Alberta
ENVIRONMENTAL APPEAL BOARD

Alberta Treasury Branches Plaza
400, 9925 - 109 Street
Edmonton, Alberta
Canada T5K 2J8

Telephone 403/427-6207
Fax 403/427-4693
Bulletin Board 403/422-4992

Appeal No. 94-017

Preliminary Meeting: June 15, 1995
Date of Decision: August 23, 1995

IN THE MATTER OF Sections 84, 85, 86 and 87 of the *Environmental Protection and Enhancement Act,* (S.A. 1992, c. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed by Dr. Martha Kostuch with respect to the Amending Approval issued by the Director, Air and Water Approvals Division, Alberta Environmental Protection to the Alberta Cement Corporation.

DECISION

Cite as: Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection.

PRELIMINARY MEETING BEFORE:

William A. Tilleman, Chair
David H. Marko, Vice-Chair
Max A. McCann

REPRESENTATIONS:

Appellant:	Dr. Martha Kostuch, represented by Jennifer J. Klimek (counsel)
Other Parties:	Director, Air and Water Approvals Division, represented by Wally Nahulak and William McDonald (counsel)
	Alberta Cement Corporation, represented by Aage Tottrup and Richard C. Secord (counsel)

I. BACKGROUND

On October 31, 1994, the Director of Air and Water Approvals, Alberta Environmental Protection (the Director) issued Amending Approval No. 93-WP-042B and 93-AP-099B (94) (the Approval) to the Alberta Cement Corporation (Alberta Cement). The effect of the Approval was to *amend* the Permits to Construct by extending the deadline for commencement of construction of the cement plant from November 1, 1994 to November 1, 1995 and providing for additional soil and groundwater monitoring.[1]

Ms. Klimek, on behalf of Dr. Martha Kostuch (the Appellant), filed a notice of objection with the Environmental Appeal Board (the Board) on November 28, 1994. The Appellant had previously submitted a statement of concern to the Director with respect to the proposed Approval, and she remained opposed to it. On November 30, 1994, the Board wrote to the Director advising him that the appeal had been filed and requesting a copy of the Approval as well as the application for it. On the same date, Alberta Cement was informed that an appeal had been filed. Dennis Eriksen, Manager of the Regulatory Approvals Centre, subsequently responded to the Board on behalf of Alberta Environmental Protection and provided the documentation as requested.

The Board determined that this appeal raises the following issues:

A. Is the Appellant "directly affected" by the amendments to an existing Approval as required for standing to appeal an Approval[2]?

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[1] Alberta Environmental Protection Permits #93-WP-042 and #93-AP-099 issued pursuant to the *Clean Water Act*, R.S.A. 1980, c. C-13, ss. 3 & 4, and *Clean Air Act*, R.S.A. 1980, c. C-12, ss. 3 & 4, were amended by Amending Approval #93-WP-042A and 93-AP-099A (94) pursuant to the *Environmental Protection and Enhancement Act.*

[2] S.A. 1992, c. E-13.3, s. 84(1)(a)(ii) and (iv).

B. Do the transitional provisions of the *Environmental Protection and Enhancement Act* (the Act) operate to deny the Appellant the opportunity to appeal the construction and/or operation of the cement plant?

The Board sent letters to the three parties on February 6, 1995 requesting written representations on the interpretation of the transitional provisions of the Act and on the issue of whether the Appellant was "directly affected" by the Director's decision. Responses were to be submitted by February 24, 1995. Counsel for the Appellant requested a one week extension, which was granted, and all of the parties provided their answers to the Board by March 3, 1995. The Board then offered the three parties the opportunity to reply to the answers that had been filed and the issues that arose therein, and submissions were received from Ms. Klimek on behalf of the Appellant and from Mr. Secord of Parlee McLaws for Alberta Cement.

