Appeal No. 03-147-D

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 28, 2004

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

-and-

IN THE MATTER OF an appeal filed by Wood Buffalo First Nation with respect to *Environmental Protection and Enhancement Act* Approval No. 48263-00-00 issued to ConocoPhillips Canada Resources Corp., by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Wood Buffalo First Nation* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *ConocoPhillips Canada Resources Corp.,* (28 June 2004), Appeal No. 03-147 (A.E.A.B.).

BEFORE:	Mr. Al Schulz, Board Member.
APPEARANCES:	
Appellant:	Wood Buffalo First Nation, represented by Mr. John Malcolm.
Director:	Mr. Kem Singh, Director, Northern Region, Regional Services. Alberta Environment, represented by Mr. Randy Didrikson and Mr. Darin Stepaniuk, Alberta Justice.
Approval Holder:	ConocoPhillips Canada Resources Corp., represented by Mr. Randall W. Block, Borden Ladner Gervais LLP.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 48263-00-00 on November 7, 2003, to ConocoPhillips Canada Resources Corp. for the construction, operation, and reclamation of the Surmont enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Fort McMurray, Alberta.

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

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

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

Therefore, the Board dismissed the appeal.

TABLE OF CONTENTS

I. BACKGROUND

[1] On November 7, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 48263-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to ConocoPhillips Canada Resources Corp. (the "Approval Holder"), for the construction, operation, and reclamation of the Surmont enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Fort McMurray, Alberta.

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

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

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

[5] On December 23, 2004, the Approval Holder raised motions with respect to the directly affected status of the Appellant and the review completed by the AEUB.

[6] On January 2, 2004, the Director notified the Board of the following preliminary issues associated with the appeal:

> "1. The legal status of the Wood Buffalo First Nation (WBFN);
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> 2. Whether WBFN is directly affected including issues in relation to WBFN membership;
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> 3. The validity of the appeal in light of prior Alberta Energy and Utilities Board proceedings;

4. Whether the appeal is frivolous and vexatious; and,

5. The appropriate legal forum for determination about assertions of aboriginal and treaty rights."

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

> "…did receive an application from ConocoPhilips Canada Corp. for the Surmont Commercial Oil Sands Scheme. The [AEUB] also received a number of objections with respect to the application, including an objection from John Malcolm of the Wood Buffalo First Nation. The [AEUB] dismissed all the objections on the basis that the objectors did not have standing, pursuant to s.26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the [AEUB] issued its approval on May 15, 2003."

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

[9] On January 14, 2004, and January 15, 2004, the Approval Holder submitted to the Board that the motion regarding the validity of the appeal in light of prior AEUB proceedings should be heard prior to the remaining motions raised by the Director and the Appellant's stay request are considered. The Board requested the Parties provide their comments with respect to the Approval Holder's motion.

[10] On February 2, 2004, the Board received the requested documents from the AEUB, including Approval No. 9426 issued to the Approval Holder.

[11] The Board notified the Parties on February 10, 2004, that:

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

[12] On February 17, 2004, the Board received a copy of the limited return of the Record and on February 18, 2004, forwarded a copy to the Appellant and the Approval Holder. Additional documents were provided on May 13, 2004, and copies were forwarded to the other Parties.

[13] On April 22, 2004, the Board wrote to the Parties advising that the Board had decided to conduct the Preliminary Meeting via written submissions as opposed to an oral Preliminary Meeting, as it was unable to find a common suitable date for all the Parties and the Board. In the same letter the schedule for receiving written submissions was set. The Board stated the issue was "…whether the Wood Buffalo First Nation had an opportunity to participate in a hearing before the Energy and Utilities Board at which all matters included in their notice of appeal were adequately dealt with, pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*."

[14] On April 29 and May 3, 2004, the Board received a request from the Appellant for an extension of 30 days to the deadline for filing their submission. On May 6, 2004, the Board received a letter from the Approval Holder objecting to a 30-day extension, but it was willing to accept a two week extension. The Board notified the Parties on May 7, 2004, that a 17-day extension would be granted to the Appellant, and a revised schedule for providing submissions was provided.

[15] On May 13, 2004, the Appellant wrote to the Board requesting a further extension to file their submission. The Approval Holder objected to an extension. The Board notified the Parties on May 17, 2004, that no further extensions would be allowed.

