

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Mediation – March 13, 14 and 19, 2001

Date of Hearing – April 18 and 19, 2001

Date of Report and Recommendations – May 18, 2001

IN THE MATTER OF sections 84, 85, 86, 87, and 91 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

-and-

IN THE MATTER OF appeals filed by Mr. K.F. Bailey Q.C. on behalf of Ms. Gwen Bailey, Mr. Nick Zon, Mr. Blair Carmichael, Mr. D.R. Thomas Q.C. on behalf of Ms. Donna Thomas and the Summer Village of Kapasiwin, Mr. I. Samuel Kravinchuk on behalf of Mr. James Paron, His Worship Mayor William F. Purdy on behalf of the Village of Wabamun, Mr. David Doull, and Mr. F. Locke Boros on behalf of the Lake Wabamun Enhancement and Protection Association with respect to Approval 10323-02-00 issued on November 30, 2000 to TransAlta Utilities Corporation by the Director, Northern East Slopes Region, Environmental Service, Alberta Environment.

Cite as: *Bailey et al. #2 v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation.*

HEARING BEFORE

William A. Tilleman, Q.C., Chair
Ron V. Peiluck
Dr. Roy A. Crowther

APPEARANCES

Appellants: Mr. Nick Zon; Mr. Blair Carmichael; Mr. James Paron, represented by Mr. I. Samuel Kravinchuk; the Village of Wabamun, represented by Mr. Leigh Randle; Mr. David Doull; and the Lake Wabamun Enhancement and Protection Association, represented by Mr. Locke Boros and Ms. Linda Duncan.

Director: Mr. Rick Ostertag, Director, Northern East Slopes Region, Environmental Service, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak, McLennan Ross and Mr. Alan Harvie, Macleod Dixon.

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer; and Ms. Valerie Higgins, Hearing Officer.

NOT ATTENDING

Appellants: Ms. Gwen Bailey, represented by Mr. K.F. Bailey, Q.C.; and Ms. Donna Thomas and the Summer Village of Kapasiwin, represented by Mr. D.R. Thomas, Q.C.

WITNESSES

Mr. Nick Zon: Mr. Nick Zon and Mr. C.P.G. Spilsted.
Mr. Blair Carmichael: Mr. Blair Carmichael.
Mr. James Paron: Mr. I. Samuel Kravinchuk.
Village of Wabamun: Mr. Leigh Randle.
Mr. David Doull: Mr. David Doull.
Lake Wabamun Enhancement and Protection Association: Mr. Locke Boros, Ms. Linda Duncan, and Mr. John B. Drever.
Director: Mr. Rick Ostertag, Mr. Ed Hoyes, Mr. Richard Phaneuf, Mr. Steve Cook, Ms. Anne-Marie Anderson, Mr. Rob Burland, Mr. Stephen Spencer, and Mr. Andy Lamb.
Approval Holder: Ms. Lynne McNeil, Mr. Fred Lindsay, Mr. Doyle Sam, Ms. Gail Faltham, Mr. Larry Patterson, Dr. Stella Swanson, and Dr. Rick Robinson.

Table of Contents

I.	BACKGROUND	1
A.	NOTICES OF APPEAL	1
B.	PROCEDURAL BACKGROUND	1
C.	PRELIMINARY MEETING	3
D.	MEDIATION MEETING/SETTLEMENT CONFERENCE	4
E.	NOTICE	5
F.	PRELIMINARY MOTIONS	5
G.	INTERVENOR REQUEST	5
H.	AGREEMENT AMONG SOME OF THE PARTIES	6
I.	THE HEARING	8
II.	ANALYSIS	8
A.	PUBLIC CONSULTATION	8
B.	LWEPA	10
C.	PUBLIC SAFETY	12
D.	ALTERNATE TECHNOLOGIES TO HARVEST WEEDS	14
E.	SEDIMENT DEPOSITION	17
F.	DEFINITIONS OF COOLING WATER AND DECOMMISSIONING	17
	<i>Cooling Water</i>	17
	<i>Decommissioning</i>	19
G.	WATERSHED MANAGEMENT PLAN	19
H.	SECTIONS 4.1.2 AND 4.3.27 AND TERM OF THE APPROVAL	22
	<i>Section 4.1.2 and the Ten-Year Approval Term</i>	22
	<i>Section 4.3.27</i>	24
	<i>Lake Levels</i>	28
	<i>The Connection Between Lake Levels and the Approval</i>	30
	<i>Performance Measures</i>	31
	<i>Mandatory Requirement to Expand the Water Treatment Plant</i>	34
	<i>Incorporation of Penalty Provision Directly into the Approval</i>	35
I.	AGREEMENT REGARDING 4.1.3	35
J.	CONCERNS OF THE VILLAGE OF WABAMUN	36
III.	CONCLUSIONS	37
A.	ICE SAFETY	37
B.	ALTERNATE TECHNOLOGIES TO CONTROL WEEDS	38
C.	SEDIMENT DEPOSITION AT POINT ALISON	38
D.	DEFINITIONS OF COOLING WATER AND DECOMMISSIONING	38
E.	WATERSHED MANAGEMENT PLAN	39
F.	SECTION 4.1.2 AND THE TEN YEAR TERM	39
G.	SECTION 4.3.27	40
H.	SECTION 4.1.3	41
I.	PUBLIC CONSULTATION	41
IV.	RECOMMENDATIONS	42
V.	COSTS	43
VI.	EXHIBITS	45
VII.	DRAFT ORDER	47

I. BACKGROUND

A. Notices of Appeal

[1] On November 30, 2000, the Director, Northern East Slopes Region, Environmental Service, Alberta Environment (the “Director”) issued Approval 10323-02-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the “Act”) to TransAlta Utilities Corporation (the “Approval Holder” or “TransAlta”) for the operation and reclamation of the Wabamun Thermal Electric Power Plant (the “Wabamun Power Plant”), in the Village of Wabamun, in the Province of Alberta.

[2] On December 28, 2000, and January 2, 3, 4, and 10, 2001, the Environmental Appeal Board (the “Board”) received Notices of Appeal from the following parties (collectively the “Appellants”):

1. Ms. Gwen Bailey and the Summer Village of Point Alison;
2. Enmax Energy Corporation (“Enmax”);
3. Mr. Nick Zon;
4. Mr. Blair Carmichael;
5. Ms. Donna Thomas and the Summer Village of Kapasiwin;
6. Mr. James Paron;
7. the Village of Wabamun;
8. Mr. David Doull;
9. the Lake Wabamun Enhancement and Protection Association (“LWEPA”);
and
10. the Summer Village of Point Alison.¹

B. Procedural Background

[3] The Board acknowledged receipt of each of the Notices of Appeal and requested that the Director provide a copy of the records (the “Records”) related to this matter. The Board

¹ Two separate appeals were filed on behalf of the Summer Village of Point Alison. The first was filed by Mr. K.F. Bailey Q.C. (included in the Notice of Appeal of Ms. Gwen Bailey) and the second filed by His Worship Mayor C. Gordon Wilson. In a letter dated February 15, 2001, Point Alison confirmed that His Worship Mayor C. Gordon Wilson would be representing the Summer Village of Point Alison.

also advised the Approval Holder of the appeals and provided the Approval Holder and the Director with copies of the Notices of Appeal. The Board subsequently received the Records from the Director and provided a copy of the Records to each of the other parties to these appeals.

[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” or “EUB”) asking whether this matter has been the subject of a hearing or review under their respective legislation. The NRCB replied in the negative.

[5] With respect to the AEUB’s jurisdiction, the Board was advised that TransAlta currently holds AEUB Approval No. HE 8109 with respect to the Wabamun Power Plant. The Board was provided with a copy of AEUB Decision Report 81-6 that formed the basis for that approval.²

[6] On January 19, 2001, the Approval Holder requested that the Board expedite the appeal and set a March date for a hearing. The Board also received a letter from LWEPA, dated January 23, 2001, supporting the Approval Holder’s request for an expedited hearing.

[7] On January 25, 2001, the Board wrote to the Appellants, the Approval Holder and the Director advising that it would proceed to an oral preliminary meeting. The Board advised that at the preliminary meeting it would consider the status of the appeal filed by Enmax and determine which of the issues included in the Notices of Appeal would be included in the hearing of the appeals.

[8] The Board advised all parties on February 16, 2001, that it would hold an oral preliminary meeting on March 1, 2001, at the Board’s offices in Edmonton.

[9] On February 20, 2001, Mr. Doull requested that the Board provide him with all records relating to Approvals 18528-00-00 and 18528-00-01 that were previously issued to TransAlta for the Wabamun Power Plant. The Board forwarded this request to the Director,

² This information was subsequently confirmed by the AEUB in a letter dated March 12, 2001. Further, with respect to the AEUB’s jurisdiction, the Board was advised that on April 27, 1999 Mr. Zon wrote to the AEUB and made a “... formal request to conduct a review hearing.” This request for a review was presumably made pursuant to section 42 of the *Energy Resources Conservation Board Act*, R.S.A. 1980, c. E-11. On November 2, 1999 the AEUB wrote to Mr. Zon and advised that his application to review was denied.

asking that these records be provided directly to Mr. Doull and indicated that these records would not be included in the Board's file.

C. Preliminary Meeting

[10] On March 1, 2001, following the receipt of written submissions, the Board convened an oral preliminary meeting to consider the status of the appeal by Enmax and determine which of the issues included in the Notice of Appeal were properly before the Board.

[11] In a written decision,³ (the "March 13, 2001 Decision") the Board dismissed the Notice of Appeal of Enmax⁴ and held that "... the remaining Appellants are directly affected by the Wabamun Power Plant and, as a result, have standing with respect to these appeals."⁵

[12] The Board also determined that it would deal with only the following issues at the hearing of the remaining appeals:

- “• public safety, solely as it relates to TransAlta's operations and the impact on winter ice;
- harvesting weeds, but solely on the matter of alternate technologies - chemical, physical, or other such technologies - to enhance TransAlta's current weed control program;
- sediment deposition at Point Alison;
- the definitions of decommissioning and cooling water in the Approval;
- the watershed management plan; and
- sections 4.1.2 and 4.3.27 of the Approval, regarding timing and duration only, but including the length (the term) of the Approval.”⁶

³ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID.

⁴ E.A.B. Appeal No. 00-075.

⁵ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID at paragraph 75.

⁶ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID at paragraphs 76 to 80.

[13] After the oral preliminary meeting on March 1, 2001, the Board received a March 6, 2001 letter from Mr. Zon providing a list of "... outstanding requests [for information from the Director]." The Board forwarded the letter to the Director on March 9, 2001, asking the Director to respond directly to Mr. Zon, and indicated that the information provided to Mr. Zon would not form part of the Board's appeal file.

[14] On March 22, 2001, the Director responded to the Board's letter of March 9, 2001, advising that Mr. Zon's "...request for information that was attached to his March 6th letter does not address any of the issues contained within his appeal of the current Wabamun Approval and accordingly, Alberta Environment [the Director] will not be providing Mr. Zon with further information related to this attachment." TransAlta supported the Director's position on this issue with a letter, dated March 28, 2001, where TransAlta advised "... the majority of this information [requested by Mr. Zon] has been provided to him on earlier occasions ... [and] it would appear that a number of his requests are beyond the scope of the issues the Board has identified for this hearing."

