it.

3. Vegetation Effects

[90] A similar approach was taken by the NESCR Appellants on the issue of vegetation effects. In paragraph 15 of their Notices of Appeal, the NESCR Appellants argue that the Amending Approval is inadequate because the "... NRCB had evidence that the vegetation guidelines were exceeded on numerous occasions. No requirement was specified in the Approval to begin immediate mitigation." Here again the NESCR Appellants are actually taking issue with the findings of the NRCB:

> "The Board finds there is evidence that ambient fluoride concentrations in the vicinity of the operation frequently exceed the Alberta one-hour ambient guideline, which is intended to protect vegetation. The Board recognizes that the 2003 data were collected in the summer, precisely the season when fluoride concentrations should be greatest. *The Board also understands that the ambient guideline is not intended as a statutory limit, but as Alberta Environment advised,*

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64 NRCB Decision, Appendix B: Form of Approval, at page B-2.

65 Section 70(3)(a)(ii) of EPEA 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 ... (ii)if the term or condition relates to a monitoring or reporting requirement...."

a threshold indicating that there might be a need for further action, possibly including detailed monitoring, ecological effects monitoring and careful scrutiny of whether control measures are feasible. The Board finds that the double-digit proportion of observations exceeding the guideline is ample reason to place Agrium's fluoride impact under greater scrutiny. The Board therefore welcomes Agrium's commitment to improve its ambient and vegetation fluoride monitoring. The Board recommends that Alberta Environment oversee this effort both to ensure that the monitoring data can be used to document changes in the proportion of hourly measurements that exceed the ambient guideline and to provide the company with guidance as to what is ultimately acceptable."[66] (Emphasis added.)

[91] In its views on vegetation, the NRCB stated:

"The Board finds that both the vegetation data collected by Agrium and the [NESCR Appellants] identifies the need for further quantification and the fate of fluoride that is being emitted from Agrium's facility. The Board finds the data indicates that fluoride is being taken up by vegetation in the surrounding area, but that neither the magnitude nor the impact of the uptake is well understood. Based on the evidence presented, the Board does not believe that the presence of fluoride in the concentrations measured represent an immediate environmental risk; however, the Board believes that Agrium needs to more fully investigate feasible reductions in fluoride emissions from the facility and understand the impact of the fluoride emissions on receptors. The Board concurs with Alberta that an appropriate EPEA approval condition would include the requirement to conduct further investigation of vegetation impacts. The Board recommends that the vegetation fluoride monitoring program make provision for the analysis of locally grown produce and forage. Additionally, the Board recommends that the further vegetation assessments be designed using recognized scientific protocols."[67]

[92] Condition 4.1.28 of the Amending Approval requires a vegetation study that specifically incorporates each point in this NRCB recommendation. In some cases, a careful reading of the Amending Approval, for example the requirement in Condition 4.1.28(g) for the Approval Holder to compile and provide a list of locally grown produce and forage that will be included in the study, shows that the NESCR Appellants' matters related to vegetation have been addressed by the Director.

[93] In other cases, such as the NESCR Appellants' issue in paragraph 25 of their Notices of Appeal, which states that the Amending Approval should provide for an external

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66 NRCB Decision, at page 36.

67 NRCB Decision, at page 88.

review of the vegetation study, is not what the NRCB recommended. Condition 4.1.28(a) of the Amending Approval requires the Approval Holder to compile and submit information on scientifically recognized protocols for the gathering and assessment of fluoride in and on vegetation. This directly reflects the NRCB Decision.[68]

4. Noise

[94] Another matter in the NESCR Appellants' Notices of Appeal is the failure of the Amending Approval to deal with noise concerns.[69] The NRCB found that noise is a cause of concern:

> "This is an area where the Board believes that there is an overlap with the recent zoning changes. The Board heard from Agrium that guidelines were being met, proactive steps were being taken and that the NRCB should leave this component of the application to the [A]EUB under the Industrial Development Permit system. The Board heard from the [NESCR Appellants] that noise has been one of their greatest concerns with the Agrium facility, despite the noise reduction measures implemented by Agrium.
>
> The Board notes that Agrium's neighbours believe it could do more to resolve noise issues. As a result of the adoption of the Industrial Heartland Structure Plan this area will contain both large industrial developments and residences. The residences were there prior to the zoning changes and the Board finds that Agrium must take all reasonable measures to minimize the impact of its facility on the neighbours. The Board understands that granting this extension means that the plant life will be extended an additional 26 years, whereas denying the project would mean that the phosphorus fertilizer production would likely only continue for another two to three years.
>
> Given the strong concerns raised by the neighbours about noise from the facility, the Board is not convinced that Agrium has focused sufficient resources on this issue. It would appear that noise guidelines have been exceeded, that Agrium has not employed someone with appropriate noise training to evaluate complaints and that Agrium has not pursued evaluation of low frequency noise. Given Agrium's corporate commitment to continuous improvement, the Board is disappointed that Agrium has not actively addressed this key issue of the neighbours more proactively.
>
> The Board is hopeful that if Agrium were to show a renewed commitment to addressing noise issues, residential neighbours would be prepared to meet with

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68 See: NRCB Decision, at page 85.

69 See: NESCR Appellants' Notices of Appeal, at paragraphs 26 and 27.

> Agrium through initiatives such as SNAP [(Strathcona Noise Advisory Panel)] to ensure that this issue is thoroughly dealt with."[70]

[95] The difficulty the Board encounters with this matter is that the NRCB Decision does not recommend that the Director take this matter into consideration in the Amending Approval. Rather, the Board reads this passage of the NRCB Decision as suggesting that the matter is best left to be dealt with by the Approval Holder and the neighbours through initiatives such as SNAP.