[16] The Parties provided their submissions between May 20, 2004, and June 3, 2004.

II. SUBMISSIONS

A. Appellant

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

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

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

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

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

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

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

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

[23] The Appellant stated the AEUB did not hold a hearing even though they had submitted written statements of concern within the specified timelines. They argued the public

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

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

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

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

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

interest test of the AEUB failed to protect the Appellant's members. They stated the granting of the approvals by the AEUB "…closed the door for WBFN to orally submit our concerns as a directly affected party. Our view is that oral submissions are a fundamental aspect of our tradition. Requiring that we participate in regulatory processes solely through written submissions is outside of our traditions."[8]

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

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

[26] The Appellant argued the "…absence of meaningful consultation consistent with our culture is unacceptable…" and that "…failure to be properly consulted (as a collective) in the decision-making process followed by Alberta Environment in the issuance of the above referenced approvals infringes on our constitutional rights, as Indians, and even more profoundly, as Canadians."[10]

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

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

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

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

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

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

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

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

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

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

[33] The Appellant stated the Approval Holder had provided funding ($5000 of $6000 promised) to allow the Appellant to scan through the application. They further stated:

> "Given the several volumes of the application, limited funding and the limited time available, the outcome was a minimal personal understanding of the application and virtually no understanding of the application by the WBFN. …The WBFN had no such opportunity of receiving external advice or professional assistance in presenting our concerns."[14]

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

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

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

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

[35] The Appellant argued the "…lack of opportunity for the WBFN to submit effective, informed and traditional and expert advice to the decision-makers, at this stage and earlier in the application processes amounts to a blatantly unfair process."[15]

B. Approval Holder

[36] The Approval Holder submitted that the only issue raised in the Notice of Appeal relates to whether there had been meaningful consultation with the Appellant by the Approval Holder.

[37] The Approval Holder submitted that the requirements of section 95(5)(b)(i) have been met, and the Board is required to dismiss the appeal. It stated the section expresses the legislative intent to avoid multiplicity of proceedings.

[38] The Approval Holder stated:

> "Public consultation with affected stakeholders is a core consideration by the [A]EUB when evaluating any commercial project. The [A]EUB approved the Surmont project, considered the adequacy of CPC's stakeholder consultation, including consultation specific to Malcolm/WBFN and trappers, and indeed commended CPC on the level and degree of its stakeholder consultation."[16]

[39] According to the Approval Holder, the Appellant participated in and had the opportunity to further participate in a review before the AEUB regarding the issues raised in the Notice of Appeal.

[40] The Approval Holder argued the environmental allegations raised in various filings by the Appellant were not part of the Notice of Appeal and are not material to the motion presently before the Board. The Approval Holder stated the AEUB and Alberta Environment adequately dealt with the environmental matters, and the Approval Holder had presented detailed

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

16 Approval Holder's submission, dated May 27, 2004, at paragraph 5.

evidence on environmental matters that was comprehensively reviewed by the AEUB and Alberta Environment.

[41] According to the Approval Holder, the Appellant received notice of the AEUB's review of the project through stakeholder consultations, including being served the application materials, and public notification by the AEUB.

[42] The Approval Holder explained that, between October 15, 1998, and February 1, 2000, it had conducted at least 15 stakeholder contacts directly with the Appellant or their members to discuss matters related to the project, including the stakeholder consultation process, project updates, trapper matters, employment opportunities, and environmental impacts.

[43] The Approval Holder stated its application included a description of the stakeholder and community consultation process, a Traditional Land Use Study, and an environmental impact assessment report. The Approval Holder explained a copy of the application was provided to the Appellant as well as copies of its responses to subsequent supplemental information requests by the AEUB and Alberta Environment. It stated it also provided the Appellant with its responses to a number of questions posed by the Appellant. The Approval Holder explained the Appellant was compensated for reviewing and providing comments on the application materials.

[44] The Approval Holder stated the AEUB published a notice of application in the local newspapers, and a copy was mailed directly to the Appellant, and those with bona fide objections to the project were to file their objections with the AEUB.

[45] The Approval Holder explained the Appellant responded to the Notice of Filing, submitting a letter to the AEUB and Alberta Environment, setting out a number of general allegations respecting the project but no details regarding how the project may affect the Appellant specifically.