D. Mediation Meeting/Settlement Conference

[15] In an attempt to settle the matter, the Board held mediation meeting/settlement conferences on March 13, 14 and 19, 2001. The mediations were generally unsuccessful. At the end of the last mediation, the Board advised the parties of its intent to hold a hearing on April 18 and 19, 2001.

[16] On March 19, 2001, the Board received a letter from His Worship Mayor Gordon Wilson advising:

"Please be advised that the Summer Village of Point Alison is withdrawing its appeal [E.A.B. Appeal No. 00-011]. ... We are pleased to advise that we have entered into a partnership agreement with TransAlta Utilities to rectify and remediate our concerns. We look forward to once again working with TransAlta."

[17] On March 26, 2001, the Board discontinued its proceedings with respect to EAB Appeal No. 00-011.

E. Notice

[18] On March 20, 2001, the Board provided a confirming letter to the parties and posted notice of the April 18 and 19, 2001 hearing at its offices in Edmonton.⁷

F. Preliminary Motions

[19] Following the mediation, the Board received the following additional preliminary motions:

1. Reconsideration Request (lake levels) by Mr. Zon dated March 15, 2001;
2. Reconsideration Request (lake levels) by Mr. Doull dated March 15, 2001;
3. Adjournment Request by Mr. Zon dated March 19, 2001;
4. Interim Costs Request by Mr. Zon dated March 19, 2001;
5. Reconsideration Request (AEUB licence and priority number) by Mr. Zon dated March 22, 2001;
6. Interim Costs Request by Mr. Carmichael dated March 23, 2001;
7. Reconsideration Request (delta T) by Mr. Zon dated March 26, 2001; and
8. Interim Costs Request by LWEPA dated March 26, 2001.

[20] On April 6, 2001 the Chairman wrote to the parties and advised that all of the preliminary motions had been denied. The Chairman provided reasons on April 17, 2001.⁸

G. Intervenor Request

[21] On April 2, 2001, in response to the Notice of Public Hearing advertisement, the Board received an intervenor request from Mr. C.P.G. (Pat) Spilsted. Mr. Spilsted, who owns a cottage on Lake Wabamun, requested the opportunity to participate in the hearing based on his long residency and use of the lake.

⁷ A Notice of Public Hearing advertisement was placed in the Edmonton Journal on March 23, 2001, and in the Wabamun Community Voice on March 27, 2001, advising of the hearing date. The advertisement asked that if any person, other than the parties wished to make representations before the Board, they were to advise the Board by April 2, 2001. Copies of these advertisements were forwarded to the parties on April 6, 2001.

⁸ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (April 17, 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005ID.

[22] On April 2, 2001, the Board asked the other parties for comments in response to Mr. Spilsted's intervenor request. Comments were received from several of the other parties.

[23] On April 6, 2001, the Board wrote to Mr. Spilsted and advised that after considering his request, "...the Board has determined that you will be given the opportunity to participate though the mechanism of written submissions...." Further participation was denied.

[24] On April 10, 2001, the Board received a letter from Mr. Spilsted asking that the Board reconsider its decision to permit him to participate in the hearing by written submission only. The Chairman reviewed Mr. Spilsted's reconsideration request and in a letter dated April 12, 2001, determined that Mr. Spilsted had "... not provided any new information or evidence that would cause the Board to change its mind." Further, the Board noted that Mr. Spilsted did "... not point to any error of law the Board needs to correct." As a result, the Board denied Mr. Spilsted's reconsideration request.

H. Agreement Among Some of the Parties

[25] On April 3, 2001, the Board wrote to Mr. K.F. Bailey, Q.C. and Mr. D.R. Thomas, Q.C. and asked them to advise as to the status of the appeals filed on behalf of their clients.

[26] On April 5, 2001, the Board received a letter from Mr. Bailey advising that an agreement had been reached between Ms. Donna Thomas, the Summer Village of Kapasiwin, Ms. Gwen Bailey, the Village of Wabamun, TransAlta, and the Director.

[27] On April 5, 2001, the Board received a letter from Mr. Ron Kruhlak on behalf of TransAlta, advising that an agreement had been reached between Ms. Donna Thomas, the Summer Village of Kapasiwin, Ms. Gwen Bailey, TransAlta, and the Director. The agreement was to ask the Board to replace section 4.1.3 of the Approval with the following:

"The Approval holder shall apply for an amendment to or renewal of this Approval to provide that it will be operating with, or decommissioning, in accordance with one of the proposals provided in 4.1.2 by the date of expiry in the Approval."

[28] On April 6, 2001, the Board wrote to the parties and asked the Village of Wabamun to confirm whether they were part of this agreement. The Board also advised the

parties to this agreement that the request "... will be put before the Board, but that no decision will be made prior to the hearing." The Board further advised the parties to this agreement that they "... may wish to consider your participation at the hearing...." The Board asked the parties to this agreement to advise the Board whether they would be attending the hearing.

[29] On April 6, 2001, the Board received a letter from Mr. D.R. Thomas, Q.C., on behalf of Ms. Donna Thomas and the Summer Village of Kapasiwin. On April 9, 2001, the Board received a letter from Mr. K.F. Bailey, Q.C. on behalf of Ms. Gwen Bailey. Both letters indicated that they would not be attending the hearing, but indicated that they have entered into this settlement on the understanding that the Board will accept the proposed amendment, that the Board will recommend the proposed amendment to the Minister, and that the Minister will accept the Board's recommendation. Mr. Thomas and Mr. Bailey then indicated that it is on this "condition" that they withdraw their appeals.

[30] On April 9, 2001, the Board received a letter from the Director confirming his agreement with the proposed change to section 4.1.3 of the Approval.

[31] On April 10, 2001, the Board received a letter from the Village of Wabamun advising that it was not part of the agreement regarding section 4.1.3 of the Approval. The Village further advised that it was of the view that section 4.1.3 should be removed from the Approval as it is "... confusing, unnecessary, [and] not legally required...."

[32] On April 17, 2001, the Board wrote to the parties to this agreement and advised that:

"The Board wishes to make it clear that it will certainly take the agreement ... into account when making its Report and Recommendations and will certainly identify to the Minister the agreement reached by the parties. However, in that the Board has not heard from all of the parties with regard to these appeals, it can not guarantee that it will ultimately include this amendment as part of its recommendations to the Minister. ... Further, the Board wishes to make it clear that it can only make recommendations to the Minister, it can not require the Minister to accept an agreement between the parties.

[The letters from Mr. Thomas and Mr. Bailey] ... seem to suggest that in the event that the agreement is not accepted, that they would be able to continue with their appeals. The Board wishes to make it clear that the April 18 and 19, 2001 hearing is their only opportunity to make further representations to the Board with respect to these appeals. Mr. Thomas and Mr. Bailey should not

expect to be able to continue with these appeals in the event that the Board or the Minister should not accept this agreement.” (Emphasis not included.)

I. The Hearing

[33] On April 18 and 19, 2001, the Board convened a hearing regarding these appeals.

[34] Mr. Bailey and Mr. Thomas did not attend the hearing.

II. Analysis

[35] At the beginning of the hearing, the Chairman emphasized that the issues that were to be addressed in these appeals were identified in his March 13, 2001 Decision. These issues were:

- public safety, solely as it relates to TransAlta’s operations and the impact on winter ice;
- harvesting weeds, but solely on the matter of alternate technologies - chemical, physical, or other such technologies - to enhance TransAlta’s current weed control program;
- sediment deposition at Point Alison;
- the definitions of decommissioning and cooling water in the Approval;
- the watershed management plan; and
- sections 4.1.2 and 4.3.27 of the Approval, regarding timing and duration only, but including the length (the term) of the Approval.

[36] In this Report and Recommendations to the Minister, the Board will deal with each of these in turn. However, there are also two other issues that arose during the course of the hearing. The first is public consultation. This is a topic that was also discussed in the March 13, 2001 Decision. The second is the submission of LWEPA. The Board will address all of these issues, reminding the Appellants that the onus is on them to prove that the Director’s decision was not reasonable.

A. Public Consultation

[37] Various parties, in particular TransAlta and the Director, spoke at length about the public consultation process. The Director explained that he took time to ensure extensive public

consultation with respect to an application that he viewed as controversial.⁹ Among the steps that he took, was delaying the advertising until January to avoid the Christmas vacation. Further, he extended the ordinary 30-day notice period to 45-days. Finally, he indicated that he met directly with Statement of Concern Filers, including all of the Appellants before the Board, and also circulated a draft Approval to the parties prior to making his decision. The evidence before the Board indicates that the Director took significant steps and made significant changes to the Approval to address the concerns of the Statement of Concern Filers. The Board notes particularly the list of major and minor changes between the current and previous approvals.¹⁰ Some of the major changes that TransAlta identified were:

- expanded air monitoring;
- increase restrictions for the emission stacks;
- developing a plan for either upgrading or decommissioning the facility;
- participation in community advisory committee;
- tighter limits for ash lagoon discharge;
- participation in the watershed management plan;
- study plant wastewater sump;
- fisheries studies; and
- effects monitoring program.

[38] In response to the approach taken by the Director, in their closing arguments, the Appellants were universally supportive of the Director. Despite their continued differences with the Director, several Appellants commented about the cooperative nature of the Director and his staff in dealing with this Approval. To quote Mr. Zon:

“... I would like to say that Rick [Ostertag – the Director] is a breath of fresh air. His is considerate and understanding. And I thought that it was a pleasure to deal with him, however, we didn’t agree on everything.”¹¹

[39] The Chairman summarized the comments of the Appellants. He stated:

“As we come to the close I think one comment is in order ... it is exceptional and rare that we have so many comments paid in favour of the Director.”

⁹ Hearing Transcript, page 588.

¹⁰ “Changes in Wabamun EPEA Operating Approval – Old to New” prepared by TransAlta. Exhibit #16.

¹¹ Hearing Transcript, page 724.

And Mr. Ostertag [the Director], in my experience since I came to this Board I never heard so many comments, including your testimony today which to me shows that you exercised common sense and good judgement. And I think kudos are in order. I'm not sure again what the Board ultimately will [report to the Minister] but I think that you need to be congratulated."¹² (Emphasis added.)

[40] The Board has now considered the evidence before it in detail. It is clear to the Board that with respect to establishing and carrying out the public consultation process regarding this Approval, the Director exercised common sense and good judgement. The Director is clearly to be commended. The Board notes the comments of the Director that this process took a lot of time and effort,¹³ but it is time and effort that in the Board's view was put to good use. The Board is of the view that the approach taken by Director Ostertag with the public consultation process is an approach that should be followed by Alberta Environment with respect to major approvals.

B. LWEPA

[41] At the start of the hearing, TransAlta raised an objection to the submissions of LWEPA. In essence, TransAlta objected to the "switch" in the position of LWEPA from its original Notice of Appeal to the position it took in its written submission filed for the purposes of the hearing. In its original Notice of Appeal, LWEPA's main purpose for filing the appeal was to oppose the appeal filed by Enmax.¹⁴ Enmax's appeal was eventually dismissed as per the Board's March 13, 2001 Decision. Essentially, the appeal filed by Enmax sought to delete conditions in the Approval that required TransAlta to upgrade the Wabamun Power Plant. LWEPA wanted to ensure that these provisions were maintained, and generally, LWEPA appeared to support the Approval. In their Notice of Appeal LWEPA stated:

"III. The details of the decision which I object to are:

The association doesn't have any objection to the decision issue[d] on November 30, 2000, but as a Statement of Concern Filer we have objections to any variation to the terms and conditions that may be made during any appeal.

¹² Hearing Transcript, page 756.