[96] The Director's position on this issue, in both the Director's Response to the NRCB Decision on Noise and in his evidence at the Preliminary Meeting, was while there is potential for overlapping jurisdiction, the Director defers to the AEUB for noise regulation where the AEUB has jurisdiction.[71] In this case, the Director has deferred noise regulation to the AEUB, because the Approval Holder is regulated by the AEUB through an Industrial Development Permit[72] and, accordingly, must comply with the AEUB directive on noise.[73] The Director acknowledged at the Preliminary Meeting that this deference to the AEUB is not legislated, nor is it a formal administrative agreement, but rather described it as a "common sense and practical practice."[74]

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70 NRCB Decision, at pages 82 and 83.

71 See: Preliminary Meeting Transcript, at page 158, lines 24 to 31, which provides:

> "Mr. Stepaniuk: And, sir, you're right, there is a potential for overlapping jurisdiction between the AEUB and Environment with respect to noise. Noise could be covered by EPEA, but the reality is that Alberta Environment has deferred to the AEUB where the AEUB has jurisdiction. And for good practical reasons, and that's because the AEUB has standards and reference levels that it applies." (Edited for clarity.)

72 The requirement to obtain an Industrial Development Permit from the AEUB is found in section 43 of the *Oil and Gas Conservation Act*, RSA, 2000 c. O-6, which provides that: "No energy resource produced in Alberta shall be used in Alberta as a raw material or fuel in any industrial or manufacturing operation, unless the Board, on application, has granted a permit authorizing that use for that purpose in accordance with this section." An "energy resource" is defined to include "...gas, methane, ethane, propane, butane, pentanes plus, condensate or crude oil or any primary derivative of them or any of them."

73 See: Preliminary Meeting Transcript, at page 158, lines 32 to 35 and page 159, lines 1 to 2, which provides:

> "Mr. Stepaniuk: In this case, the [A]EUB had jurisdiction because there was some, I think it's called an industrial development permit that has to do with their use of natural gases of fuel, and that's why the EUB had jurisdiction over this particular facility in terms of regulating noise.

74 See: Preliminary Meeting Transcript, at page 159, lines 12 to 18, which provides:

> "Mr. Stepaniuk: In terms of Alberta Environment deferring, not wanting to have sort of, well, we're going to exercise authority over this as well, that's not, in legislation, that's not in, to my

[97] The Board is somewhat uncomfortable with the Director's immediate deference to the AEUB on this important issue, not because the AEUB does not have the expertise, but because noise pollution could be read to be into Alberta Environment's purview. For example, section 1(mmm)(iii) of EPEA expressly defines sound as a "substance" and, therefore, capable of being regulated. However, for purposes of determining jurisdiction on this matter, the Board is of the opinion that in taking this approach, the Director has not carried out his duties in a manner that is inconsistent with the NRCB Decision.

[98] As a final note on the matter of noise, at the Preliminary Meeting the Approval Holder's evidence on noise was that the resident's noise concerns were related to the ammonia plant, not the existing phosphogypsum storage area.[75] Notwithstanding the source of the noise, the Approval Holder made a number of commitments related to noise at the NRCB Hearing. These commitments are incorporated into the NRCB's conditions for its approval of the phosphogypsum storage area extension, and the Approval Holder is obligated to act in accordance with those commitments.

5. Odours

[99] The NESCR Appellants' issue with odours is that the Amending Approval does not require the distribution of an annual appraisal of the protocol used for responding to odours as recommended by the NRCB.[76] The Director, in the Director's Response to NRCB Decision on Odours, states:

> "Regarding the item of distributing the findings, [the Director] is not prepared to include an approval clause to this effect, since any reports from the approval holder are in the public domain and can be obtained through the existing formal process. In addition, Agrium chould [sic] deal with this as a good corporate citizen in attempts to rebuilding [sic] their relationship with the residents."[77]

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knowledge, any kind of formal administrative agreement. I think it is a common sense and practical practice."

75 See: Preliminary Meeting Transcript, at page 185, lines 12 to 18, which provides:

"Mr. Roth: The NRCB basically let the appellants pursue any issues, and we got into groundwater with respect to a nitrate land fill, and we got into noise regardless of where it came from on Agrium's operations. There is not very much noise at all associated with the gyp stack construction or noise in other aspects of the operation." (Edited for clarity.)

76 See: Notices of Appeal, at paragraph 29.

77 Director's Record, NRCB Related Only, Director's Response to NRCB Hearing Report Recommendations,

[100] The Board accepts that this information will be in the public domain and effectively complies with the NRCB recommendation. The Board also agrees with the Director that the Approval Holder both could and should address this matter by taking the initiative to provide the information to the NESCR Appellants directly.

6. Wildlife

[101] Another issue in the NESCR Appellants' Notices of Appeal is that Condition 4.1.39 of the Amending Approval is inconsistent with the recommendation in the NRCB Decision because it permits the Director to determine if a wildlife study is required.[78] Condition 4.1.39 states: "If the Director is of the opinion that the Screening Level Health and Environmental Risk Assessment requires further delineation on wildlife, the approval holder shall conduct a Wildlife Study to better understand the effects of fluoride on wildlife...."

[102] On wildlife, the NRCB Decision states:

> "The Board finds that that fluoride emissions and their impact from the phosphogypsum stack appear to be poorly quantified and understood. The Board further finds that this has led to data gaps with respect to potential impacts associated with fluoride emissions, including predicted and measured effects on wildlife. The Board agrees with the [NESCR Appellants'] evidence that Agrium's wildlife risk assessment is incomplete and cannot, at this point, be substantiated. Therefore, the Board finds that the identified data gaps with respect to fluoride emissions from the stack and the impact of the emissions need to be filled.
>
> The Board notes that Agrium has proposed to examine deer within a 2 km radius of the facility for dental fluorosis. The Board does not believe that such a study would yield conclusive results because a phosphogypsum stack has been at the site for over 30 years, emitting undefined amount of fluoride. Therefore, it would be very difficult to tie any evidence of fluorosis in deer to the facility and the results would not describe effects that have occurred over the life of the facility. The Board believes that further assessment on impacts to wildlife should consist of a properly designed study including the use of a control group, analysis of forage being consumed and measurements of bone fluoride concentrations."[79]

October 15, 2004, Tab 11, Odour.