[46] The Approval Holder stated the Appellant filed a letter of objection with the AEUB and "…included a number of unsubstantiated allegations, some of which were clearly irrelevant to the [A]EUB's review and beyond its jurisdiction."[17] According to the Approval

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[17] Approval Holder's submission, dated May 27, 2004, at paragraph 28.

Holder, the AEUB responded to the Appellant's letter of objection, stating the letter did not contain sufficient information for the AEUB to understand the Appellant's position and make a determination on whether the Appellant may be directly and adversely affected. The Approval Holder stated the Appellant did not reply to the AEUB's correspondence requesting additional information.

[47] The Approval Holder stated a copy of the AEUB approval was sent to the Appellant.

[48] The Approval Holder submitted the Appellant filed submissions to the AEUB on at least three occasions, and the Appellant was afforded the opportunity to provide additional details respecting their interests and how they may be affected by the project but did not respond. Therefore, according to the Approval Holder, the Appellant had the opportunity to participate in and did participate in the AEUB review of the project.

[49] The Approval Holder submitted the adequacy of its consultation with the Appellant was the only matter identified in the Notice of Appeal. The Approval Holder stated the AEUB considered all matters addressed in the application material and accounted for them in the decision, including the public consultation program and specific consultation activities with the Appellant. The Approval Holder explained the application materials also included information related to traditional land use and environmental matters, including water management, waste management, cumulative effects, air quality, noise, surface hydrology, water quality, ground water, aquatic resources, geology, terrain, soil, vegetation, forest resources, wildlife, land use, and reclamation and abandonment.

[50] The Approval Holder referred to a letter from the AEUB in which it commended the Approval Holder for its proactive consultation process, and its expectation the Approval Holder would continue its stakeholder consultation and honour its commitments to stakeholders. The Approval Holder stated it continues to meet the expectation.

[51] The Approval Holder argued the Appellant's submission did not establish any new matters that were not adequately dealt with by the AEUB, and the Appellant "…should not be allowed to re-litigate the Surmont project through an *EPEA* appeal."[18]

C. Director

[52] The Director explained the Approval was issued after the AEUB conducted a review and issued an approval for the project pursuant to the *Oil Sands Conservation Act*, R.S.A. 2000, c. 0-7.

[53] The Director stated the Appellant responded to the AEUB Notice of Filing and Alberta Environment's Notice of Application. The Director stated he accepted the letter as a Statement of Concern in the EPEA application review process.

[54] According to the Director, the AEUB and Alberta Environment conducted a review of the application and requested further information from the Approval Holder, including an update on its public consultation efforts.

[55] The Director stated the Appellant responded to the AEUB's Notice of Application, and the AEUB requested the Appellant provide additional information in connection with determining the Appellant's standing. According to the Director, the Appellant did not respond to the AEUB's request.

[56] The Director stated he afforded the Appellant the opportunity to comment on a draft approval for the project.

[57] The Director submitted that section 95(5)(b)(i) "…precludes an appeal from proceeding where the notice of appeal raises a matter that was not specifically addressed during an [A]EUB hearing or review and the appellant had an opportunity to raise the matter during the [A]EUB proceeding but failed to do so,"[19] or, alternatively, section 95(2)(a) of EPEA provides the Board with authority to prevent an appeal from proceeding on the same basis.[20]

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18 Approval Holder's submission, dated May 27, 2004, at paragraph 45.

19 Director's submission, dated May 27, 2004, at paragraph 23.

20 Director's submission, dated May 27, 2004, at paragraph 24.

[58] The Director submitted that "…fairness and efficiency dictate that an appellant should be precluded from being allowed to proceed with an appeal ground related to a matter that it could have advanced during an [A]EUB hearing or review."[21] The Director stated section 95(5)(b)(i) also prevents those who are dissatisfied with an AEUB decision from seeking redress from this Board, and instead, they should pursue the review and appeals options available under the AEUB administered legislation.

[59] The Director argued the Appellant did not take the opportunities to enhance their participation in the AEUB process, as they did not respond to the AEUB's request for further information. The Director stated there was no evidence the Appellant had any issue with the AEUB letter advising the approval was pending with conditions and subject to approval of the Lieutenant Governor in Counsel. He submitted there was no evidence the Appellant pursued courses of action open to them under the *Energy Resources Conservation Act* regarding the AEUB's determination on standing or the disposition of the application.