On April 11, 1995, the Board decided to hold a preliminary meeting for the sole purpose of allowing all parties to present evidence and submissions on the issue of standing, i.e., whether the Appellant was "directly affected" by the Approval. It scheduled that meeting for May 12, 1995. (This was not a suitable date for the Appellant, so the preliminary meeting was rescheduled for June 15, 1995.)

II. THE STANDING ISSUE

The Appellant filed her notice of appeal pursuant to s. 84(1)(a)(iv) of the Act. This section states:

> A notice of objection may be submitted to the Board by the following persons in the following circumstances:
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> (a) where the Director

(i) issues an Approval,

(ii) makes an amendment, addition or deletion....

A notice of objection may be submitted

(iv) by the Approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 69(1) or (2), or....

As a preliminary matter, arguments were made that the standing issue should be disposed of before other jurisdictional issues. The Board points out that standing is a jurisdictional issue. As such, it can be raised at any time after the filing of the notice of appeal. In this appeal, we propose to deal with the standing issue first.

III. SUMMARY OF THE EVIDENCE ON THE STANDING ISSUE

The evidence of the Appellant was that she moved to the Rocky Mountain House area twenty years ago and became active in protecting the environment. The Board heard of her extensive involvement in Energy Resources Conservation Board (E.R.C.B.) hearings into gas plants in the area, particularly the relicensing of the Husky Ram River gas plant. This involvement was the result of her concern over the effects of air emissions on animal health.

When asked by the Board how her connection to the gas plant was relevant to the proposed cement plant, she explained that both plants emitted air pollutants and the addition of the

cement plant to the area would increase those emissions. In other words, there would be a cumulative environmental impact.

The Appellant gave evidence of her responsibility as a veterinarian for the general welfare of all animals and her belief that wildlife and domestic animals will be affected by the proposed cement plant. She gave evidence of her involvement in each of the steps of the proposed cement plant project, including input into the construction permits and the terms of reference for the environmental impact assessment of the related quarry. The Appellant stated that her major concern is for the environment in the area and she believes the plant will negatively affect that environment. She contends that an environmental impact assessment is required to determine appropriate mitigation measures to reduce those effects.

She also told the Board that, as an environmentalist, she works toward protecting the environment as a public consultant and as a member of a federal group involved in air quality issues.

When asked by the Board how the proposed cement plant would specifically affect her, she stated that she would be affected by the emissions of CO_2, particulates, nitrogen oxide, and heavy metals. She was unable to say, however, whether the emissions would have an unacceptable effect. She also suggested that run-off from the plant may affect fish in the Swan River but did not fully explain the connection.

IV. SUBMISSIONS OF THE PARTIES ON THE STANDING ISSUE

The Appellant

Counsel for the Appellant, Ms. Klimek, argued that to assess whether the Appellant is "directly affected," the Board should consider the effects of the original approvals and the amendments together, not just the environmental effects of the amendments.

Ms. Klimek submitted that once the prior approvals were amended they became new approvals, all of which become the substance of matters reviewable by the Board.

In support of a fair and broad interpretation, Ms. Klimek relied on a number of cases[3] for authority that the Board should look to the purpose of the legislation when construing its provisions. For example, in the *CNR*[4] case, the court held that:

> The purpose of the Act [Ontario's Environmental Protection Act[5]] is to provide for the protection and conservation of the natural environment and should be liberally construed.[6]

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3 *CNR v. Ontario (Director of Environmental Protection Act)* (1991), 80 D.L.R. (4th) 269; *R. v. 264544 Alberta Ltd. and Fix*, [1986] 1 W.W.R. 365 (Alta. C.A.); *Atco Ltd. et al. v. Calgary Power Ltd. et al.* (1980), 14 Alta. L.R. (2d) 106 (C.A.), aff'd [1982] 2 S.C.R. 557, 23 A.L.R. (2d) 1.

4 *Ibid.*

5 R.S.O. 1980, c. 141.

6 *CNR v. Ontario (Director of Environmental Protection Act)* (1991), 80 D. L. R. (4th) 269 at 278.