¹³ Hearing Transcript, page 593.

¹⁴ E.A.B. Appeal No. 00-075.

IV. The grounds for this appeal are:

Any future variations of any terms and conditions related to the licence issued as at November 30, 2000, specifically related to emissions, standards and return of water to Lake Wabamun via Wabamun Lake Water Treatment Plant.

V. The relief which I request is as follows:

No changes to the conditions outlined in the November 30, 2000 licence without the involvement of Lake Wabamun Enhancement and Protection Association.”¹⁵

[42] But then something happened. In its subsequent written submission, LWEPA argued for substantial amendments to the Approval. LWEPA argued that “... sections 4.1.2, 4.1.3, and 5.1.2 [of the Approval] should be struck down and replaced with ... provisions which will ensure legal clarity, enforceability and more timely action on the part of the government to require the upgrading or decommissioning of grand-fathered polluting facilities....”¹⁶ LWEPA also went on to address the Lake Wabamun Watershed Management Plan and a proposed amendment to section 4.3.27 of the Approval.¹⁷

[43] TransAlta argues that it has been surprised by this submission, claiming that the changes proposed by LWEPA are drastic in nature and that this position could not have been anticipated by anyone based on the Notice of Appeal. In reply, LWEPA argues that these positions are not new matters and that they have been the longstanding positions of LWEPA despite the fact that they were not expressed in LWEPA’s Notice of Appeal. Finally, LWEPA argued that: (1) they were overwhelmed with the appeal process, (2) through the public consultation process they got some of the changes that they asked for, but not all, and (3) they are now taking the opportunity to put their “real” position forward.

[44] While the Board does not believe that LWEPA acted in bad faith, and while LWEPA may have felt “overwhelmed” by the appeal process, the Board believes that it is *not* appropriate or fair for a party to substantially change positions between the filing of the Notice of Appeal and attending the hearing of the appeal. In the Board’s view, the purpose of a Notice of Appeal is to identify to the Board, and to the other parties, the issues or concerns that the

¹⁵ Exhibit 2.

¹⁶ LWEPA Written Submission, dated April 11, 2001, page 1.

¹⁷ LWEPA Written Submission, dated April 11, 2001, page 3.

Appellant has with the decision under appeal. It is clear from section 87(2) of the Act that the Notice of Appeal scopes the issues that can be included in the hearing of an appeal. This section of the Act provides that the Board may "... determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal...." It is the Board's view that if a party wishes to advance a concern or issue in the hearing of an appeal, that concern or issue must be raised in the Notice of Appeal in at least very broad general terms. In this case, the broad general concern raised by LWEPA was that they wanted to stop the appeal filed by Enmax – they wanted to prevent the agreement reached with the Director regarding the Approval from being changed in the appeal process. LWEPA did *not* indicate that they want to "get more of the changes that they wanted".

[45] As it turns out, many of the other Appellants are seeking, at least in broad terms, similar changes to those finally requested by LWEPA. Therefore, the Board is of the view that the submissions by LWEPA did not create a prejudice for TransAlta – particularly given our findings in this matter.

C. Public Safety

[46] The first issue identified in the Board's March 13, 2001 Decision was public safety, solely as it relates to TransAlta's operations and the impact on winter ice. As the Board stated in the March 13, 2001 Decision, the Board is of the view that even one accident or injury is a significant concern and must be addressed.

[47] At the hearing of this appeal, Mr. Zon testified that in 1999 two snowmobiles went through the ice while they were crossing the lake at 11:00 p.m. The immediate question is "Who was primarily at fault for this event?" Upon hearing Mr. Zon's testimony, the Chairman stated:

"I'm sorry to interrupt, but how do you get around ... [the concern] that people have to use some common sense as well. 11 o'clock at night, four snowmobilers in the dark are headed across the bay."¹⁸

¹⁸ Hearing Transcript, page 299.

[48] Mr. Zon responded:

“This is true. I understand what he is saying. We have developed common sense because we have been on the lake. ... [Mr. Zon then discusses a number of incidents going back over 10 years where he has assisted snowmobilers who have gone through the ice.] We developed a sense. We don't go on the lake, ever. It is nothing uncommon for people to get on the lake going out for a Sunday drive, or evening drive, get on at Seba Beach where it's fine, come across the lake and hit the open water.”¹⁹

[49] The Board notes that TransAlta has properly undertaken work with the Village of Wabamun to address the issue of public safety as it relates to winter ice. Mr. Leigh Randle of the Village of Wabamun testified as to the Regional Response Improvement Program established by the Village of Wabamun.²⁰ TransAlta provided a detailed overview of the public safety measures that are already in place. TransAlta presented Mr. Larry Patterson as a witness, who we find credible, on the issue of public safety.²¹

[50] Mr. Patterson assessed the ice safety program at Lake Wabamun. Mr. Patterson concluded:

“When I assessed what was in place both in terms of the ice safety program by TransAlta as well as the capacity for ice rescue present in the Village of Wabamun, I found that to be a good solution to the hazards and risks that were present.”²²

Mr. Patterson went on to comment on the incident that Mr. Zon identified where two snowmobiles went through the ice in 1999. Mr. Patterson commented that:

“Probably the outstanding point on that is the fact that they were operating out on ice in the dark at night and that is not a recommended practice for anybody to travel, whether it is by snowmobile or otherwise, on ice.”²³

¹⁹ Hearing Transcript, page 300.

²⁰ Hearing Transcript, page 392.

²¹ Mr. Patterson is with the Lifesaving Society and is responsible for the aquatic safety management service of the society.

²² Hearing Transcript, page 430.

²³ Hearing Transcript, pages 430 to 431.

[51] The question before the Board is whether there is anything else that can be done to improve ice safety. Mr. Patterson directly addressed this issue during cross-examination by Mr. Zon. Mr. Zon asked:

“In your opinion do you feel that the TransAlta program is a reasonable program to manage and mitigate the hazards? The Board in its decision of 1997 says, the Board expects that everything should be done to prevent such [tragedies]. On a scale of 1 to 10, the present TransAlta program, where would you rate it?”²⁴

Mr. Patterson advised that he would rate it an 8. Mr. Zon then asked what it would take to make it a 9, 9 ½, or 10? Mr. Patterson responded: “First thing you do is take away all of the snowmobiles. The other thing you do is put a fence around the whole lake.”²⁵ This is an implausible recommendation and of course we can not make it.

[52] The Board is satisfied that TransAlta and the Village of Wabamun are doing everything that they can reasonably be expected to do under the Approval to protect the public with respect to the issue of ice safety at Lake Wabamun.²⁶ The Board notes that none of the Appellants provided specific comments on what changes could be made to improve the situation. The Board is of the view that the public is required to exercise common sense in undertaking activities on ice. As a result, the Board is not prepared to make any further recommendation respecting ice safety. However, the Board expects that, as with any public safety program, TransAlta will work with the Village of Wabamun to continually review the public safety program and undertake improvements where appropriate.

D. Alternate Technologies to Harvest Weeds

[53] The second issue that the Board identified in its March 13, 2001 Decision was the use of alternate weed harvesting technologies – chemical, physical, or other such technologies – to enhance TransAlta’s current weed control program. The reason the Board identified this issue

²⁴ Hearing Transcript, pages 470 to 471.

²⁵ Hearing Transcript, page 471.

²⁶ In TransAlta’s Written Submission, dated April 11, 2001, at page 13, TransAlta describes the various methods that are used to ensure public safety. These include signage warning of thin ice located at all points of access around the Lake, buoys and strobe lights to warn lake users that they are entering an area of thin ice, advertising to advise the public of thin ice conditions, and the Wabamun Water Rescue Branch, which has equipment such as a rescue boat, sea-doo, and snowmobile that are used to assist in rescues.

is that weeds are a significant concern to many of the Appellants. At the Preliminary Meeting, Mr. Carmichael advised the Board that herbicides were being used to control aquatic weeds at the provincial park on Lake Wabamun. The potential use of other technologies was new information that was not presented to the Board in the hearing it held respecting the Wabamun Lake Power Plant in 1997.²⁷

[54] The principle technology the Appellants presented was the use of the herbicide Reglone A which is "... the only herbicide registered for use in open water bodies in Alberta."²⁸ The Board is of the view that there is insufficient evidence to demonstrate that herbicides can be used on a larger scale and there is evidence that there may be negative environmental impacts from the use of such herbicides. Concerns were also expressed that if herbicides were used, the intake for the water supply of the Village of Wabamun would have to be shut down for a period of time.²⁹ That would make little environmental sense since people, who drink water, are the most significant part of the biological component protected by the purposes of the Act.³⁰ Further, it would appear that the practice of using Reglone A to control weeds, to which Mr. Carmichael refers,³¹ were "... trials with herbicide at the provincial park, Point Alison and at Lac Ste. Anne ... [that] were unsatisfactory in controlling submerged weeds."³²

²⁷ In the previous appeals regarding the Wabamun Power Plant, the Board made a Decision following an oral preliminary meeting: *Zon et al. v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (September 26, 1997), E.A.B. Appeal No. 97-005 – 97-016. The Board also issued a Report and Recommendations, following an oral hearing: *Zon et al. v. Director Air and Water Approvals Division, Alberta Environmental Protection, re: TransAlta Utilities Corporation* (December 9, 1997), E.A.B. Appeal No. 97-005 – 97-015. Subsequent to that Report and Recommendations, the Minister issued his final decision in this matter, agreeing with the Board's recommendations, by way of a Ministerial Order dated December 18, 1997.

²⁸ TransAlta's Written Submission, dated April 11, 2001, Appendix 8, Table 1, page 13.

²⁹ This is a concern that the Village of Wabamun identified in its Written Submission, dated April 11, 2001, page 4.

³⁰ Section 1(t) of the Act defines environment as:

"... the components of the earth and includes

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

³¹ Mr. Blair Carmichael's Written Submission, dated April 9, 2001, pages 2 to 3.

³² TransAlta's Written Submission, dated April 11, 2001, page 15.

[55] TransAlta commissioned a review of alternative methods of weed control and concluded that:

“... none of the available methods of aquatic submergent weed control would be suitable for augmenting the existing submergent weed control program at Wabamun Lake. A number of the available methods were rejected by Golder [TransAlta’s consultant] because of the predicted ineffectiveness at achieving the results desired by residents, or because of extreme logistical difficulties with implementing the method. The majority of available methods assessed likely have unacceptable environmental consequences ranging from fairly localized impacts on fish habitat to wide-scale changes in ecology of the lake.”³³

The evidence of TransAlta is that all “... the available methods of submergant weed control Golder reviewed have some degree of negative environmental impacts, particularly to fish and fish habitat.”³⁴

[56] The evidence of the Director is that the use of herbicides such as Reglone A – which has now been discontinued and replaced with Reward – requires, among other things, an approval under the Act and authorization under the *Fisheries Act*, R.S.C. 1985, c.F-14. Further, applications for such approvals are reviewed on an individual basis having regard for “... the lack of remaining plant growth to support spawning in the following spring; the oxygen depletion and nutrient release resulting from the decomposition of the vegetation; and the possibility of fish kill.”³⁵

[57] Based on the information before it, the Board is not prepared to recommend the Approval require TransAlta to use alternate technologies to control weeds on a large scale. As stated above, the Board notes that weeds are one of the greatest concerns to the Appellants. And as several of the Appellants have noted, the presence of weeds is related to lake levels. If, in the long term what is needed is a solution to restore lake levels, the evidence before the Board is that TransAlta intends to address lake levels through the expansion of the Lake Wabamun Water Treatment Plant. That Plant’s approval is the subject matter of another approval process under the Act and a licencing process under the *Water Act*, S.A. 1996, c.W-3.5.