78 See: NESCR Notices of Appeal, at paragraph 31.

79 See: NRCB Decision, at pages 88 and 89.

[103] The Board agrees with the Director that a reasonable interpretation of the NRCB Decision is that the Wildlife Study need only be undertaken if the Director determines the Screening Level Health and Environmental Risk Assessment indicates that the Approval Holder's risk assessment for wildlife is not complete. The Board notes that if the Director determines a Wildlife Study is required, Condition 4.1.39(a) specifies that the study must meet the design requirements recommended by the NRCB. On this basis, the Board is satisfied that the Director has considered the NRCB's Decision in relation to wildlife.

7. Livestock

[104] The NESCR Appellants' concerns with livestock are similar to those with wildlife. The NRCB Decision states:

> "The Board finds that without a clear understanding of the composition and concentration of fluoride emissions from the gypsum stack and the associated facilities, Agrium is not in a position to fully understand the potential impact of the emissions on the health of livestock living in the vicinity of the facility. Based on the evidence received, the Board believes that the extension would not cause an immediate health risk to livestock in the area. However, the Board believes that this is an area that requires further scientifically defensible investigations."[80]

[105] The Director's response to this recommendation is set out in the Director's Response to NRCB Decision on Animal Health provides:

> "[The Director] has considered this recommendation and is requiring that Agrium understand the composition and concentration of fluoride emissions from the phosphogypsum stacks. These requirements are included within the Enhanced Ambient Air Monitoring Program and the Fugitive Fluoride Study."

[106] At the Preliminary Meeting, the Director also pointed to the Screening Level Health and Environmental Risk Assessment and the possibility of including livestock in the Wildlife Study should the results suggest that further study on the effects of livestock is warranted.[81] The Board accepts that the requirements for a Wildlife Study are capable of this

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80 See: NRCB Decision, at page 89.

81 See: Preliminary Meeting Transcript, at page 166, lines 10 to 17, which provides:

"Mr. Stepaniuk: Mr. Chairman, I believe that the NRCB captured that in approval condition 2 with the Health Risk Assessment and Environmental Risk Assessment. That is what we have mirrored in the EPEA Approval Condition. There is a requirement for an Environmental Risk Assessment that is 4.1.33. There is also a clause, 4.1.39, which is sort of tied to that. Depending on what that shows, there may be a need to do additional studies." (Edited for clarity.)

broad interpretation particularly given the Director has reserved the right in Condition 4.1.39(b) to obtain "...any other information as required in writing by the Director." Moreover, the Approval Holder did not object to this broad interpretation at the Preliminary Meeting, therefore, if the Director makes that determination that livestock is to be included in the Wildlife Study, the Board expects the Approval Holder to fully comply. On this basis, the Board is satisfied that the Director has considered the NRCB Decision in relation to livestock.

8. Health

[107] The health matters in paragraphs 34 through 38 of the NESCR Appellants' Notices of Appeal take issue with the NRCB's Decision on health. For example, paragraph 34 criticizes the NRCB's approach to fluoride:

> "The NRCB had evidence that just consuming fluoride contaminated garden vegetables would cause children and adults to exceed the accepted daily intake levels. *The NRCB recommended further monitoring. Monitoring is not mitigation.* There was nothing in the Approval that required immediate action to reduce these effects or to mitigate them." (Emphasis added.)

[108] Similarly, paragraph 38 of the Notices of Appeal criticizes certain time frames in the Amending Approval:

> "The Approval allows another 6 months to develop a proposal (Sect 4.1.33; due June 30, 2005) and another year to submit its findings (Sect 4.1.36; June 30, 2006). This is a significant time extension. Why does the approval holder get so much time to complete this work when it should have been done properly at the outset?"

[109] However, the time frames are those specified in the NRCB Decision:

> "The Board further directs Agrium to use the upper confidence limits of its emission estimates or another conservative assumption acceptable to Alberta Environment as input to its dispersion model and to conduct a Screening Level Health and Environmental Risk Assessment based on this new input. This work shall be conducted to the satisfaction of Alberta Environment and on a timeline determined by Alberta Environment. *The Board recommends that this work be completed by the end of 2006.* If the revised assessments indicate that the predicted fluoride emissions pose a risk to the environment or to human health, Agrium shall develop and implement a mitigation plan to the satisfaction of Alberta Environment."[82] (Emphasis added.)

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82 NRCB Decision, at page 93.

[110] The NESCR Appellants were very clear in their submissions that their appeals do not challenge the NRCB Decision; rather they are challenging the Director's consideration of the NRCB Decision. With respect, the NESCR Appellants cannot have it both ways and challenge the Director because the Amending Approval is in accordance with the NRCB Decision.

[111] The NESCR Appellants' Notices of Appeal overstate the recommendations in the NRCB Decision regarding fluorosis. In paragraphs 35 and 36 of their Notices of Appeal the NESCR Appellants state:

> "The NRCB made the following recommendations with respect to health:
>
> a) that Agrium undertake a screening level risk assessment based on historical process stack emission data and its records of the concentration of [hydrogen fluoride] in the gypsum stack pond. (p.38)
>
> b) that clinical studies be done on any individual suffering from fluorosis and a screening of the risk factors be done if such a condition is confirmed and that those results be given to Residents.
>
> Conditions in 4.1.33-35 and 4.1.37 of the Approval do not provide for these recommendations."