Counsel also relied on *Syncrude Environmental Assessment Coalition v. Alberta (Energy Resources Conservation Board)*[7] in interpreting the Act. In that case the court said:

> We are aware, as is the legislature and the E.R.C.B., of the need to encourage the liberal assessment of environmental concerns. But equally, if the wording of a statute supports an interpretation which better encourages the smooth working of the system the statutory regime purports to regulate, we will favour, if we can, that interpretation as opposed to one which promotes uncertainty, friction and confusion.[8]

Ms. Klimek submitted that the Appellant is affected by the cement plant "in a manner that surpasses other residents". For example, the Appellant enjoys and uses the area affected by the plant; has been actively involved in protecting the area for over 15 years, as a public consultant, an intervenor in E.R.C.B. hearings dealing with a local gas plant; and has been a participant in all public meetings involving the surrounding environment. The Appellant also provided input into the original approvals to construct the cement plant.

Ms. Klimek referred to previous Board decisions[9] and argued that the proper test to determine the persons who are "directly affected" is flexible, always depending upon the facts of each case.

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7 (1994), 17 Alta. L.R. (C.A.) 368.

8 *Ibid.* at 372.

9 *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (Alta. E.A.B.); *Maurice Boucher v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 93-004 (Alta. E.A.B.); *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection* (11 May 1995), Appeal No. 95-002 (Alta. E.A.B.).

Alberta Cement

Mr. Secord argued strongly that the Board was restricted to a consideration of the effects of the amendments on the Appellant, not the effects of the original approval, and notwithstanding that a licence to operate was never issued (following the earlier permits to construct which were issued). He based his argument on the wording of s. 84 of the Act and the assertion that the Act does not contemplate a right to appeal an approval every time an amendment is issued. In his view, this would result in "the same ground being covered over and over again."

He argued that the extension of time to construct the plant simply means that the environmental effects of the original approval will occur in 1995, rather than 1994. It was Alberta Cement's position that the Appellant provided no evidence as to how the amendments to the original approval would affect her.

Mr. Secord pointed out that, while the Appellant did receive half of her costs from the E.R.C.B. hearings on the Husky Ram River Gas Plant, the E.R.C.B. found that she was not a local intervenor and that she would not be directly or adversely affected by the plant. Assuming it was relevant, it became clear that local intervenor status under the *Energy Resources Conservation Act*[10] involved a different test from that in this Act.

Regarding the evidence of the Appellant, Mr. Secord argued that the Appellant's use and enjoyment of the area, including the inconvenience of increased rail traffic, would not be affected uniquely as compared with other residents of the area. He further argued that, while

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[10] R.S.A. 1980, c. E-11.

the Appellant may have a special interest in the environment, this was insufficient to meet the "directly affected" test. He relied on two cases of the Alberta Court of Queen's Bench. In the first case, *Canadian Union of Public Employees v. WMI Waste Management Canada Inc.*,[11] Mr. Justice Agrios was called upon to interpret s. 4 of the *Public Health Act*,[12] which requires a person to be "directly affected" in order to acquire standing to appeal. He held that:

> "Affect must be something more direct than a general affect on the public at large". [13]

and that section 4

> " ... does not authorize appeals to the Appeal Board by public interest groups or organizations purporting to act in the general interest of the residents of the municipality".[14]

That interpretation was followed in the second case, *Friends of the Athabasca Environmental Assn v. Public Health Advisory and Appeal Board*.[15] However, in the latter case, Veit J. said:

> "...decisions granting standing to environmental and similar groups must always be assessed in their procedural context".[16]

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[11] (February 9, 1994), Edmonton 9303-21182 (Q.B.).

[12] S.A. 1984, c. P-27.1.

[13] *Supra,* note 11 at 8.

[14] *Supra,* note 11 at 9.

[15] (1994), 18 Alta. L.R. (3d) 92.

[16] *Ibid.* at 104.