³³ TransAlta’s Written Submission, dated April 11, 2001, page 16.

³⁴ TransAlta’s Written Submission, dated April 11, 2001, page 16.

³⁵ Director’s Written Submission, dated April 11, 2001, page 10.

[58] This being said, the Board's decision in this regard does not prevent individual Appellants from applying herbicides for the purpose of weed control on their own property, subject to all applicable laws. The Board notes that among other things, an approval under the Act is required,³⁶ as well as an authorization under the *Fisheries Act*. Other approvals or authorizations may also be required.

E. Sediment Deposition

[59] The third issue identified by the Board in its March 13, 2001 Decision was sediment deposition at Point Alison. The Board notes that Point Alison has withdrawn its appeal and the Board understands that this issue will be addressed through the agreement reached between Point Alison and TransAlta.

F. Definitions of Cooling Water and Decommissioning

[60] The fifth issue identified by the Board in its March 13, 2001 Decision was the definitions of cooling water and decommissioning in the Approval. Section 1.1.2(i) of the Approval defines cooling water as "... water which passes through the plant heat exchangers, but does not come in contact with any other process water or equipment..." Section 1.1.2(m) defines decommissioning as "... dismantling and decontamination of a plant undertaken subsequent to the termination or abandonment of any activity or any part of any activity regulated under the Act..."

Cooling Water

[61] Mr. Zon is principally advancing the concerns with these definitions. Mr. Zon expresses the view that cooling water "... carries sedimentation and metals (from the scouring of the plant components) into the lake." Mr. Zon also comments that "... the switchyard drainage

³⁶ With respect to the approval that is required under the Act, the Board wishes to make it clear that it makes no comment on whether the Director should or will grant the approval.

drains into the exit canal.” Mr. Zon wants the cooling water “... included in the definition of industrial waste water with limits.”³⁷

[62] The evidence on this point from TransAlta counters Mr. Zon’s concerns. TransAlta presented Mr. Doyle Sam, the Plant Manager of the Wabamun Power Plant to address Mr. Zon’s concerns. Mr. Sam stated that cooling water “...flows through the inlet control and through the condensers and exits through the outlet canal which essentially comes in contact solely with the condenser and does not come into contact with any other waste water or foreign bodies.”³⁸ When asked whether the cooling water could scour the condensers, Mr. Sam testified that “... the condensers are made of stainless steel tubing so if there was any scouring at all it would be minuscule.”³⁹ When asked whether the cooling water is monitored, Mr. Sam testified that

“... under the previous approval we monitored for heavy metals. The monitoring has shown no contaminants. As well the monitoring did not show any differences from the inlet versus the outlet sample locations. ... Presently under this approval we are required to monitor twice a year for chronic and acute aquatic toxicity, suspended solids and heavy metals.”⁴⁰

Finally, Mr. Sam was asked whether surface water from the substation could drain into the outlet canal. Mr. Sam advised that it does, but that “... the risks are minimal for any contaminants or any drainage from the substation to enter that inlet/outlet canal.”⁴¹ Mr. Sam then went on to detail the mechanism that they have in place to prevent any such contamination.

[63] The Board accepts the evidence of Mr. Sam. The Board is of the view that the cooling water is not industrial waste water and, therefore the definition included in the Approval for cooling water is appropriate and should not be changed.

³⁷ Mr. Zon’s Written Submission, dated April 11, 2001, page 13.

³⁸ Hearing Transcript, page 437.

³⁹ Hearing Transcript, page 438.

⁴⁰ Hearing Transcript, page 438 to 439.

⁴¹ Hearing Transcript, page 438.

Decommissioning

[64] Mr. Zon's concern regarding the definition of decommissioning is that it must "... include the removal of the fill (that originally formed the walls of the canals) that was deposited on the bed and shore of the lake."⁴²

[65] In response to this concern, Mr. Steve Cook, on behalf of the Director, advised that he took this concern into account when developing the Approval. Specifically, Mr. Cook testifies that:

"With respect to the affected lands, we defined affected lands in a standard approval, as part of our standard approval package, we defined affected lands to be mean the lands which received substances released from the plant. We modified this to say released from the plant including the bed and shore of any water body.

We did that because of Mr. Zon's concern, and again, we discussed that with Mr. Zon and he didn't express any concerns with that. And that comes into play in Section 5 of the approval where the approval holder has to develop and submit a plan for the decommissioning phase to the Director which shall include at a minimum all of the following.

And under B it says, A comprehensive study to determine the nature, degree, and extent of contamination at the plant and affected lands."⁴³

[66] The Board is satisfied that the concern raised by Mr. Zon respecting the definition of decommissioning has been adequately addressed by the Director. As a result, the definition of decommissioning in the Approval is appropriate and should not be changed.

G. Watershed Management Plan

[67] The fifth issue identified in the March 13, 2001 Decision of the Board is the watershed management plan. Section 4.3.24 of the Approval requires that:

"The approval holder shall participate as an active stakeholder in the Lake Wabamun Watershed Management Plan. The terms of reference for this plan shall be as outlined by the Director."

⁴² Mr. Zon's Written Submission, dated April 11, 2001, page 13.

⁴³ Hearing Transcript, page 605 to 606.

[68] TransAlta agrees with the watershed management plan. In its written submission TransAlta said:

“TransAlta, as one of many stakeholders at the lake, intends to participate in any watershed management plan regardless of whether or not it is required to do so as a term and condition of the Approval.”⁴⁴

Further, during questioning from Mr. Peiluck, Dr. Swanson for TransAlta made it clear that in order to fully understand one of the greatest issues facing Lake Wabamun – that of nutrient loading - a watershed management plan was required.⁴⁵ In response to questioning from Dr. Crowther, Dr. Swanson and Mr. Lindsay both made it clear that a watershed management plan was essential to understand the overall impact on the lake from the various activities that are taking place around the lake, such as TransAlta’s mining operations.⁴⁶ During questioning by the Chairman, when asked when the watershed management plan should be put in place, Dr. Swanson responded: “As soon as possible. There has been a series of people calling for this as I think Mr. Zon pointed out since the early ‘80s. There was a plan in ‘85. So it is over due.”⁴⁷ When Mr. Lindsay was asked whether he agreed with Dr. Swanson; he indicated that he did.⁴⁸

[69] Evidence was presented to the Board that this section of the Approval evolved out of the Lake Wabamun Public Advisory Group (the “PAG”). The PAG made a recommendation for a comprehensive watershed management plan. The purpose of the watershed management plan is, among other things, to “... build a shared understanding among the main users of the lake about both the lake’s ecology and the wide range of impacts on it.”⁴⁹ TransAlta supports the recommendation of the PAG.

[70] A number of concerns were expressed about the watershed management plan. Mr. Zon advises that there are two pre-existing watershed management plans, including, remarkably a plan that is almost 20 years old.⁵⁰ Mr. Zon is of the view that a new watershed

⁴⁴ TransAlta’s Written Submission, dated April 11, 2001, page 22.

⁴⁵ Hearing Transcript, pages 530 to 534.

⁴⁶ Hearing Transcript, pages 551 to 552.

⁴⁷ Hearing Transcript, page 564.

⁴⁸ Hearing Transcript, page 564.

⁴⁹ TransAlta’s Written Submission, dated April 11, 2001, page 22.

⁵⁰ Lake Wabamun Watershed Advisory Committee Report, June 1983 – Exhibit 18. Lake Wabamun

management plan is not required. Instead, he argues that all that is required is to update the two pre-existing plans. Concerns were also expressed that the requirement to have TransAlta participate in the proposed watershed management plan does not ensure that the plan will be conducted in a timely fashion.⁵¹

[71] The Director advises that watershed management plans are authorized under Part 2, Division 1 of the *Water Act* and is coordinated through a “Provincial Planning Framework” established under section 7 of the *Water Act*. The Director detailed the steps that are being taken with regard to the Lake Wabamun Watershed Management Plan.⁵² Part 2, Division 1 of the *Water Act* makes it clear that the authority to require a watershed management plan lies with the Minister – it is in his discretion.⁵³ Section 9 of the *Water Act* indicates that it is the “... Minister that may require a water management plan to be developed...” The decision to carry out a watershed management plan includes the assessment of priorities and the allocation of the resources of Alberta Environment. As a result, it is the Board’s view that it would be inappropriate for the Board to make recommendations requiring or specifying the timing of a watershed management plan. The Approval identifies the need for a watershed management plan and the *Water Act* provides for the mechanism by which such a planning process will be carried out. Again, it is important to note that TransAlta wants the watershed management plan in place as much as anyone else.

[72] However, the Board would draw Alberta Environment’s attention to the two pre-existing plans identified by Mr. Zon for Lake Wabamun. The Board is of the view that these pre-existing plans are a starting point for the Lake Wabamun Watershed Management Plan being contemplated. Further, the Board is of the view that TransAlta, as a principle stakeholder in the watershed, should take a leading role with respect to the watershed management plan. In undertaking this leadership role, the Board is of the view that TransAlta should be able to

Management Plan February 1985 – Exhibit 19.

⁵¹ A concern was also raised that the section of the Approval is not clear because it does not make reference to the *Water Act*. The Director advises that there was a clerical error in the Approval and that the phrase “by the Director” will be corrected to read “pursuant to the *Water Act*.” The Board agrees that this clerical amendment will improve the clarity of the section. See Director’s Written Submission, dated April 11, 2001, page 17.

⁵² Director’s Written Submission, dated April 11, 2001, pages 16 to 17.

⁵³ See section 7(1), 9(1) and 10 of the *Water Act*.

commence work on elements of the watershed management plan even before the Province formally establishes the planning process.⁵⁴

H. Sections 4.1.2 and 4.3.27 and Term of the Approval

[73] The final issue identified in the March 13, 2001 Decision was the timing and duration of section 4.1.2. and 4.3.27 of the Approval, including the duration of the Approval.

Section 4.1.2 and the Ten-Year Approval Term

[74] Section 4.1.2 of the Approval provides:

“By December 31, 2005, the approval holder shall submit a plan, to the Director that either:

- a) proposes modifications and amendments to this approval that will permit the plant to meet all applicable environmental standards and guidelines required for a new coal-fired electrical generating plant by April 1, 2010; or
- b) details the decommissioning of the plant to commence no later than April 1, 2010, in accordance with section 5.1.1.”

[75] The concern that the Appellants, with the exception of the Village of Wabamun,⁵⁵ express regarding this provision is that it is a “grandfathering” provision. Allegedly the provision allows TransAlta to continue to operate the Wabamun Power Plant subject to its current standards and does not move TransAlta to the new standards quickly enough.

[76] Further, the effect of accepting the Appellants’ position, other than that of the Village of Wabamun, would also require an examination of the ten-year term of the Approval. If the Wabamun Power Plant is to continue to operate, the Appellants, again other than the Village of Wabamun, want to see a transition to a new approval sooner than the current ten-year term.

[77] The Board is of the view that the apparent purpose of section 4.1.2 is to require TransAlta to “put up or shut up”. In other terms, by December 31, 2005 TransAlta must make the decision whether to upgrade the Wabamun Power Plant to 2010 standards or make plans to decommission the facility. It is clear to the Board that this is not a grandfathering clause – rather

⁵⁴ One example of such work would be the collection of baseline data.