[112] In contrast, the NRCB Decision states:

> "The Board observes that an expert on behalf of [the NESCR Appellants] diagnosed at least two cases of 'moderate to severe' dental fluorsis.... The Board is not certain if the assessment of the severity of fluorsis in these cases was based on the clinical criteria and a scoring system comparable to that used in the Capital Health [Authority (the "CHA")] oral survey [thirty-six percent of school aged children showed evidence of fluorosis]. If the two cases diagnosed as moderate to severe do entail staining and/or pitting of the enamel, they would be more severe that 95 percent of the fluorosis observed in the regional study and would be cause for concern.
>
> *The Board would recommend that any individual with clinical symptoms of moderate to severe fluorosis be examined by a dentist.* If the diagnosis is confirmed, the Board would recommend that an assessment of individual risk factors be undertaken to determine the relative contribution of all potential sources of exposure with a view to curtail manageable exposures. *The Board appreciates the CHA's expression of willingness to assist with this kind of investigation, when it appears to be warranted.*
>
> ...The Board believes that any assessment of individual risk factors should take this recent history of higher environmental exposure into account. The Board therefore recommends that Agrium undertake a screening level risk assessment based on historical process stack emission data and its records of the

> concentration of HF in the gypsum stack pond. *The Board recommends that Agrium share the result of this simulation with the CHA to facilitate the assessment of individual risk factors for any neighbours diagnosed with moderate to severe fluorosis.*"[83] (Emphasis added.)

[113] This recommendation by the NRCB clearly does not put the onus on the Approval Holder to carry out clinical studies, and absent new information, there is no onus on the Director to consider such a study in the Amending Approval. Should an assessment of individual risk factors be warranted, and the Approval Holder does not cooperate with the CHA, the Director has the option of adding this requirement into the Screening Level Health and Environmental Risk Assessment under Condition 4.1.37(f), which requires the Approval Holder to submit "...any other information as required in writing by the Director."

9. Reclamation

[114] In reclamation matters, the NESCR Appellants' Notices of Appeal take exception to the findings of the NRCB. In paragraph 41(d) of their Notices of Appeal, the NESCR Appellants acknowledge that the NRCB recommended the Approval Holder have its reclamation plan reviewed by a third party who has successfully reclaimed a phosphogypsum stack. At paragraph 42(d), the NESCR Appellants state that the Amending Approval is deficient on the basis that "...there is no evidence that any third party has successfully reclaimed a stack and, if so, that it is willing to undertake a review." It is clear from the NESCR Appellants' own submission that the Director has incorporated the recommendations of the NRCB into the Amending Approval and it is in fact, the NRCB Decision that the Appellants take issue with.

[115] At paragraph 42 of their Notices of Appeal, the NESCR Appellants state that the Amending Approval is deficient because there is no definition for "self-sustaining," and that there are no criteria for off-gases that may be released, nor a testing and reporting protocol. On this issue, the NRCB Decision states:

> "The Board agrees with [the Director] that a self sustaining design is required. The Board finds that the definition of 'self sustaining' needs to be put on paper and that it should include, amongst other things, consideration of the contour of the stack so that if fits in with the regional topography, assurance that drainage from the stack will be collected, tested and treated if required, criteria for off-

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[83] NRCB Decision, at page 38.

> gases that may be released from the stack including a testing and reporting protocol to ensure that the criteria are being met, and a description of the stack vegetation management program. The Board finds that the term 'self sustaining' also needs to include a time horizon to ensure that the stack will be environmentally sound in perpetuity."[84]

[116] The Director responded to this recommendation by including it as one of four key factors to be investigated in the finalization of a Conceptual Reclamation Plan. The design of a final cover would perform several environmental functions, including: providing a suitable substrate for vegetation growth; minimizing infiltration and downward migration of potential contaminants; attenuating radon gas and gamma radiation emanation; minimizing wind and water erosion; minimizing exposure pathways between potential receptors and the phosphogypsum material; and providing a self-sustaining design.[85] The remaining four key factors for finalizing the reclamation plan include: requirements to assess the suitability and availability of cover materials; evaluate trace element uptakes by the vegetation; and design a long term water management strategy.[86] The Board is of the view that these Conditions of the Amending Approval clearly reflect the NRCB Decision.

[117] The NESCR Appellants' Notices of Appeal at paragraph 42(c) also state that the Amending Approval is deficient because there is no reference to requiring any financial commitment, security deposit, or bond to ensure sufficient funds are available for the reclamation of the phosphogypsum stack. The economic feasibility of reclamation was a concern expressed by the NRCB. In the context of the stack being environmentally sound in perpetuity, the NRCB stated: "It is the Board's belief that this also includes a financial commitment by Agrium, in perpetuity, to ensure that the funds are available for the proper maintenance of the stack."[87] The NRCB went on to discuss reclamation security:

> "The [NRCB] believes that this is a case that should be considered by the Minister of the Environment as requiring a reclamation security [pursuant to Section 17(2) of EPEA]. The [NRCB] understands it has no authority to require a security, but urges the Minister to consider it. The [NRCB] believes that the similarity of this project with the oil sands and coal mines, which are captured under section 17(1)

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84 NRCB Decision, at page 90 and 91.