Alberta Environmental Protection

Mr. McDonald, on behalf of the Director of Air and Water Approvals, took the position that the onus was on the Appellant to provide evidence of the special indicia of standing, i.e., that the subject matter of the Approval will affect her more than any other member of the general public.

The Director took no position on the Appellant's standing, other than to say the burden to demonstrate that she is directly affected rests with the Appellant.

V. DISCUSSION OF THE STANDING ISSUE

Since the Board's inception in 1993, we have received more than 60 appeals and, like the appeal before us, many of those appeals have raised the question of "directly affected". We have not found a universal, simple and easy test to determine when a person is "directly affected" which can be applied automatically in all cases. We believe that this determination should be made on a case by case basis, taking into account the varying circumstances and facts of each appeal.

As a starting point, one derives some help from dictionary definitions. According to Black's Law Dictionary:[17]

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[17] 6th ed. (St. Paul: West Publishing Company, 1990).

"Direct" is defined as:

"immediate; proximate;... without any intervening medium, agency or influence"... .

"Affect" is defined as:

"to act upon; ... often used in the sense of acting injuriously upon persons and things ... or produce an effect or result upon"; ... .

This Board believes that the word "directly" requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Approval in question. It seems clear that generalized grievances do not give a person standing before this Board.

The Director also stated, however, that employees of Alberta Environmental Protection (the Department) will look after this plant and the environment. The Director's argument is that the Appellant does not have to worry about this appeal, because the matter will be under the scrutiny of the Departmental watchdogs.

Standing, however, is not defeated by assumptions or assurances that Department employees will act to protect the environment, if the need later arises. Nor is standing acquired by allegations that the Department will not do its job in the future. Such promises or references to future prosecutorial discretion (or any other type of discretion) are matters that will be determined in the future. No matter how meritorious these claims are, they cannot be used as a reason to grant or deny standing.

In understanding the range of the "directly affected" interests, it is also helpful to turn to the courts. Until approximately the last 10 years, Canadian courts, drawing on English common law, held consistently that standing for judicial review of a tribunal decision required that a person be "directly" or "specially affected" or "aggrieved". This required the applicant to establish some "sufficient private or personal interest" in the subject matter of the proceedings. Some courts spoke of "special interests" or "special damage peculiar to [the applicant]": *Boyce v. Paddington Borough Council,*[18] and *Australian Conservation Foundation v. Commonwealth of Australia.*[19] In practice this meant either an economic interest or some other special interest different than that of the public at large. These categories, but particularly the latter, raised the question of an appropriate causal relationship between the effects complained of and the decision attacked. The judicial response was the concept of "directness". See *Finlay v. Canada (Minister of Finance);* [20] *Rothmans of Pall Mall Ltd. v. M.N.R.*[21] While we appreciate that standing for judicial review is a different matter than standing to appear before a board, we do find these concepts helpful.

In the context of a different Alberta board, the Public Health Advisory and Appeal Board, we note that the word"directly" is clearly an adverb because it does restrict the word "affected". As Madame Justice Veit stated in *Friends of Athabasca Environmental Assn. v. Public Health Advisory and Appeal Board*[22]:

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[18] [1903] 1 Ch. 109 at 114.

[19] (1980), 28 ALR 257 at 268 (Aust. H.C.).

[20] [1986] 2 S.C.R. 607.

[21] [1976] 2 F.C. 500 (Fed. C.A.).

[22] *Supra,* note 15.