⁵⁵ The Village of Wabamun is of the view that condition 4.1.2 is premature and is not required at this time.

it is a provision to move TransAlta toward new requirements or alternatively to move TransAlta toward decommissioning the facility. The Village of Wabamun, for a variety of reasons that are reviewed later in this decision, seeks to delay this decision point.

[78] TransAlta views this clause as quite onerous. TransAlta outlined in some detail the step that it will have to take to before it is in a position to make this decision and the steps that it will have to take if it decides to upgrade the Wabamun Power Plant to the 2010 standards.⁵⁶ TransAlta stressed the importance of the ten-year term of the Approval and its necessity to ensure the economic viability of upgrading the facility. Ms. Lynn McNeil and Mr. Doyle Sam testified on behalf of TransAlta on this issue at some length. Ms. McNeil spoke about the importance of the ten-year term to provide TransAlta with certainty.⁵⁷ Mr. Sam spoke about the importance of the ten-year approval term and its relationship to the "... significant capital investment that we'll [TransAlta] be required to make from an environmental perspective, from a safety perspective and reliability of the plant perspective that would not be rational without a 10-year period."⁵⁸ Mr. Sam then went on to detail some of the capital expenditures that are planned.⁵⁹ He indicated that many of these components were "... big ticket items and long lead items..."⁶⁰ and that "...the certainty around the 10-year licence is important to us [TransAlta] to plan for that and to justify, rationalize those large expenditures that will improve the environmental performance and improve the efficiency of the plant..."⁶¹ We agree.

[79] The Director advised that the purpose of section 4.1.2 is to move the facility to new source performance standards. The Director stressed that section 4.1.2 "... can not be viewed in isolation ... [and that the] approval is one of continuous improvement."⁶² He identified for the Board provisions of the Approval that "... ratchet down the standards."⁶³

⁵⁶ Hearing Transcript, pages 423 to 427.

⁵⁷ Hearing Transcript, page 422.

⁵⁸ Hearing Transcript, page 424.

⁵⁹ At page 424 of the Hearing Transcript, Mr. Sam identifies: turbine generators, boiler components, high-energy piping components, transformers, and electrical components.

⁶⁰ Hearing Transcript, page 424.

⁶¹ Hearing Transcript, pages 424 to 425.

⁶² Hearing Transcript, page 593.

⁶³ Hearing Transcript, page 594.

[80] The Director discussed the purpose of requiring a proposal to be submitted by December 31, 2005 as required in section 4.1.2. The Director stated:

“The intention of presenting this proposal is ultimately leading to by 2010 that the plant be operating under new source performance standards. And I originally wanted a later date, [later than the 2005 date] a date of 2007. And I thought that the advantage of that later date would be -- would give us, the department, an opportunity to have the newest evolved standards provincially and federally that we could apply to this particular activity.

Dealing with SOC filers, Statement of Concern filers, sorry for the acronym, I decided to go with 2005 and I believe that that is realistic based on things that are happening on the federal level and things that are happening on the provincial level. And I believe that the adequate standards will evolve so that the applicant can submit this particular document that we are requesting.”⁶⁴

The Board is of the view that the Director’s consideration in this regard is entirely reasonable. In making a decision of this nature it is important to have regard to the purposes of the Act. One of the key purposes of the Act is to protect the environment while balancing the interests of all Albertans. Section 2 of the Act identifies the need for “... economic growth and prosperity in an environmentally responsible manner...” and the importance of the “... principles of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations...”. Section 2 also recognizes the “... opportunity ... for citizens to provide advice on decisions affecting the environment...” The Board is satisfied that the Director has considered all sides in this discussion and has come up with a balanced solution. The Board is of the view that the environment is being protected by moving the company forward to either a new standard or a decommissioning plan in a timely fashion. The Director’s decision should not be interfered with.

Section 4.3.27

[81] Section 4.3.27 of the Approval provides:

“The approval holder shall make all necessary applications such that:

- (a) by no later than September 30, 2002, the approval holder shall increase the excess capacity of the Wabamun Lake Water Treatment Plant;

⁶⁴ Hearing Transcript, pages 594 to 595. See also Hearing Transcript, pages 595 and 596 for the Director’s consideration of the submission of LWEPA and the Village of Wabamun.

- (b) the approval holder shall submit water quality monitoring results and report on the volume of water returned to Lake Wabamun from the Wabamun Lake Water Treatment Plant on a monthly basis;
- (c) by no later than December 31, 2006, the approval holder shall have pumped sufficient water into the lake to offset the historical debt (51.1 million cubic meters as of December 31, 1999) of TransAlta Utilities Corporation operations on lake level and ongoing impacts from all TransAlta Utilities Corporation operations, unless the lake level surpasses the elevation of 724.55 m (outlet control weir);
- (d) after December 31, 2006, the approval holder shall operate the Wabamun Lake Water Treatment Plant at sufficient capacity to offset ongoing impacts to the lake level from all TransAlta Utilities Corporation operations, which is forecasted to be 9 million cubic meters annually, or as otherwise authorized in writing by the Director based on the annual report submitted under the Water Act licence 12086, unless the lake level surpasses the elevation of the outlet control weir.”

[82] The essential issue that is before the Board with respect to this provision is the interconnection or link between this Approval and the operations of the Wabamun Lake Water Treatment Plant (the “Water Treatment Plant”). The Water Treatment Plant was built by TransAlta to address the impact of TransAlta’s operations on lake levels at Lake Wabamun. The existing water treatment plant was supposed to “... discharge approximately 15,000,000 cubic metres of treated water per year to Wabamun Lake until such time as the licensee’s accumulated historical water impact has been returned to Wabamun Lake....”⁶⁵

[83] TransAlta’s initial plan for addressing the accumulated historical water impact was addressed in the hearing through Mr. Kravinchuk’s cross-examination of Mr. Fred Lindsay, Community Relation Manager for TransAlta. Under cross-examination Mr. Lindsay acknowledged that at the time of the 1997 Board hearing, TransAlta had hoped to address “... the historical water debt within two years with a some help from Mother Nature.”⁶⁶ We conclude that TransAlta was not successful in meeting that goal.⁶⁷ Unfortunately, it does not appear that Mother Nature has helped either.

⁶⁵ Interim Licence No. 12086 under the *Water Resources Act*, R.S.A. 1980, c.W-5, issued to TransAlta on May 31, 1996, at section 9. See Mr. Paron’s Written Submission, dated April 11, 2001, page 1.

⁶⁶ Hearing Transcript, page 500.

⁶⁷ As of December 1996, TransAlta’s historical impact on Lake Wabamun was 37.4 million cubic metres. In accordance with Interim Licence No. 12086, TransAlta has pumped approximately 25.3 million cubic meters into Lake Wabamun as of December 2000. (TransAlta never reached the target of 15 million cubic metres per year.)

[84] TransAlta now proposes to address the historical water debt by expanding the Water Treatment Plant.⁶⁸ In fact, the Board heard that TransAlta had in fact submitted its application for the expansion of the Water Treatment Plant and that the public notice requesting Statements of Concern had been published on April 13, 2001.⁶⁹ Section 4.3.27 requires that TransAlta make the appropriate licence applications in order to meet this goal. Section 4.3.27 also requires that once the historical water debt is met, it will continue to operate the Water Treatment Plant to offset any continuing water deficit impacts on the lake. Mr. Lindsay has expressed confidence that TransAlta will be able to meet this goal. Most of the Appellants do not share Mr. Lindsay's confidence.

[85] The concerns that are expressed by most of the Appellants are threefold. First, these Appellants are concerned that all section 4.3.27 requires is for TransAlta to "...make all necessary applications..."⁷⁰ and presumably not requiring the pumping of water. Second, these Appellants want to see specific performance standards included in the Approval. Third, these Appellants want to see specific penalty mechanisms included in the Approval to ensure that these performance standards are met. While several proposals were advanced by the Appellants to argue their case, one of the proposals – the one put forward by Mr. Kravinchuk – explains the Appellants' concerns. Mr. Kravinchuk has suggested that section 4.3.27 be amended by adding the following clauses which stresses annual pumping requirements:

“(e) Notwithstanding any applications that the approval holder shall make, the approval holder shall:

- (i.) pump at least 13,512,329 cubic metres of water into the Lake by December 31, 2001;
- (ii.) pump at least 17,016,438 cubic metres of water into the Lake by December 31, 2002;
- (iii.) pump at least 23,000,000 cubic metres of water into the Lake by December 31, 2003;
- (iv.) pump at least 23,000,000 cubic metres of water into the Lake by December 31, 2004;

However, as of December 2000, TransAlta's historical impact on Lake Wabamun was 57.5 million cubic metres. See Mr. Paron's Written Submission, dated April 11, 2001, at page 2.

⁶⁸ See Hearing Transcript, page 501.

⁶⁹ Exhibit 20.

⁷⁰ Section 4.3.27 of the Approval.

- (v.) pump at least 23,000,000 cubic metres of water into the Lake by December 31, 2005;
 - (vi.) pump at least 23,000,000 cubic metres of water into the Lake by December 31, 2006 unless the lake level surpasses the elevation of 724.55 metres;
 - (vii.) after December 31, 2006, annually pump sufficient water, to offset all of the approval holder's impact on lake level as a result of its operations, unless the Lake level surpasses the elevation of 724.55 metres and remains there during each year of the term;
 - (viii.) in the event the approval holder fails to pump the required amounts during any one year, the shortfall for that year shall be added to the next year's requirements; [and]
 - (ix.) in the event the approval holder fails to pump the required amounts during two consecutive years (including shortfalls) the Director shall give notice to the approval holder of such breach of condition and this Approval shall terminate six months from such notice.
- (f) All approvals issued to the approval holder with respect to the Wabamun Lake Treatment Plant shall be deemed to be part of this Approval.”⁷¹

Mr. Kravinchuk's proposed clause makes it mandatory to meet these pumping targets, it sets annual targets, and it includes a penalty provision – the termination of the Approval!

[86] TransAlta responds in three basic ways. First, TransAlta attempts to argue that there are no specific concerns related to the impact of TransAlta on the “health” of Lake Wabamun. Second, TransAlta submits that it is confident it will be able to meet the target prescribed in section 4.3.27.⁷² Finally, TransAlta argues that “... it would be inappropriate for the Director ... to prescribe operating conditions for a facility licenced by another decision-maker...” and that it would be improper for the Board to interfere with the public consultation process associated with that application process.⁷³

[87] The Director's counsel states that it would be wrong for the Director to prescribe annual performance measures in the Approval in that it could be viewed as fettering the discretion of the decision-maker that has to deal with the Water Treatment Plant.⁷⁴

⁷¹ Mr. Paron's Written Submission, dated April 11, 2001, pages 4 to 6.

⁷² TransAlta's Written Submission, dated April 11, 2001, page 12. Hearing Transcript, page 501.

⁷³ TransAlta's Written Submission, dated April 11, 2001, pages 11 and 12.

⁷⁴ In closing arguments, Mr. McDonald, on behalf of the Director, expressed concerns with respect to including annual performance measures in the Approval. See Hearing Transcript, pages 748 to 751.