85 See: Amending Approval, Conditions 5.3.5(a)(i) to (vi).

86 See: Amending Approval, Conditions 5.3.5(b) to (d).

87 NRCB Decision, at page 91.

> of EPEA, is that the landscape has been permanently altered as a result of this project and that there will be a requirement for ongoing maintenance of the facility forever."[88]

[118] On October 15, 2004, the Director sent a letter to then Minister of Environment, Dr. Lorne Taylor, drawing his attention to the NRCB recommendation on the financial security required for the Approval Holder's Plant.[89] The Minister replied on November 19, 2004 stating:

> "At this time, I will not designate the activity carried on by Agrium as one in respect of which security must be provided. As you note, Cabinet has recently directed that a review be undertaken of our system for reclamation security, and I will await the results of this review before deciding on action to be taken with respect to the Board's recommendations."[90]

This matter is now before the Minister of Environment as contemplated by the NRCB.

10. Mitigation

[119] Paragraphs 43 through 47 of the NESCR Appellants' Notices of Appeal are matters related to mitigation of fluoride emissions. Their view is that the Amending Approval does not reflect the NRCB recommendation that if "...the revised assessments indicate that the predicted fluoride emissions pose a risk to the environment or to human health, Agrium shall develop and implement a mitigation plan to the satisfaction of Alberta Environment."[91]

[120] The Board notes that this requirement is set out in the second condition of the NRCB approval and as such is a requirement of that approval.[92] The Amending Approval addresses mitigation of fluoride emissions in the Fugitive Fluoride Emissions Studies, which requires the Approval Holder to develop an understanding of the relationship between the state of the surface (dry, moist or ponded) of the phosphogypsum stack and the associated fluoride emission rate.[93] Based on these findings the Approval Holder must design a means to mitigate emissions from the phosphogypsum stacks,[94] as well as provide the Director with a description

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88 See: NRCB Decision, at page 91.

89 See: Director's Record, NRCB Related Only, Tab 12.

90 Director's Record, NRCB Related Only, Tab 16.

91 NRCB Decision, at page 93 and 94.

92 See: NRCB Decision, Appendix B: Form of Approval, at page B-2.

93 See: Amending Approval, Condition 4.1.26(e).

94 See: Amending Approval, Condition 4.1.26(f).

of any proposed or ongoing projects that will further address the reduction or mitigation of potential fugitive fluoride emissions or air related emissions from the phosphogypsum stacks.[95]

[121] In paragraphs 46 and 47 of the NESCR Appellants' Notices of Appeal, the NESCR Appellants expressed concern that the Amending Approval does not allow for more than two iterations of a risk assessment, and there is no requirement to cease operations or for further mitigation if any serious problems are found. Condition 4.1.27 *requires* the Approval Holder to address any deficiencies in the Fugitive Fluoride Emissions Study to the satisfaction of the Director. Similarly, Condition 4.1.38 *requires* the Approval Holder to address all deficiencies in the Screening Level Health and Environmental Risk Assessment. Finally, as the Director submitted, there are general provisions within EPEA that allow the Director to respond to unforeseen significant adverse effects.[96] The Board is satisfied that these requirements demonstrate that the Director has fully considered the NRCB Decision and its recommendations related to mitigation of potential adverse effects from fluoride emissions.

11. Public consultation

[122] The last matter in the NESCR Appellants' Notices of Appeal is that, despite the NRCB commenting that public consultation was a problem with the original environmental impact assessment, the Amending Approval "...does not require Agrium to provide any of this information to the public, obtain public input into any of the studies or otherwise consult with the public on any matter."[97]

[123] The NRCB Decision actually found that the lack of communication between the NESCR Appellants and the Approval Holder was frustrating to both parties:

> "The Board finds that Agrium undertook a public consultation process that included a series of advertisements, distribution of a newsletter, open house meetings and a website dedicated to providing information on the proposed extension. The Board heard that the consultation program was developed with input solely through CAP, a group to which none of the [NESCR Appellants] belong. The Board is disappointed that Agrium was not able to reach out

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95 See: Amending Approval, Condition 4.1.26(g).

96 See: Director's Record, NRCB Related Only, Director's Response to NRCB Hearing Report Recommendations, October 15, 2004, Tab 11, Fluoride and Dust with Respect to Air Emissions and Health.

97 NESCR Notices of Appeal, at paragraph 49.

> specifically to the [NESCR Appellants] given their close proximity to the facility. The Board heard a level of frustration on the part of both Agrium and the [NESCR Appellants] that neither party was able to proactively listen to each other. The Board urges Agrium to take all reasonable steps to improve its communication with the surrounding residential neighbours. The Board also urges surrounding neighbours to engage in dialogue with Agrium to ensure that their feedback about the operation is understood."[98]

[124] As submitted by the Director, any reports from the Approval Holder are in the public domain and can be obtained through the existing formal process.[99] The Board believes that to fully comply with the study requirements in the Amending Approval, the Approval Holder must make its best efforts to communicate with local residents. From the evidence given by Ms. Henkelman and Mr. Smulski at the Preliminary Meeting, this appears to be the case, as the Approval Holder has been in contact with local residents in relation to carrying out the vegetation study and groundwater monitoring.

[125] The Board is also aware that the Director cannot compel local residents to cooperate with the Approval Holder, and the Director must be cognizant of putting the Approval Holder in a position where it is impossible to comply with the Amending Approval without the residents' cooperation.[100] The Board agrees with the Director that resolving the land-use conflict is not within his, or Alberta Environment's, mandate, and this conflict must be dealt with through other processes.[101] Similarly, the land-use conflict is not within the Board's jurisdiction.

12. Summary

[126] Based on *Slauenwhite,*[102] the NESCR Appellants have raised the question whether the Director has complied with his duty to consider the NRCB Decision in accordance with section 68(4)(a) of EPEA and they argue that this gives the Board has jurisdiction to hear these

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98 NRCB Decision, at page 92.

99 See: Director's Record, NRCB Related Only, Director's Response to NRCB Hearing Report Recommendations, October 15, 2004, Tab 11, Odour.