> I agree with the decision of Agrios J. in the related, and as yet unreported case of *WMI Waste Management*. First, the phrase "directly affected" is different from the mere use of the word "affected". The adverb "directly" brings a restrictive connotation to the words "affects". Second, the only case relied on by the applicants is *Friends of the Island*. In that case, the court's interpretation operated within a special context [p. 736]: "difficulties which had been created by the earlier division of jurisdiction between the Trial Division and the Appeal Division [of the Federal court]". No such background applies here to the interpretation of s. 4 (2) of the Alberta *Public Health Act*. Moreover in her decision, Reed J. held that, under its statutory provision that limited the right of judicial review to parties "directly affected", the Federal Court had the discretion to grant standing where an applicant met the common law test for standing: a serious issue is raised, the applicant shows a genuine interest, and there is no reasonable and effective manner in which the issue may be brought before the court. In her case, she concluded that there was no other reasonable way for the matter to have been brought before the court. She was not setting general standards of interpretation that public interest groups should always be granted standing under the rubric "directly affected". In any event, to the extent that she obliterated any distinction between "directly affected" and "affected", I agree with Agrios J. that her decision does not represent the weight of authority in this province.[23]

Our Board adopted consistent reasoning in the *Ross*[24] case:

> To be directly affected under section 84(1)(a)(v), this Board feels the person who appeals must have a substantial interest in the outcome of the approval that surpasses the common interests of all residents who are affected by the approval [see the Board's February 2, 1994 decision in *Maurice Boucher v. Director, Environmental Protection*]. "Directly affected" depends upon the chain of causality between the specific activity approved (the storm sewer outfall) and the environmental effect upon the person who seeks to appeal the decision.
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> In our opinion, Mr. Ross has not established a causal connection between the storm sewer outfall and himself. He does not own land next to the Bow River. He has not raised any particular legal claim to

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[23] *Supra*, note 15 at 104.

[24] *Gerald M. Ross v. Director, Alberta Environmental Protection* (24 May 1994), Appeal No. 94-003 (Alta. E.A.B.).

> the Bow River such as riparian rights. He does not use water downstream of the storm sewer outfall, and although he does have a water well, the well at its lowest point is still approximately 186 vertical metres above the Bow River. Mr. Ross' property is also located at least 2400 horizontal metres from the storm sewer outfall. The Board does not see how the use and enjoyment of his own
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> property is directly related to the storm sewer outfall, or dependent upon the water quality or quantity of the Bow River.[25]

Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. "Directly" means the person claiming to be "affected" must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be "directly affected" if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic. Section 2 states:

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[25] *Ibid.* at 4.

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
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> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
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> (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; ....

Because most of the interests referred to by individual appellants have been related to the environment or human health (both of which are specifically referred to in section 2 of the Act), there has been less occasion to date for the Board to focus on the second (more legal) ingredient for standing, and has instead focused more of its attention on assessing whether the appellants meet the factual tests for standing (the first test).

Therefore, as correctly pointed out by all parties to this appeal, the facts of each case will determine who may appeal actions taken or decisions made by directors from the Department of Environmental Protection. Again, the general principle was stated by our Board in its first decision[26] dealing with directly affected. We repeat this important point:

> "[We] believe that the definition of which persons are "directly affected" is flexible and will depend upon the circumstances of each case".[27]

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

[27] *Ibid.* at 6.

The determination of whether a person is directly affected is a multi-step process. First the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act.

If the person meets the first test, they must then go on to show that the action by the Director will cause a direct effect on that interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified.

VI. APPLICATION TO THE PRESENT CASE

In the appeal before us, counsel for Alberta Cement and the Director have correctly pointed out that the onus lies on the Appellant to show that she is "directly affected". We agree.

In some cases, this might raise a difficult question as to when in the proceedings the Appellant must discharge this burden. As the Court of Appeal of Alberta commented in *Leduc (County No. 25) v. Local Authorities Board*[28]:

> If the section is to be construed as requiring the person proposing to intervene to show with certainty that his rights *will* be affected, how is

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[28] (1987), 54 Alta. L.R. (2d) 396.

