
ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – May 10, 2002

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

-and-

IN THE MATTER OF an appeal filed on behalf of Big Lake Environmental Support Society with respect to Approval No. 00150792-00-00 issued by the Director, Northeast Boreal Region, Regional Services, Alberta Environment, to Genstar Development Company to place fill material in the flood plain of the Sturgeon River, Parcel A 3032RS and River Lots 20 and 21, St. Albert Settlement, (N1/2 32-053-25-W4M) near St. Albert, Alberta.

Cite as: *Big Lake Environmental Support Society v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company.*

**PRELIMINARY MEETING
BY WRITTEN SUBMISSION
ONLY BEFORE:**

William A. Tilleman, Q.C., Chair.

PARTIES:

Appellant: Big Lake Environmental Support Society,
represented by Ms. Louise Horstman.

Director: Mr. Patrick Marriott, Director, Northeast
Boreal Region, Regional Services, Alberta
Environment, represented by Mr. Randy
Didrikson and Ms. Michelle Williamson,
Alberta Justice.

Approval Holder: Genstar Development Company, represented
by Mr. Dennis Thomas, Q.C., Fraser Milner
Casgrain.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to the Genstar Development Company authorizing the placement of earth fill material on two parcels of land in the flood plains of the Sturgeon River and in the flood plains of Big Lake, in the City of St. Albert, Alberta. The area where the fill material is being placed is proposed to become part of a new housing development.

A Notice of Appeal was received from Ms. Louise Horstman, secretary for the Big Lake Environmental Support Society (BLESS) appealing the Approval.

Written submissions were received from the parties on how Ms. Horstman and BLESS are directly affected by the Approval issued to Genstar. Upon review of the submissions, the Board decided to dismiss BLESS' appeal for not being directly affected. BLESS did not provide a complete membership list nor any indication how the members are directly affected as individuals by the Approval. BLESS did not demonstrate to the Board how it had a unique interest over and above the community that is generally affected by the granting of the Approval.

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I. BACKGROUND

[1] On August 3, 2001, Approval No. 00150792-00-00 (the “Approval”) was issued to Genstar Development Company (the “Approval Holder”) under the *Water Act*, R.S.A. 2000, c. W-3,¹ by the Director, Northeast Boreal Region, Regional Services, Alberta Environment (the “Director”). The Approval states that the Approval Holder is authorized to place earth fill material in the flood plains of the Sturgeon River on Parcel A 3032RS and River Lots 20 and 21, St. Albert Settlement (N1/2 32-053-25-W4M) near St. Albert, Alberta.

[2] On August 14, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal, appealing the Approval, and an application for a Stay from Ms. Louise Horstman, secretary for the Big Lake Environmental Support Society (the “Appellant” or “BLESS”).

[3] On August 15, 2001, the Board wrote to all parties and acknowledged receipt of the Notice of Appeal and Stay application filed by the Appellant. The Board requested the Director provide all documents (the “Record”) related to the appeal, and requested the Appellant respond to the following questions with respect to the Stay request:

1. What is the serious concern that the Appellant has that should be heard by the Board?
2. Would the Appellant suffer irreparable harm if the Stay is refused?
3. Would the Appellant suffer greater harm for the refusal of a Stay pending a decision of the Board on the appeal than the Approval Holder would suffer from the granting of a Stay; and
4. Would the overall public interest warrant a Stay?

[4] According to standard practice, on August 15, 2001, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under the Board’s respective legislation. Both Boards responded in the negative.

¹ As of January 1, 2000, the *Water Act*, S.A. 1996, c. W-3.5, has been replaced with the *Water Act*, R.S.A. 2000, c. W-3, as part of the Revised Statutes of Alberta.

[5] On August 22 and 29, 2001 the Board received the Record from the Director and forwarded copies to the Approval Holder and Appellant.

[6] On August 22, 2001, the Board received a letter from the Appellant in which it requested that an amended advertisement be placed in the St. Albert Gazette reflecting the Approval include fill to be placed in Big Lake as well as the Sturgeon River, but it failed to answer the questions posed to it by the Board regarding the Stay application. On August 27, 2001, the Board acknowledged the Appellant's letter of August 22, 2001, and advised that the Stay application had been dismissed. This letter stated, in part, the Board "... notes that Ms. Horstman did not respond to the Board's questions regarding her Stay request. In this regard the Board dismisses Ms. Horstman's application for a Stay pursuant to s. 87(5)(a)(ii) [now section 95(5)(a)(iv)] of the *Environmental Protection and Enhancement Act* ('EPEA'), for failing to provide additional information."²

[7] On August 31, 2001, the Board received a letter from the Appellant again requesting proper public notification regarding the Approval, advising that the proposed fill involved Big Lake. The Board acknowledged this letter on September 4, 2001.