100 The Board believes, given the zoning conflict in this area, this is a very real concern. For example, in Ms. Henkelman's testimony before the NRCB, her response to why the residents would not meet with the Approval Holder prior to the NRCB Hearing to see if some issues could not be resolved was: "I think unless Agrium packs up and leaves, they won't satisfy any of our questions." (NRCB Hearing Transcript, February 27, 2004, at page 112, lines 14 to 16.)

101 See: Director's Record, NRCB Related Only, Director's Response to NRCB Hearing Report Recommendations, October 15, 2004, Tab 11, Public Consultation & Emergency Response.

appeals. The NESCR Appellants point to section 95(2)(c) of EPEA, which allows the Board to consider the Director's adherence to section 68(4)(a) in determining the issues to be considered in the hearing of an appeal, to support their position that the Board has jurisdiction to hear these appeals. In the Board's view, section 95(2) *only* comes into play for "matters included in a *notice of appeal properly before it....*" (Emphasis added.) To get to section 95(2), the Board must first have jurisdiction to hear the appeal, among other things, pursuant to section 95(5)(b)(i). If the Board does not have jurisdiction to hearing the appeals, then there are no issues to be set under section 95(2).

[127] However, when the Director's duty to consider section 68(4)(a) is at issue in the context of the section 95(5)(b)(i) jurisdiction question, the inquiry the Board is obligated to make to form its opinion on the matter is, by its very nature, a *similar* inquiry as that under section 95(2). The section 95(5)(b)(i) jurisdictional question for the Board is whether the matters included in the Notices of Appeal were adequately dealt with by the NRCB. When the NRCB has otherwise adequately dealt with matters by making recommendations to the Director, and those recommendations are on the face of his decision evidently considered by him as required by section 68(4)(a), then the Board must find that the NRCB has adequately dealt with the matters. However, if the Director failed to consider the NRCB decision under the scrutiny required by EPEA, then that may not be the case.

[128] The Board agrees with the NESCR Appellants that *Slauenwhite*[103] stands for the Board having a duty to determine whether the Director has discharged his duties under the Act. In *Slauenwhite*,[104] the pipeline gathering system being constructed to deliver approximately 40% of the gas capacity to the proposed plant had not been considered by either the ERCB (now AEUB) or the Director. As a result, the Court concluded that the environmental impacts of a significant part of the natural gas processing facility in question had not been considered by either the ERCB (now AEUB) or the Director. In this case, unlike *Slauenwhite,* there is no similar question here of failure of the NRCB or the Director to assess environmental impacts of a significant physical component of the Approval Holder's expansion.

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102 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

103 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

[129] In this case, the Board has carefully reviewed each of the issues in the NESCR Appellants' Notices of Appeal in light of the NRCB Decision and the Director's Amending Approval. Based on this analysis, the Board cannot, under any interpretation of the term "consider," find that the Director did not comply with his statutory duty in section 68(4)(a) to consider the NRCB Decision. The Board believes the Director is to be commended for what on the evidence has shown to be very careful consideration and disposition of the recommendations in the NRCB Decision. For the all of the foregoing reasons, the Board concludes that all of the matters in the NESCR Appellants' Notices of Appeal were adequately dealt with by the NRCB and must, as required by EPEA, be dismissed in accordance with section 95(5)(b)(i).

VI. HEARING ISSUES

[130] The Board has reached the opinion that it does not have jurisdiction to hear these appeals. Accordingly, it is not necessary to consider the submissions on the hearing issues.

VII. ADDITIONAL COMMENTS

[131] Having dismissed of the Notices of Appeal, the Board has two additional comments it feels compelled to make. While initially focused on preventing the expansion of its phosphogypsum storage area from being approved by the NRCB, the Board believes that the Appellants are now coming to terms with the Approval Holder's project, and accordingly, have a renewed interest in ensuring that areas of specific concern and importance to them are taken into account as the studies set out in the Amending Approval are designed and implemented. At the Preliminary Meeting, the NESCR Appellants stated it is important that the programs and studies required by the Amending Approval result in information necessary for the Director and those directly affected by the project to make full and informed decisions when the approval is considered for renewal in 2007. The Board agrees.

[132] Virtually all of the matters in the Notices of Appeal have fit within the terms of the Amending Approval. This is particularly so when the Board considers that the Director has in a number of circumstances reserved the right to add information requirements to the studies that the Approval Holder is required to undertake. The Board encourages the Director and the

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104 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

Approval Holder to meet with both the Smulski Appellants and the NESCR Appellants to ensure that their specific information requirements are satisfied through the various studies.

[133] The NRCB Decision also discusses the growing land-use conflict arising from the adoption of the Industrial Heartland Area Structure Plan by the County of Strathcona and the County of Sturgeon. The NRCB stated:

> "Considerable evidence was presented on the effects from growing industrial land use on local residents; indeed, the Board believes that if Agrium was siting a greenfield project of the magnitude of their development, such a project might not be in the public interest without first dealing with this significant regional issue."[105]

[134] In 1999, this Board found these same land-use conflicts in *Dzurny*.[106] In that case, the appellant, on behalf of himself and as representative of the Strathcona Land Owner Group, appealed an approval issued to Dow Chemical Canada Ltd. for the construction, operation and reclamation of a chemical manufacturing plant near Fort Saskatchewan. The Board deferred to the AEUB's disposition of the matter, citing the following excerpt from the AEUB Decision:

> "Given the location and nature of this expansion, the [AEUB] does not believe the proposed expansion represents a significant increase to the existing land-use conflict in the area... The Board remains convinced that the ultimate and most timely solution to the residents' concerns must involve a collaborative process with all affected parties...." [107]

[135] While deferring to the AEUB, at the time the Board felt compelled to comment on the land-use conflict. In light of the NRCB's Decision on the land-use conflict in this case, the Board feels compelled to restate the comments it made in 1999:

> "...the Board believes that the main resolution that was being sought by these Appellants, and that is likely necessary to achieve any meaningful resolution of this situation, is a fair and equitable resolution of the land use conflict. Notwithstanding the considerable sympathy the Board holds for the Appellants under their circumstances, the powers provided to this Board by the Act do not

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105 NRCB Decision, at page 84.