> he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will involve.
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> The only certain way to determine that would be to require each person to call evidence on the point. In the present case, Mr. Zajes would presumably be forced to call enough evidence to establish the potential for a serious effect on him if the annexation takes place. That would be to force him to succeed on the principal issue in the hearing before he has a right to appear in it, which in our view would be applying the statute to bring about an absurd conclusion. On the other hand, if the Board were required to wait until the petitioning city had called evidence as to the effect of annexation and that had been answered by the other parties, the hearing would be virtually completed before the preliminary question of who are to be parties could be answered. Meanwhile, would those seeking status be permitted to take part?
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> In our view, the legislature cannot have intended that degree of certainty in this definition. The overriding purpose sought to be attained by the Administrative Procedures Act is fairness in the administrative process. The board must ensure that those persons with a serious interest in the proceeding are fairly heard. At the same time, it must protect itself, and the legitimate parties to the hearing, from having the whole proceeding complicated and made more expensive by those with no real interest at stake. The board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing.[29]

This is why we gave the Appellant an opportunity to lead evidence and make submissions about the standing issue, before we proceeded to a hearing.

It is significant that Mr. Secord points out that the Appellant does not appear to be differentially affected *vis a vis* the general community in the Rocky Mountain House area. While the point is significant, it is not dispositive in every case. In *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta*

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[29] *Ibid.* at 399-400.

Environmental Protection[30] our Board found a community group to be directly affected because, *inter alia,* many members of the affected group would have surely had standing in their own right. The Board noted that:

> ...the residents of the community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighborhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emission to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbors of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean District who lived immediately adjacent to the facility are not directly affected, no one ever will be.
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> Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of the air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the act to involve the public in the making of environmental decisions which may affect them.[31]

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[30] (11 May 1995), Appeal No. 95-002 (Alta. E.A.B.).

[31] *Ibid.* at 4. While the community group was given standing, the appeal was resolved at a pre-hearing meeting. Details of the resolution are found in *Hazeldean Community League v. Director of Air and Water Approvals, Alberta Environmental Protection* (6 July 1995),

This Board found group standing in *Hazeldean* because the environmental effects were common to a group of people living in close proximity to the source of that effect. On the facts of that case it would have been unreasonable to deny standing. This would seem to be true whenever the nature of the pollution renders it impossible to prove or to differentiate effects or impacts between individuals who will clearly be directly affected. To deny standing to certain individuals on the basis that *many other* individuals will also be directly affected is illogical. It would mean that widespread pollution events that generate direct effects on groups of individuals (or worse yet, an entire community) could be questioned by nobody.

VII. DECISION

In this appeal, the Appellant has identified her various interests as the following:

1. her long standing involvement in protecting the environment in and around Rocky Mountain House;
2. an interest in the general health and welfare of animals as part of her professional responsibility as an intervenor; and
3. her use of the area adjacent to the plant for hunting and recreation.

To acquire standing, the Appellant first asserts that her long standing interest in the environment of the Rocky Mountain House area (and all of Alberta, for that matter) is genuine. We agree. She has obviously been a continuing participant in E.R.C.B. hearings in

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Appeal No. 95-002 (Alta. E.A.B.).

the area, and has participated with governments and various applicants in the area for several years. This evidence is not disputed.

The Appellant also alleges a more direct harm from the plant, in that the alleged pollution will affect a deterioration in animal health, and therefore, affect her professional (veterinarian) work.

Finally, she claims to be a recreational user of the public lands in the area surrounding the plant site. For example, she has been a successful deer hunter in the area immediately adjacent to the site.

Is there a direct effect?

The Appellant's interest in the general health of animals was based on her past observations of health effects on animals, which she believes were related to air pollution. She told the Board that this was one of the reasons underlying her involvement in environmental matters. She also indicated that as a result of raising environmental issues, emissions have been substantially reduced in the area.

Our consideration of the evidence and arguments made by the Appellant's counsel suggest a genuine concern by Dr. Kostuch for the environment west of Rocky Mountain House. There is the potential for cumulative air emissions with the addition of this plant that may affect the downwind plant and animal communities, including residents of Rocky Mountain House. However, these effects will concern the general community. Most of those who might be affected live in excess of 50 km away, although some live and own land much closer to the proposed cement plant.