[60] The Director submitted that all of the matters raised in this appeal were thoroughly dealt with by the AEUB. The Director referred to the AEUB record and the references to the project's effects on water, land, trapping, human health, muskeg, and caribou, and the Approval Holder's consultation process.

[61] The Director concluded by stating the Appellant received notice of, participated in or had the opportunity to participate in the AEUB review of the project, and all matters included in the appeal were adequately dealt with. He submitted the Appellant did not use the opportunities available to put the matters before the AEUB during the review, and they should not be allowed to pursue a remedy through this Board because they were dissatisfied with the AEUB decision.

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[21] Director's submission, dated May 27, 2004, at paragraph 26.

III. ANALYSIS

A. Statutory Basis

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

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

B. Discussion

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

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

[64] The AEUB notified the Board that no public hearing was held with respect to the project.[22] Therefore, what the Board must determine is whether the Appellant was aware of and was given the opportunity to participate in the AEUB process. As the Board stated in *Bildson*,[23]

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

> "The Board also received a number of objections with respect to the application, including an objection from John Malcom (*sic*) of the Wood Buffalo First Nation. The Board dismissed all the objections on the basis that the objectors did not have standing, pursuant to s.26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the Board issued its approval on May 15, 2003."

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

"…the underlying question in this appeal is whether Mr. Bildson had a reasonable chance to make his views known to the [A]EUB."[24]

[65] The Appellant had submitted a letter to the AEUB in response to the initial notice of the application. As the letter did not provide sufficient information on which the AEUB could make a fair and reasonable assessment on whether the Appellant was affected by the project, the AEUB requested the Appellant provide additional information. In its letter to the Appellant, the AEUB provided a guideline as to the type of information it was seeking and would be required for the Appellant to be granted standing.[25] The Appellants were also warned that failure to provide the information by a specific date would result in the AEUB continuing its review and processing of the application.

[66] If the Appellant had made some effort to comply with the AEUB request for further information, and then the AEUB had not granted standing, this Board may have considered the application of section 95(5)(b)(i) differently. However, the Appellant was given every opportunity to provide additional information but chose not to respond to the AEUB request. As they did not elaborate on how the application would affect them, it can be interpreted as their concerns had been dealt with and they no longer had concerns/issues with the application.

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

[25] See: Letter from AEUB to the Appellant, dated January 31, 2003, in which the AEUB stated:

> "The Board will consider that you have a legally recognized right if you own, lease or otherwise have a direct interest in lands on which the proposed facility is to be located or on adjacent lands or other lands which may be impacted by a proposed project and the following criteria are addressed:
>
> - Is your health or safety affected, or property rights or other economic interests? Examples of effects that may be considered by the Board include: negative interference with livelihood or commercial activity on the land, devaluation of land and house, damage to property, concerns for safety of persons or animals, negative effects on health from contaminants in water, air, soil or noise.
> - Are you affected in a different way or to a greater degree than members of the general public?
> - Are you able to show a reasonable and direct connection between the activity complained of and the rights of interests alleged to be affected?
>
> You should provide sufficient information so that the Board is able to clearly understand your position and make a reasonable decision at this stage of the application that you may be directly and adversely affected by a project."

[67] Without the additional information requested, it would be very difficult to find the Appellant affected. In their letter to the AEUB, the Appellant only stated concerns in very general terms.[26] The information provided does not demonstrate the connection between the project and the effect on the Appellant. Without this nexus clearly demonstrated, the AEUB perhaps could not accept the Appellant as affected. This does not necessarily mean that the AEUB would have found the Appellant affected even with the additional information, and it is not this Board's place to second guess what the AEUB might have done, but it would have demonstrated to this Board that they had taken advantage of every opportunity provided to them to participate in the AEUB process.