106 *Dzurny et al v. Director, Northeast Boreal Region, Alberta Environment re: Dow Chemical Canada*, (November 24, 1999), Appeal No. 99-137 (A.E.A.B.), ("*Dzurny*").

107 Alberta Energy and Utilities Board Decision 97-7, June 12, 1997, at page 4, cited in *Dzurny et al v. Director, Northeast Boreal Region, Alberta Environment re: Dow Chemical Canada*, (November 24, 1999), Appeal No. 99-137 (A.E.A.B.), at paragraph 29.

> provide the scope to resolve this land use zoning conflict because that ability does not fall within the powers of the Director.
>
> Despite our lack of jurisdiction to resolve this matter, the Board is compelled to note that a land use conflict that was described by the [A]EUB as 'leading to a deterioration of lifestyles' for affected residents remains unresolved more than two and half years later. Long term residents who have experienced increasing encroachment of major industrial developments upon their rural lifestyle now face the reality that their land has been re-zoned for industrial development, thereby restricting their freedom to upgrade their own residential property. On the face of it, this situation appears unfair and inequitable. The Board believes that industrial developers, local government and the provincial government (on behalf of all Albertans), all of whom are major beneficiaries of these industrial developments must find the means to achieve fair and equitable treatment for affected rural landowners. The industrial developers, as the initiators of these projects, should be showing some leadership in moving this process forward and ensuring that it reaches an expeditious conclusion."[108]

Based on the evidence at the Preliminary Meeting, it appears that the Approval Holder is working to engage the residents. We hope this results in amicable relationships and perhaps a commitment to work together to press for the resolution of the broader land-use conflict which is apparent in this case and over which we have no jurisdiction.

VIII. DECISION

[136] Pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeals[109] on the basis that in the Board's opinion the Smulski Appellants and the NESCR Appellants participated in a review before the Natural Resources Conservation Board at which all matters in their Notices of Appeal were adequately dealt with.

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[108] *Dzurny et al v. Director, Northeast Boreal Region, Alberta Environment re: Dow Chemical Canada*, (November 24, 1999), Appeal No. 99-137 (A.E.A.B.), at paragraphs 30 and 31.

[109] The Board dismisses the following appeals: Mr. Ken Smulski (04-074) filed on behalf of the estate of J. Smulski, S.V. Half Diamond Ranch, 267554 Alberta Ltd., and S.V. Farms Ltd.; Mr. Ward and Ms. Connie Sawatzky (04-075); Ms. Tia, Mr. Ken and Ms. Alysha Bartlett (04-076); Mr. Barry and Ms. Sharon Ziegeman (04-077); Mr. Percival and Ms. Martha Henkelman (04-078); Mr. Erich and Ms. Evelyn Marquardt (04-079); Ms. Cheryl Henkelman (04-080); Mr. Brent and Ms. Cindy Marquardt (04-081); and Ms. Sylvia and Ms. Heather Garon (04-082).

IX. COSTS

[137] Before the close of the Preliminary Meeting, the Board received notice that the NESCR Appellants, the Smulski Appellants, and the Approval Holder may wish to make an application for costs. The Board requests that should the NESCR Appellants, the Smulski Appellants, and the Approval Holder wish to proceed with their applications, they are to provide their applications to the Board within two weeks of the date of this Decision. The Board will then provide the Participants with an opportunity to respond to any such applications before making its decision on costs.

Dated on April 29, 2005, at Edmonton, Alberta.

-original signed by-

William A. Tilleman, Q.C.
Chair

-original signed by-

Dr. M. Anne Naeth
Board Member

-original signed by-

Dr. Steve E. Hrudey
Board Member

Appendix A

Preliminary Meeting Transcript, March 21, 2005, page 62, lines 5 to 36, pages 63 to 67, and 68, lines 1 to 27, which provides:

"Ms. Klimek: ...[Section 63 of the] Act says, when something has been sent over for an environmental impact assessment, the Director cannot issue an approval until that process has completed itself. ...

Once that process has run its course and not everything goes to a hearing, but in this case it did, section 68 then comes into play. That section says, the Director may issue or refuse to issue an approval or registration. ... [I]n making his decision under section [68](4)(a) he must consider, or he shall consider any applicable written decision of, and goes through the NRCB, in respect to the subject matter of the approval. Then it goes on to say, he may consider evidence that was before that Board. So there is a statutory obligation on him to consider that decision, and that is the matter that we are asking this Board to look at in the appeal.

Now, ... after this process, there is an Environmental Appeals Board process established. Section 91 gives you the power to look at appealed granted by the Director. Then section 95 limits that and the question is how does it limit it in this case.

Before getting into section 95(5), 95(2) sets out what this Board must do or consider when an appeal comes before it. It says, prior to conducting a hearing of an appeal, the Board may determine if the matters are properly before it. In [subsection] (a) it says the matter was the subject of a public hearing before the NRCB. Subsection (c) is very important in this situation, and you must consider whether the Director has complied with section 68(4)(a), and that is whether the Director has considered the NRCB decision. ...

Section 95 then goes on and says, it shall dismiss it if we have participated an AEUB hearing or NRCB at which all matters included in the notice of appeal were adequately dealt with.