The Board also accepts that the Appellant, as a Doctor of Veterinary Medicine, has a genuine concern with respect to the health of animals. Extending this argument to standing would rest the case on a vocational or professional relationship (or harm to that relationship) because of the alleged environmental effects from the Approval before us. Yet, the Appellant gave no evidence that this Approval would cause effects on animals. Any effect on animals, domestic or wild, belonging to her clients would be collateral to the Appellant, as presumably owners or guardians of the animals would bring them to her for medical treatment. The Appellant says that her professional responsibility imposes a duty to raise issues of general animal (domestic or wild) health. While this may be true, the Act does not allow this to be a basis for standing and, while the Appellant stated that she had seen adverse effects on animal health in the past, which she believes were related to air quality, the Board found no demonstrable causal connection between the Approval appealed and the assertions made by the Appellant in her professional capacity as a veterinarian. The Board finds that this alleged effect is a possibility, and it may impact her personally as a veterinarian, but that it is too remote to confer standing.

The Appellant also presented evidence of personal use of the area (deer hunting). The Board finds this to be potentially relevant to the standing issue. However, the Appellant did not show, or even suggest, that this particular Approval would have a causal relationship with the deer population. There was some evidence that government studies have been initiated on wild ungulates, but those studies were not conclusive. To the contrary, there was evidence that the number of deer may have actually increased in the area. It is also true that concerns were raised about water quality in the vicinity of the plant, but the Appellant did not present evidence that convinces the Board that her use of the water, including drinking, fishing, or other recreational uses, would be impacted by this Approval.

Counsel for the Appellant submitted that if standing was not granted in this case, there would be no environmental checks and balances for projects located in remote areas on Crown land. The Board finds that the location of a project is only one factor that is relevant to the determination of standing. The more important factor would seem to be the location of the affected land and affected resources. Regardless of who owns the land,[32] any person who has a *prima facie* entitlement (e.g. a hunting or fishing permit) to use or enjoy land or resources, will be given a reasonable opportunity to put such evidence before the Board, including how the project will specifically impact their use or enjoyment of the land or its resources. But the Board must be convinced on a preponderance of the evidence that the Appellant is directly affected by the Approval or amendment in question. We were not convinced in this case.

VIII. CONCLUSION

Having reviewed the evidence and arguments before it, the Board does not believe the Appellant is directly affected by this particular Approval. Therefore, the appeal is dismissed. Having made this decision, it is therefore unnecessary for the Board to rule on the issue of whether or not the transitional provisions of the Act operate to deny the Appellant the opportunity to appeal the construction and/or operation of the cement plant. It is also unnecessary for the Board to rule on the issue of whether the notice of appeal against the Approval delaying the completion date brings into question all aspects of the previous permits to construct issued under the prior legislation.

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[32] It does not seem to us that whether or not the land is public or private would automatically be determinative of the standing matter either way.

IX. COSTS

At the conclusion of the preliminary meeting, counsel for Alberta Cement sought costs, arguing (among other things) that the appeal by Dr. Kostuch was frivolous or vexatious.

The Board disagrees. The appellate provisions in the Act were introduced in September of 1993 as part of a new comprehensive statutory scheme that included the opportunity for Albertans to challenge certain decisions made by environmental regulators. It would be undesirable for the Board to use its power to award costs to thwart appellants who feel they have specific, legitimate concerns, even though in the end the rather specific terms of the Act may preclude the Board from hearing the appeal, or the appellants may be unsuccessful in the appeal. In the case before us, there is no doubt about this Appellant's bona fides in bringing this appeal. It raised interesting and genuine issues of fact and law, her case was clearly and effectively presented, and her appeal was well argued by competent counsel. We decline to grant costs to Alberta Cement, or to anyone else.

Dated on August 23, 1995, at Edmonton, Alberta.

William A. Tilleman, Chair

Max A. McCann