[88] The key question that is before the Board is how to satisfy section 2(b)⁷⁵ of the Act that requires us to balance the concerns of all the parties including the economic concerns in the eyes of 500,000 people across Alberta that receive power from the Wabamun Power Plant.⁷⁶

Lake Levels

[89] We turn first to TransAlta's argument related to the lack of TransAlta's impact on the "health" of Lake Wabamun. In support of this position, TransAlta presented Dr. Stella Swanson who gave testimony⁷⁷ that Lake Wabamun is a healthy lake. She indicated that loss of recreational use in a lake does not mean a lake is not healthy; that by all standards of ecological measurement the lake is healthy; and that the main issue that has been identified is nutrient loading which is a problem that needs to be dealt with by way of a watershed management plan.⁷⁸

[90] With respect to the ecological standards by which Dr. Swanson measures the lake, Dr. Swanson cites a number of factors including that there "... are no dissolved oxygen sags, no evidence of winter kill or summer kill."⁷⁹ With respect, the Board rejects Dr. Swanson's testimony and prefers the testimony of Mr. Stephen Spencer, a fisheries biologist, who appeared on behalf of the Director. Mr. Spencer testified that there had been isolated incidents of declining oxygen in winter, with evidence that some fish are dying from lack of oxygen.⁸⁰ We believe, on the balance of all the evidence, Mr. Spencer who seems more credible.

[91] We disagree with Dr. Swanson because we believe there *are* lake level concerns at Lake Wabamun relating to the operations of the Wabamun Power Plant. TransAlta does not

⁷⁵ Section 2(b) of the Act provides:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ... (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...."

⁷⁶ TransAlta's Written Submission, dated April 11, 20001, page 1.

⁷⁷ See Hearing Transcript, pages 433 to 435.

⁷⁸ See Hearing Transcript, page 433.

⁷⁹ Hearing Transcript, page 433.

⁸⁰ Hearing Transcript, page 611.

dispute the evidence. In fact, under cross-examination by Mr. Doull, Dr. Swanson herself admitted that there were lake level problems. Mr. Doull asked: "... [Dr. Swanson,] you were saying this [the growth of significant amount of biomass] is typical conditions of a prairie lake. I mean, the low lake levels contributed to it. And you know it, Alberta Environment knows it."⁸¹ Dr. Swanson responded: "I don't think anyone is questioning that the issue here is that there is a lake level deficit that has to be made up."⁸² The problem exists, among other things, because TransAlta did not receive any help from Mother Nature, thus TransAlta's water quantity impact is not currently being mitigated in an effective manner.⁸³ This is obviously the concern of the Director⁸⁴ and it is the concern of the Board. The purpose of the Water Treatment Plant and the inclusion of section 4.3.27 in this Approval is to deal with that impact. The Board also disagrees with Dr. Swanson that a loss of recreational opportunities at Lake Wabamun is not an environmental concern. People and their desire for recreational activity are clearly a component of the environment, and as such, the impact on such opportunities must be considered when assessing the "health" of the lake.⁸⁵

[92] Many of the Appellants repeatedly wanted the Board to deal with lake levels as an issue in this hearing. In its March 13, 2001 Decision where the Board set the issues to be considered at this hearing, it did *not* include lake levels as an issue. As stated by the Chairman in that decision: "The Board has heard nothing that would demonstrate to it that there has been some significant change in circumstances with respect to the issues of water quality, air quality, or lake levels."⁸⁶ To conclude, the Chairman made the comment that it remains our position that the proper place to address lake level is the Water Treatment Plant and the approvals and licences associated with *that* facility.

⁸¹ Hearing Transcript, page 451.

⁸² Hearing Transcript, page 451.

⁸³ TransAlta's previous plan to return its historic debt to the lake was predicated on getting help from Mother Nature. See Hearing Transcript, pages 500 to 501.

⁸⁴ Hearing Transcript, page 660.

⁸⁵ Hearing Transcript, pages 561 to 563.

⁸⁶ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID at paragraph 65.

The Connection Between Lake Levels and the Approval

[93] However, it is clear to the Board that the reason that the Director included section 4.3.27 in the Approval was to address the concerns that the Statement of Concern Filers had with lake levels. We believe the Director did this to instill some level of confidence that the target set by TransAlta will be met. In order to instill this confidence, the Director created a connection between the Approval for the Wabamun Power Plant and the operation of the Water Treatment Plant.⁸⁷ The Director confirmed that in making his decision to issue the Approval, he had regard for the operation of the Water Treatment Plant, that he was aware of the volume of water that the Water Treatment Plant has been able to return to the lake, and that the licence for the Water Treatment Plant included performance measures.⁸⁸ Finally, the Director stated that "... with regards to the water treatment plant, I feel strongly about it. There is a condition in this approval that they must expand it and I am probably hovering around the end of my responsibility. And its home is the *Water Act*."⁸⁹

[94] The Director was within the four walls of his regulatory "home" by connecting the Water Treatment Plant in 4.3.27 as the method by which TransAlta mitigates the impact of the Wabamun Power Plant on the lake. The Board notes particularly TransAlta's closing comments regarding the challenges facing the Director in making this decision, and how these challenges relate to the purposes of the Act. TransAlta stated:

"The Director embarked on this very challenging process in balancing interests and we submit that he has looked at Section 2 very closely, the purposes section of the Environmental Protection and Enhancement Act. 2(a) he has clearly addressed the protection of the environment. 2(b) the need for reasonably priced electric power to sustain Alberta's economic growth and prosperity in a reliable manner has been considered. 2(d) the importance of preventing and mitigating environmental impacts. 2(g) he has provided clearly an opportunity for citizens to provide advice on decisions affecting the environment."⁹⁰

⁸⁷ This was clear from the response that the Director provided under cross-examination by Mr. Kravinchuk on behalf of Mr. Paron. See Hearing Transcript, pages 657 to 660.

⁸⁸ Hearing Transcript, page 659.

⁸⁹ Hearing Transcript, page 660.

⁹⁰ Hearing Transcript, page 744.

[95] The Appellants are still not satisfied. They want to see a mandatory requirement to expand the Water Treatment Plant, they want annual performance measures specified in this Approval such that failure to meet those performance measures would permit the Director to take enforcement action against the Wabamun Power Plant, and they want to see specified penalties built directly into the Approval that would automatically take effect if those performance measures are not met. In short, what they are seeking is an assurance that the impacts of the Wabamun Power Plant are going to be mitigated. While the ideas behind this request are understandable, their failure to offset their proposed measures against the costs that would be imposed on the electrical users of Alberta is not. Accordingly, we reject the proposals of the Appellants.

Performance Measures

[96] During the course of the hearing, the Chairman asked TransAlta to find a middle ground for proposed amendments to section 4.3.27 to address performance measures. TransAlta developed two suggested amendments to this Approval:

4.3.27.1

“In the event specific requirements for returning quantities of water to Wabamun Lake are set by the Director to achieve the commitment in 4.3.27(c) in the approval for the expanded Wabamun Lake Water Treatment Plant, the Approval Holder shall meet such production volume.”

and in the alternative

4.3.27 (c)(i)

“By not later than December 31, 2004, the Approval Holder shall have pumped sufficient water into the lake to ensure the remaining historical debt is no greater than 30 million m³ of TransAlta’s historical operations on lake level and ongoing impact from all TransAlta operations, unless lake level surpasses the elevation of 724.55 m (outlet control structure).”⁹¹

[97] The purpose of the suggested amendment 4.3.27.1 is to incorporate by reference performance measures established under the approvals and/or licences for the Water Treatment Plant into this Approval. The purpose of the proposed amendment 4.3.27(c)(i) is to address the

⁹¹ Exhibit 21. Note that in Exhibit 21 proposed amendment section 4.3.27(c)(i) was incorrectly labeled 4.3.27.1(c)(i).

concern that many of the Appellants expressed that under the current wording of 4.3.27(c), TransAlta could pump no water until December 31, 2006 and still be operating within the strict letter of the Approval.

[98] The Board, upon receiving TransAlta's suggested amendments, asked all of the parties to comment on them.⁹² The Appellants in general rejected the suggested amendments in that they did not go far enough in addressing their concerns. TransAlta, in closing arguments, expressed the view that the two suggested amendments "... that we have tendered as Exhibit 21 can provide the public with that comfort. The first clause will incorporate the limits set out in that new approval into this one, and yes, we will have cross default."⁹³ TransAlta went on to discuss the consequences of "cross default" and that the Director would have the ability to take enforcement action against the Wabamun Power Plant in the event that the Water Treatment Plant failed to meet its performance measures.⁹⁴ The Director, in his testimony in response to a question from the Chairman regarding the two suggested amendments and whether it would be possible to incorporate both of the suggested amendments into the Approval, stated:

"I guess, you know, as I indicated earlier we went around and round and around on this performance business. And it is a tough one to hammer down. And when I look at both of these, to put in the EPEA application, the one that is in front of us now ... I don't see it an issue."⁹⁵

The Chairman went on to confirm "You don't see that there would be a problem?" and the Director responded "No."⁹⁶ In closing, however, the Director's legal counsel, Mr. McDonald, expressed concerns. He indicated that connecting the Approval for the Wabamun Power Plant and the approvals and/or licences for the Water Treatment Plant could result in the fettering of discretion, that the duplication of provisions could lead to confusion, and that the possibility of double enforcement was unreasonable.⁹⁷ We disagree with Mr. McDonald. We do agree with the Director.

⁹² Hearing Transcript, pages 684 to 693.

⁹³ Hearing Transcript, page 743.

⁹⁴ Hearing Transcript, page 743.

⁹⁵ Hearing Transcript, page 704.

⁹⁶ Hearing Transcript, page 704.

⁹⁷ Hearing Transcript, page 750.

[99] The Board is mindful of the comments of Mr. McDonald and agrees that these would be concerns if amendments similar to those suggested by Mr. Kravinchuk, as detailed in paragraph [85], were adopted. However, the Board is of the view that the suggested amendments 4.3.27.1 and 4.3.27(c)(i) should not result in the difficulties that Mr. McDonald has identified. First, the suggested 4.3.27(c)(i) is effectively the same as 4.3.27(c) which is already in the Approval. The only difference is that the suggested 4.3.27(c)(i) provides for an earlier performance target. Second, the suggested 4.3.27.1 allows the decision-maker that will issue the approval and/or licence for the Water Treatment Plant the discretion to set the performance measures that will need to be met. As a result, there is no fettering of discretion. In the Board's view this is no different than adopting an external standard reference as is common elsewhere in this Approval⁹⁸ and probably other approvals in Alberta.

[100] Finally, the Board is of the view that it is important that the Director have the ability to take enforcement – or mitigative - action against the Wabamun Power Plant for a failure of the Water Treatment Plant. The purpose of the Water Treatment Plant, vis-a-vis the Wabamun Power Plant, is to mitigate the impacts of the Wabamun Power Plant. The Board is of the view that in the event that TransAlta is unable to mitigate the impacts of the Wabamun Power Plant through the operation of the Water Treatment Plant, then the Director should have the ability to take steps both at the Water Treatment Plant and at the Wabamun Power Plant in order to protect the environment. This only makes common sense. The Board notes Mr. McDonald's concerns with the ability to create double penalties, however, the Board trusts that in taking enforcement or mitigative action in such a case, Alberta Environment will be reasonable and will not attempt to impose some form of double penalty.

[101] The Board is of the view that the suggested amendments of 4.3.27.1 and 4.3.27(c)(i) are a reasonable step in addressing the concerns of these Appellants to ensure that impact of the Wabamun Power Plant are mitigated and, as a result, will be recommending that the Approval be amended to include the two provisions suggested by TransAlta.