Now, that is your statutory scheme. And what generally happens with matters that go before NRCB is, the EIA is completed, it goes in front of that Board, and may make a determination if it is in the public interest. It does not stop there. It then flips over to the Director for the management of it, to draft the terms, to do the renewals, the amendments. So it is not completely finished with the NRCB. It is a one-time review, and then the management of that, being amendments, renewals, comes into play with the Director.

I would submit that having once been there does not give the Director home free from that day on to never have to have his decisions reviewed, and I want to go through why I think that is the case. ... The cases that you have dealt with on section 95, I would submit are not parallel to this one. They are all cases where individuals have come in and said, we do not like what the AEUB has decided, they made a wrong conclusion. They found there was minimal impact or this was not the [case], they were not satisfied with their findings of fact or conclusions. In this case, we are not disputing those at this step.

Now, another thing I think before you go to the cases is, what is your role. The cases have repeatedly said the AEUB needs to step into the Director's shoes at such a hearing. That you get to do what the Director can do. You may have new evidence, you have a different view, you bring a different perspective to it because of your expertise. But you can essentially rewrite the approval.

And my submission is that holds true here, that if you can step into the Director's shoes as a statutory right and that is your role, then you can step into the Director's shoes to look at this approval and say, we would have opposed these conditions in the face of it.

We are not going to go back and change what the NRCB found, but we may put different conditions on it. That is what we are asking you to hold a hearing into. Should there have been different conditions and to take your expertise to that.

Now, the cases on Section 95 I submit support that view. I am going to focus on the *Carter [Group]* case because I think it is one as the first one you did. You did a very thorough analysis, and I do not think the principles *per se* were overturned by the Queen's Bench. They found something had not been reviewed, but they did not go in and say the Board has approached it erroneously in a principled way. ...

Now, I am not going to spend a lot of time on the other cases because I think they are just there to say that we have not looked at it in this scenario. Some of the basic principles – the purpose of Section 95 is to avoid a multiplicity of hearings. Folks, you get one shot at a hearing to bring in your evidence, someone will look at it thoroughly and make a decision. I think that is the gist of most of the cases up to that point. That was what was said in *Carter [Group]*.

But if you turn to page 7 of that case, and this Board in looking at what are the exceptions to section 95 -- not exceptions, but where does it apply, how do we look at it? In this case when they refuse to look at it, if you look down to the last sentence of the second paragraph, this Board states, 'Mr. Carter has not shown compelling and persuasive reason why the Board has jurisdiction.'

He has not shown the crucial facts or any evidence that leads the Board to conclude the Director's approval is factually or legally unsound with respect to the NRCB proceedings.

That is the very thing we want this Board to look at in the hearing: Was the Director's approval unsound with respect to the NRCB's hearing? So that was one of the cases or things that this Board was looking at.

...[In] the next paragraph, 'It appeals to this Board the burden of proof normally lies on the appellant, in this case the Carter group. To sustain this burden, the Carter group must show by a preponderance of the evidence that the Director acted unlawfully or abused his discretion when he relied on the ERCB's decision in granting Conwest's approval.' That is the very thing at a hearing we are going to ask you to look at. Now, we concur that it would be our duty or obligation to show you that he did that properly, but that is what we want a hearing to do.

Then, at the very last paragraph it said, '...the Board interprets section 87, which is now section 95 of EPEA, to prevent the relitigation of issues. That is the sole purpose. Which have been decided and substantially remain standing, both legally and factually.' The Board will use the ERCB decision operates as a barrier to a related appeal to our Board in these circumstances.

The one that is important here, because I do not think the first four apply, is number five: whether the decision was properly relied upon by the Director.

And then at the next page, at the second paragraph, and it's talking about, the Director's discretion is properly exercised when he made a reasonable reliance on the ERCB's decision, which he did in this case.

So the tenure of this decision, I submit, is that if the one ground -- there's other ones where it was properly dealt with, and you were there. But when those happened, another ground for this Board to come in is to review the Director's discretion. That has been acknowledged in the *Carter Group*. Did he act properly on the NRCB decision?

So it is not a case of reopening that decision and going back and saying, you should not have found this on fluoride, you should not have found this, our evidence is better. That will not come before you. It is whether the recommendation that this Board, the NRCB, made with respect to those issues got translated appropriately into an approval.

The *Slauenwhite* case has a few comments in it that I submit support that, and that is at Tab 13 of our submission. At page 4 of that decision, the Justice said, pursuant to section 65(4), which is now 68(4), the Director was obliged to consider a written decision of the ERCB in reaching a decision to issue the approval of Conwest.

Then he goes on to say at page 17, that it is the conclusion of the Court that the failure by the Director to undertake the review required of him by regulation is a matter properly before this Board. I submit that if he has an obligation to consider the decision, that it becomes a matter before this Board, as this Court said, whether he failed to undertake that review properly.

Then at page 18, the Court again said: The Director's performance of that duty can and should be reviewed by the Board to ensure the assessment of environmental impacts has been made in accordance with the Act. Now, granted, this was a different obligation in the *Carter [Group]* case, because it was whether or not he had to look at something that was not before the ERCB. But this case I submit stands for the principle, when a Director has a positive duty to do something under the Act, such as consider the NRCB decision that becomes a matter that is probably before this Board.

So I submit that section 95 does not preclude this intersection step. It precludes you from going back and revisiting the decision and the conclusions, but what the Director does for it is a matter that falls squarely before you.

Now, there is another argument to that in if you want to look at the strict words of section 95 and not consider what was said in your decision in *Carter [Group]* and the Queen's Bench, is were the matters in the notice of appeal adequately dealt with?

I submit that the terms of the approval and how the recommendations were implemented were not adequately dealt with by the NRCB because they were not before it. They arose after. They could not have been dealt with because the Board only issued recommendations." (Edited for clarity.)