[68] If the Appellants were not satisfied with AEUB outcome, there are review procedures in place in the legislation under the AEUB's jurisdiction. To illustrate, under the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "ERCA"), there are review and appeal mechanisms available. Section 39 of the ERCA provides:

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

Section 40(1) of ERCA states:

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

Section 41 provides an appeal mechanism:

> "(1) Subject to subsection (2), on a question of jurisdiction or on a question of law, an appeal lies from the Board to the Court of Appeal.
>
> (2) Leave to appeal shall be obtained from a judge of the Court of Appeal on application made within one month after the making of the order, decision or

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[26] See: Letter from the Appellant to the AEUB, dated January 23, 2003. The Appellant stated it had concerns "…for the following reasons:

- Displacement/Fragmentation of our Wood Buffalo 1st Nation Citizens
- Displacement/Fragmentation of our wildlife
- Contamination of our drinking water
- Contamination of our fish spawning grounds
- Contamination of our underground fresh water streams
- Racism and discrimination towards our Wood Buffalo 1st Nations Citizens
- Failure to fulfill Consultation Agreement with Gulf Canada Resource Ltd. and Wood Buffalo 1st Nation signed May 7, 1999."

> direction sought to be appealed from, or within a further time that the judge under special circumstances allows…."

[69] These review and appeal mechanisms were available to the Appellant, but instead an appeal was filed with this Board. As stated in *Bildson*:

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

[70] Section 95(5)(b)(i) only requires that a party has had the opportunity to participate in the AEUB process. The Appellant started into the process by responding to the Notice of Application, but then failed to participate further. If the opportunity was there to participate in the AEUB process, and the Board believes it was, and the party chose not to make use of the opportunity, they cannot now use another process to achieve what should have been done under the original process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[77] The Approval Holder stated it had consulted with members of the Appellant at least 15 times during the application process. The Approval Holder, as part of its application, included information on the stakeholder consultation undertaken; information on a traditional land use study that was completed; and an environmental impact assessment report. All of these documents relate to the Appellant's concerns regarding the consultation process and the rights that may be affected by the project, plus any environmental concerns raised. This information was included in the application and was reviewable by the AEUB.

[78] When the AEUB assesses projects, the public interest element is always a part of its decision making process. If a person has a specific concern regarding the project and how they will be affected, it is important to convey the information to the AEUB. The AEUB cannot guess what issues will be concerns to persons in the area. It is also not acceptable to withhold an

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

[32] *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental*

issue in a veiled attempt to leave the door open for the matter to be heard by a different board. If the opportunity is there to participate and provide information to the AEUB, that opportunity must be taken, unless new information surfaces that was not available at the time the AEUB was making its decision. Section 95(5)(b)(i) of EPEA was included to prevent an abuse of the administrative process, and as stated, to avoid duplication in the hearing process and to ensure there is no multiplicity of proceedings based on similar evidence.[33] As previously stated in the Board's decision, *Carter Group*, "…an Appellant cannot raise the challenge to an Approval, arguments which were available to the Appellant when the [AEUB] heard the evidence and made its decision."[34]

[79] In their submission, the Appellant admitted the Approval Holder had agreed to pay the Appellant $5000 to $6000 to review and provide comments regarding the application. The Appellant then argued they were unable to hire experts to review the application like other First Nations in the area had done. There was nothing in the agreement, to the Board's understanding, that prevented the Appellant from using the funds provided to hire an expert, or to combine their funds with other First Nations to have the same expert represent all of their issues.

[80] The list of issues the Appellant considered that needed to still be addressed is very similar to the table of contents page of the Final Terms of Reference for the project.[35] As such, the Approval Holder was required to provide sufficient information on these issues in order to receive approval from the AEUB and Alberta Environment, and the AEUB would have reviewed the information provided prior to the approval being issued.

[81] The Appellants submitted a list of concerns to the AEUB on June 1, 2001. As part of the submission to the AEUB, the Appellants raised issues regarding Aboriginal interests in the lands, the duty to consult, cumulative effects, impacts on traditional land use, socio-

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Protection (June 28, 1996), E.A.B. No. 95-025.

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

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

[35] See: Director's Record.

economic matters, and impacts on wildlife, air quality, noise, and water.[36] The issues raised by the Appellant in their Notice of Appeal and submissions appear to have been the same issues brought in front of the AEUB. The Approval Holder provided responses to the Appellant's questions; land use studies were conducted and Appellant members participated; and the Appellant was contacted as part of the stakeholder and community consultation process. After the responses to their questions were received, the Appellant did not continue in the AEUB process. If concerns remained, that was the time they should have been raised with the AEUB.

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

IV. CONCLUSION

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

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

"*original signed by*"

Mr. Al Schulz
Board Member

[36] See: Director's Record.