[102] We reject the various proposals of the Appellants, and specifically that of Mr. Kravinchuk, to impose performance measures because they do not give TransAlta the flexibility

⁹⁸ See, for example, section 1.1.2(f) of the Approval.

that it needs, particularly in challenging years of drought. To impose the type of annual performance measures that some of the Appellants are seeking, disrespects Mother Nature's ability to rain, snow or shine whenever and wherever she wants, regardless of licences, facilities, or the valid wishes of human beings.

[103] Further, the types of performance measures that some of the Appellants seek to impose on TransAlta do not take into account that facilities such as the Water Treatment Plant may take somewhat longer than expected to bring on line at full capacity, may suffer upsets that temporarily limit production, or may be subject to outside economic forces during construction, such as delays in obtaining materials and equipment or labour shortages. In short, the performance measures requested by some of the Appellants do not take into account valid operational considerations. The provisions recommended by TransAlta do.

[104] We also reject the various proposals of the Appellants, and in particular that of Mr. Kravinchuk, because they do not take into account the economic impact on the people of Alberta. The Wabamun Power Plant provides power to 500,000 people.⁹⁹ The three TransAlta generating facilities at Lake Wabamun represent 43 percent of Alberta's generating capacity.¹⁰⁰ The Wabamun Power Plant alone represents approximately 7.4 percent of Alberta's generating capacity.¹⁰¹ The Act requires, in section 2, that there is a balance. TransAlta's recommended provisions provide this balance.

Mandatory Requirement to Expand the Water Treatment Plant

[105] The Appellants have also requested that the Approval be amended to make it mandatory for TransAlta to expand the Water Treatment Plant. Section 4.3.27 currently only requires TransAlta to make an application to expand the Water Treatment Plant. The Board is of the view that if the section were amended to require TransAlta to expand the Water Treatment Plant, there would be the danger of fettering that Mr. McDonald is concerned about. The Board notes that TransAlta has already submitted its application for the expansion of the Water

⁹⁹ TransAlta's Written Submission, dated April 11, 2001, page 1.

¹⁰⁰ Hearing Transcript, page 422.

¹⁰¹ Calculation based on information at page 20 of TransAlta's Annual Report entitled TransForm, attached as appendix to Mr. Paron's Written Submission, dated April 11, 2001. Exhibit #4.

Treatment Plant and is of the view that it is necessary for TransAlta to expand the Water Treatment Plant in order to address its impacts on the lake. As a result, the Board is not prepared to recommend the type of change that the Appellants have suggested in this Approval.

Incorporation of Penalty Provision Directly into the Approval

[106] The Appellants have also asked the Board to amend the Approval to incorporate penalties and sanctions, for failure to mitigate the impacts on the Lake, directly into the Approval. The Board is of the view that this is not consistent with the provisions of the Act. The Act is designed with what is called a “tool box” of enforcement options. The “tool box” permits the Director to respond appropriately to a wide range of situations where enforcement or mitigation is required. The “tool box” offers a fact specific response from Alberta Environment and even from the Crown Prosecutor if necessary. We do not want to fetter that discretion.

[107] Further, one of the key elements of enforcement or mitigation action that can take place under the Act is the ability to appeal the enforcement or mitigation action to the Board. If the Board were to incorporate penalties and sanctions directly into the Approval, it would be taking away from the flexibility of the Director to respond to situations as they arise. It would be taking away the statutory right of TransAlta to appeal that enforcement or mitigation action based on a fact specific case. Again, the Board is not prepared to recommend the type of change requested by the Appellants.

I. Agreement Regarding 4.1.3

[108] As stated in the Background to this Decision, Ms. Donna Thomas, the Summer Village of Kapasiwin, Ms. Gwen Bailey, TransAlta, and the Director reached an agreement to resolve their appeals prior to the hearing of these appeals. The agreement was to ask the Board to replace section 4.1.3 of the Approval with the following:

“The Approval holder shall apply for an amendment to or renewal of this Approval to provide that it will be operating with, or decommissioning, in accordance with one of the proposals provided in 4.1.2 by the date of expiry in the Approval.”¹⁰²

¹⁰² Letter dated April 5, 2001, from Mr. Ron Kruhlak on behalf of TransAlta.

[109] The Board notes that none of the other parties, save the Village of Wabamun as discussed below, have expressed concerns with this proposal. The Board is of the view that this amendment is reasonable and, and as a result, will include this proposed amendment in its recommendations.

J. Concerns of the Village of Wabamun

[110] The Board would like to more specifically address the concerns of the Village of Wabamun. The Village of Wabamun is in a unique position in this appeal because it is a directly affected landowner. The Wabamun Power Plant is located within the Village of Wabamun, TransAlta employs many of its citizens, and the Village derives a sizable portion of its tax base from TransAlta.¹⁰³

[111] The Village of Wabamun has expressed its views on only two of the six issues before the Board. The first is alternative technologies for dealing with weeds; the Village's principle concern is protecting its water supply from the potential use of herbicides.¹⁰⁴

[112] The other issue for the Village is the inclusion of section 4.1.2 and consequently section 4.1.3 in the Approval. The Village of Wabamun's concern with the approach in these two provisions is "premature".¹⁰⁵ What the Village of Wabamun means by premature is that the decision to either upgrade or decommission the Wabamun Power Plant should more appropriately be done in a subsequent approval process. Either upgrading or decommissioning will have significant consequences to the Village of Wabamun and the Board understands their concern.¹⁰⁶ However, the Board is of the view that on a balance of all of the purposes of the Act the Director has made the right decision with respect to sections 4.1.2 and 4.1.3.

[113] The Board has every confidence that the Village of Wabamun will utilize the public participation opportunities provided in the Act. Further, as a significant stakeholder, the

¹⁰³ Village of Wabamun, Written Submission, dated April 11, 2001, page 3.

¹⁰⁴ Village of Wabamun, Written Submission, dated April 11, 2001, page 4.

¹⁰⁵ Village of Wabamun, Written Submission, dated April 11, 2001, page 5.

¹⁰⁶ The Village of Wabamun is concerned that, among other things, if the Wabamun Power Plant is upgraded cooling towers may be required. Further the Village of Wabamun is concerned that if the Wabamun Power Plant is decommissioned, it could have economic consequences for the Village.

Board expects that TransAlta and the Director will involve the Village of Wabamun closely in the decision-making process affecting the residents of the Village as a result of sections 4.1.2 and 4.1.3.

III. Conclusions

[114] The issues that the Board has had to address and report to the Minister are:

- public safety, solely as it relates to TransAlta's operations and the impact on winter ice;
- harvesting weeds, but solely on the matter of alternate technologies - chemical, physical, or other such technologies - to enhance TransAlta's current weed control program;
- sediment deposition at Point Alison;
- the definitions of decommissioning and cooling water in the Approval;
- the watershed management plan; and
- sections 4.1.2 and 4.3.27 of the Approval, regarding timing and duration only, but including the length (the term) of the Approval.

A. Ice Safety

[115] The Board is very concerned about public safety with respect to winter ice and is of the view that even one preventable incident is unacceptable. The Board is concerned about the incidents that have been reported to it, and encourages people to use common sense when it comes to ice safety or safety around the lake in general. However, the Board is of the view that everything that can reasonably be expected to be done under the Approval to ensure public safety with respect to winter ice is being done. As a result, the Board is not making any additional recommendations respecting the issue of ice safety. However, the Board expects that, as with any public safety program, TransAlta will work with the Village of Wabamun to continually review the public safety program and make improvements where appropriate. No changes will be recommended with respect to ice safety.

B. Alternate Technologies to Control Weeds

[116] The Board recognizes that weeds are one of the biggest concerns to some of the Appellants. However, based on the information that has been provided, the Board is not prepared to recommend that the Approval be amended to require TransAlta to use alternate technologies to control weeds. There was simply insufficient information and a potential negative effect on human beings from the proposal to do large-scale application of herbicides, which made it impossible to consider recommending that option. The Board received insufficient information on other options. Therefore, while the Board encourages TransAlta to be diligent in the application of its current weed cutting program, we are not recommending changes to the Approval in this regard.

C. Sediment Deposition at Point Alison

[117] This was an issue raised by the Summer Village of Point Alison. The Summer Village of Point Alison has withdrawn its appeal and the Board understands that this issue will be addressed through the agreement reached between the Summer Village of Point Alison and TransAlta. The Board therefore will make no recommendations on this issue.

D. Definitions of Cooling Water and Decommissioning

[118] The Board is of the view that the cooling water is not industrial waste water and, therefore the current definition in the Approval is appropriate.

[119] The Board is satisfied that the Director has adequately clarified the definition of decommissioning. As a result, the definition of decommissioning in the Approval should not be changed.

[120] The Board will recommend that the definitions of decommission and cooling water, being sections 1.1.2(m) and 1.1.2(i) respectively, be confirmed.

E. Watershed Management Plan

[121] The Board is of the view that the authority to carry out a watershed management plan is in the hands of the Minister. As a result, it is the Board's view that it would be inappropriate for the Board to consider recommendations requiring or specifying the timing of a watershed management plan. The Approval identifies the need for a watershed management plan in section 4.3.24 and the *Water Act* provides for the mechanism by which such a planning process will be carried out.

[122] However, the Board notes that there is considerable agreement between the parties that a watershed management plan should be done, and in the words of TransAlta "[a]s soon as possible."¹⁰⁷ Further, the Board is of the view that TransAlta, as a principle stakeholder in the watershed, should take a leading role with respect to the watershed management plan. In undertaking this leadership role, the Board is of the view that TransAlta should be able to commence work on elements of the watershed management plan, such as data collection, even before the Province formally establishes the planning process. Finally, the Board draws Alberta Environment's attention to the two pre-existing watershed management plans for the Lake Wabamun area. The Board is of the view that these pre-existing plans should provide a useful starting point for the watershed management plan that is contemplated. That said, we are not recommending changes to the Approval in relation to the watershed management plan, and subject to the clerical amendment that the Director is planning to undertake in the event that he chooses to make that amendment,¹⁰⁸ we will be recommending that section 4.3.24 of the Approval be confirmed.

F. Section 4.1.2 and the Ten Year Term

[123] The Board is of the view that the decision of the Director was reasonable and balanced. Director Ostertag considered input from all sides and weighed, appropriately, the competing interests. The Board is of the view that section 4.1.2 as worded and the ten-year term

¹⁰⁷ TransAlta's Written Submission, dated April 11, 2001, page 22.

¹⁰⁸ The Board notes the intention of the Director to correct a clerical error with respect to section 4.3.24 of the Approval, which requires the watershed management plan. See Director's Written Submission, dated April 11, 2001, page 17. The Board agrees that this clerical amendment will improve the clarity of the section.

of the Approval are appropriate. Accordingly, the Board will recommend that section 4.1.2 and the ten-year term of the Approval be confirmed.

[124] The Board notes the concerns of the Village of Wabamun with section 4.1.2 and with section 4.1.3. The Board expects that TransAlta and the Director will involve the Village of Wabamun closely in the decision-making process that result from sections 4.1.2 and 4.1.3.

G. Section 4.3.27

[125] At the hearing, in response to the discussions and at the request of the Board, TransAlta developed two suggested amendments to section 4.3.27.¹⁰⁹ The Board is of the view that the suggested amendments of sections 4.3.27.1 and 4.3.27(c)(i) are a reasonable step in addressing the concerns of the Appellants to ensure that impact of the Wabamun Power Plant are mitigated. As a result, the Board will recommend that the Approval be amended to include both of TransAlta's suggested provisions:

4.3.27.1 "In the event specific requirements for returning quantities of water to Wabamun Lake are set by the Director to achieve the commitment in 4.3.27(c) in the approval for the expanded Wabamun Lake Water Treatment Plant, the Approval Holder shall meet such production volume."¹¹⁰

and

4.3.27 (c)(i) "By not later than December 31, 2004, the Approval Holder shall have pumped sufficient water into the lake to ensure the remaining historical debt is no greater than 30 million m³ of TransAlta's historical operations on lake level and ongoing impact from all TransAlta operations, unless lake level surpasses the elevation of 724.55 m (outlet control structure)."¹¹¹

[126] The Board notes the request by the Appellants to add a mandatory requirement to expand the water treatment plant. The Board is of the view that such an amendment could potentially fetter the discretion of the decision-maker with respect to the Water Treatment Plant. As a result, the Board is not prepared to recommend such an amendment.

¹⁰⁹ Exhibit 21.

¹¹⁰ Exhibit 21.

¹¹¹ Exhibit 21. Note that proposed amendment section 4.3.27(c)(i) was incorrectly labeled on the exhibit as 4.3.27.1(c)(i).

[127] The Board notes the request by the Appellant to incorporate penalty and sanction provisions directly into the Approval. The Board is of the view that such an approach is inconsistent with the purposes and intent of the Act as it could bind the hands of both Alberta Environment and the Crown Prosecutor. As a result, the Board is not prepared to recommend such an amendment.

H. Section 4.1.3

[128] Prior to the hearing, Ms. Donna Thomas, the Summer Village of Kapasiwin, Ms. Gwen Bailey, TransAlta, and the Director reached an agreement to resolve their appeals. The Board notes that none of the other parties, save the Village of Wabamun, have expressed concerns with the proposed amendment in agreement. The Board is of the view that this amendment is reasonable. As a result, the Board will recommend that section 4.1.3 of the Approval be repealed and the following substituted, according to the wishes of these parties:

“The Approval holder shall apply for an amendment to or renewal of this Approval to provide that it will be operating with, or decommissioning, in accordance with one of the proposals provided in 4.1.2 by the date of expiry in the Approval.”¹¹²

I. Public Consultation

[129] Through the hearing, there has been a common, but unusual theme surrounding the participatory expertise and good judgement exercised by Director Ostertag with respect to the public consultation process. The Director is again to be commended for this. The Board is of the view that the approach taken by the Director with respect to the TransAlta approval process is the approach that should be followed by Alberta Environment with respect to major approvals. We believe that Director Ostertag’s approach is the primary reason why we are recommending that this Approval, for the most part, be untouched.

¹¹² Letter dated April 5, 2001, from Mr. Ron Kruhlak on behalf of TransAlta.

IV. Recommendations

[130] In accordance with section 91 of the Act, the Board recommends that the Minister of Environment:

1. confirm the definitions of decommission and cooling water in the Approval, being sections 1.1.2(m) and 1.1.2(i) respectively;
2. confirm the provision dealing with the watershed management plan in the Approval, being section 4.3.24, subject to the proposed clerical amendment of the Director should the Director choose to make that amendment;
3. confirm section 4.1.2 and the ten-year term of the Approval;
4. vary the Approval by adding the following provisions as proposed by TransAlta
 - (a) “4.3.27.1 In the event specific requirements for returning quantities of water to Wabamun Lake are set by the Director to achieve the commitment in 4.3.27(c) in the approval for the expanded Wabamun Lake Water Treatment Plant, the Approval Holder shall meet such production volume.”; and
 - (b) “4.3.27 (c)(i) By not later than December 31, 2004, the Approval Holder shall have pumped sufficient water into the lake to ensure the remaining historical debt is no greater than 30 million m³ of TransAlta’s historical operations on lake level and ongoing impact from all TransAlta operations, unless lake level surpasses the elevation of 724.55 m (outlet control structure).”; and
5. vary the Approval by deleting section 4.1.3 and replacing it as follows:
 - (a) “The Approval holder shall apply for an amendment to or renewal of this Approval to provide that it will be operating with, or decommissioning, in accordance with one of the proposals provided in 4.1.2 by the date of expiry in the Approval.”.

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

[132] Finally, with respect to section 92(2) and 93 of the Act, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent to the following parties:

1. Ms. Gwen Bailey, represented by Mr. K.F. Bailey, Q.C.;
2. Enmax Energy Corporation, represented by Mr. L.A. Cusano, Donahue Ernst & Young;
3. Mr. Nick Zon;
4. Mr. Blair Carmichael;
5. Ms. Donna Thomas and the Summer Village of Kapasiwin, represented by Mr. D.R. Thomas, Q.C.;
6. Mr. James Paron, represented by Mr. I. Samuel Kravinchuk;
7. the Village of Wabamun, represented by Mr. Barry Sjolie, Brownlee Fryett and Mr. Leigh Randle;
8. Mr. David Doull;
9. the Lake Wabamun Enhancement and Protection Association, represented by Mr. Brian O’Ferrall, Q.C, Bennett Jones, Mr. Locke Boros and Ms. Linda Duncan;
10. the Summer Village of Point Alison, represented by His Worship Mayor C. Gordon Wilson;
11. Mr. Rick Ostertag, Director, Northern East Slopes Region, Environmental Service, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice;
12. TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak, McLennan Ross and Mr. Alan Harvie, Macleod Dixon; and
13. Mr. C.P.G. (Pat) Spilsted.

V. Costs

[133] Prior to the close of the hearing, the Board received applications for final costs from LWEPA and from the Village of Wabamun.

[134] While TransAlta and the Director briefly had an opportunity to address these applications, the Board is prepared to receive full written arguments on any costs applications. In addition to arguments on the amount and nature of these costs, the Board would also like to receive arguments on the issue of who should bear the costs. The Board notes that the initial reason that LWEPA filed a Notice of Appeal was to oppose the Notice of Appeal from Enmax. As a result, the Board would like to receive arguments, including arguments from Enmax, as to whether Enmax should bear any portion of the costs claimed by LWEPA.

[135] The Board requests that the submissions in relation to these costs applications be provided to the Board two weeks from the date of the Minister's Order with respect to this Report and Recommendations.

Dated on May 18, 2001 at Edmonton, Alberta.

- original signed by -

William A. Tilleman, Q.C., Chair

- original signed by -

Ron V. Peiluck, Member

- original signed by -

Dr. Roy A. Crowther, Member

VI. Exhibits

Exhibit No.	Description
1	Advertisement placed in the Edmonton Journal on March 23, 2001 and in the Wabamun Community Voice on March 27, 2001, advising of the hearing to take place on April 18 and 19, 2001. A news release was also placed on the Government web site on March 21, 2001 and distributed to 95 daily newspapers, radio stations and television stations within Alberta.
2	Notices of Appeal filed by Ms. Gwen Bailey (00-074), Mr. Nick Zon (00-077), Mr. Blair Carmichael (00-078), Ms. Donna Thomas and the Summer Village of Kapasiwin (01-001), Mr. James Paron (01-002), Mayor Purdy of the Village of Wabamun (01-003), Mr. David Doull (01-004), Lake Wabamun Enhancement and Protection Association (01-005).
3	Photographs A, B and C submitted by Mr. Blair Carmichael.
4	TransAlta Utilities Annual Report 2000 "TransForm". Submitted by Mr. Kravinchuk on behalf of Mr. James Paron.
5	Watershed Map - Lake Wabamun taken from report: "Preservation of Water Quality in Wabamun". Submitted by Mr. Doull.
6	Newspaper article "The Battle Over Wabamun's Water". Submitted by Mr. Doull.
7	"Praxis, Transalta Utilities Corporation, Wabamun Generating Plant Statistical Overview". Submitted by Mr. Doull.
8	Photographs A, B and C of Moonlight Bay and Boathouse and Boathouse access. Submitted by Mr. Zon.
9	Environmental Enforcement Historical Search Service. Submitted by Mr. Doull.
10	Letter dated January 9, 1997 to Mr. Spink, Director, Air and Water Approval Division, Alberta Environment, from Bill and Diane Purdy, regarding Wabamun Thermal Generating Plant "Renewal Operating Licence" Submitted by Mr. Doull.

Exhibit No.	Description
11	Map – Application for Renewal of Approval to Operate, Wabamun Plant Location, August 1999. Submitted by TransAlta Utilities Corporation.
12	Bucket of Wabamun lake water and mud. Submitted by Mr. Carmichael.
13	8 Photographs. Submitted by Mr. John Drever.
14	48 Photographs. Submitted by TransAlta Utilities Corporation.
15	Erratum to submission of TransAlta Utilities Corporation. Submitted by TransAlta Utilities Corporation.
16	Changes in Wabamun EPEA Operating Approval – old to new. Submitted by TransAlta Utilities Corporation.
17	Letter dated April 5, 2001, from Mr. Ron Kruhlak to the Environmental Appeal Board. Submitted by TransAlta Utilities Corporation.
18	Lake Wabamun Watershed Advisory Committee Report, June 1983. Submitted by Nick Zon.
19	Lake Wabamun Management Plan 1985. Submitted by Nick Zon.
20	Public Notice TransAlta Utilities Corporation Environmental Protection and Enhancement Act and Water Act, Notice of Applications advertised in the Stony Plain Reporter on April 13, 2001. Submitted by TransAlta Utilities Corporation.
21	Proposed addition to clause 4.3.27.1 of Approval and alternative 4.3.27.1(c)(i). Submitted by TransAlta Utilities Corporation.
22	Undertaking of change to clause 4.3.27. Submitted by LWEPA.

VII. Draft Order

Ministerial Order
/2001

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3

**Order Respecting Environmental Appeal Board
Appeal Nos. 00-074, 077, 078, and 01-001-005**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal Nos. 00-074, 077, 078, and 01-001-005.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2001.

Honourable Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeal Board Appeal Nos. 00-074, 077, 078, and 01-001-005

With respect to the decision of Mr. Rick Ostertag, Director, Northern East Slopes Region, Environmental Service, Alberta Environment, to issue Approval 10323-02-00 (the "Approval") dated November 30, 2000, to TransAlta Utilities Corporation, I, Dr. Lorne Taylor, Minister of Environment order:

1. the definitions of decommission and cooling water in the Approval, being sections 1.1.2(m) and 1.1.2(i) respectively, are confirmed;
2. the provision dealing with the watershed management plan in the Approval, being section 4.3.24, subject to the proposed clerical amendment of the Director should the Director choose to make that amendment, is confirmed;
3. section 4.1.2 and the ten-year term of the Approval are confirmed;
4. the Approval is varied by adding the following provisions:
 - (a) "4.3.27.1 In the event specific requirements for returning quantities of water to Wabamun Lake are set by the Director to achieve the commitment in 4.3.27(c) in the approval for the expanded Wabamun Lake Water Treatment Plant, the Approval Holder shall meet such production volume."; and
 - (b) "4.3.27 (c)(i) By not later than December 31, 2004, the Approval Holder shall have pumped sufficient water into the lake to ensure the remaining historical debt is no greater than 30 million m³ of TransAlta's historical operations on lake level and ongoing impact from all TransAlta operations, unless lake level surpasses the elevation of 724.55 m (outlet control structure)."; and
5. the Approval is varied by deleting section 4.1.3 and replacing it as follows:
 - (a) "The Approval holder shall apply for an amendment to or renewal of this Approval to provide that it will be operating with, or decommissioning, in accordance with one of the proposals provided in 4.1.2 by the date of expiry in the Approval."