[8] On September 25, 2001, the Board wrote to the parties to set a schedule for written submissions on the directly affected status of the Appellant. The Board received the submissions and advised the parties on October 12, 2001, that it would issue a decision with respect to the Appellant's directly affected status.

[9] On November 2, 2001, the Board notified the Appellant that after reviewing the submissions of the parties, that the Board "...dismisses the appeal of Ms. Louise Horstman and

² The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002 as part of the Revised Statutes of Alberta. Section 85(5)(a)(ii) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 provides:

"The Board

- (a) may dismiss a notice of appeal if
- (ii) the person who submitted the notice of appeal fails to comply with a written notice under section 85...."

The wording of section 95(5)(a)(ii) of the revised statute is the same.

Section 85 [now section 92] states:

"Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice."

BLESS for not being directly affected by the Approval.” Reasons for the Board’s decision were to follow. These are those reasons.

II. ANALYSIS

[10] In previous decisions, the Board has stated that groups or organizations do have the right to file an appeal. To become a party to an appeal, the group must have filed a valid Statement of Concern and a Notice of Appeal. However, there are additional requirements that a group must satisfy to show the Board that it is directly affected by a decision of the Director.

[11] Before the Board hears an appeal, the individual or group must show that they are directly affected by the decision of the Director.³ As stated in *Wessley*, “... the definition of which persons are ‘directly affected’ is flexible and will depend upon the circumstances of each case.”⁴ This allows the Board some flexibility in determining who has standing in an appeal. The Board has, in other decisions, discussed some of the factors it will consider in determining if a party is directly affected.

[12] In *Kostuch*, the Board stated “...that the word ‘directly’ requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question.”⁵ The principle test for directly affected was stated in *Kostuch*:

“Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person’s interests.

³ Section 115(1)(a)(i) of the *Water Act* states:

“(1) A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:

(a) if the Director issues or amends an approval, a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108....”

⁴ *Fred J. Wessley v. Director, Alberta Environmental Protection* (February 2, 1994), E.A.B. Appeal No. 94-001 at page 6.

⁵ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 28, E.A.B. Appeal No. 94-017.

This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”⁶

[13] In coming to this conclusion in *Kostuch*, one of the considerations was that the interest of a directly affected person had to be greater than “...the common interest of all residents who are affected by the approval.”⁷ In this regard, in *Kostuch* the Board considered its previous decision in *Ross*.⁸ *Ross* states:

“To be directly affected under section 84(1)(a)(v) [(now 91(1)(a)(ii))], this Board feels the person who appeals must have a substantive interest in the outcome of the approval that surpasses the common interest of all residents who are affected by the approval. [(*Maurice Boucher v. Director, Environmental Protection* (February 2, 1994), E.A.B. Appeal No. 93-004.)] ‘Directly affected’ depends upon the chain of causality between the specific activity approved ... and the environmental effect upon the person who seeks to appeal the decision.”⁹

⁶ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraphs 34 and 35, E.A.B. Appeal No. 94-017 (“*Kostuch*”). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.) at paragraph 25.

⁷ *Ross v. Director, Environmental Protection* (May 24, 1994), E.A.B. Appeal No. 94-003 (“*Ross*”).

⁸ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33, E.A.B. Appeal No. 94-017.

⁹ *Ross v. Director, Environmental Protection* (May 24, 1994), E.A.B. Appeal No. 94-003.

Section 91(1)(a)(ii) of EPEA provides:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances: (a) where the Director issues an approval ... a notice of appeal may be submitted ... (ii) by the approval holder or by any person who is directly affected by the Director’s decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3)...”

[14] The Board has previously held that whether an organization is directly affected does not, on its own, determine standing.¹⁰ What is relevant is whether the individuals that make up the group are directly affected. As stated in *Kostuch*:

“The determination of whether a person is directly affected is a multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing.”¹¹

[15] The onus to demonstrate that they do have a unique interest and therefore they are directly affected, is on the appellants. In *Paron*, the Board held:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”¹²

The Board’s Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.¹³

¹⁰ In *Graham et al. v. Alberta (Director of Chemicals Assessment and Management, Environmental Protection)* (1996), 20 C.E.L.R. (N.S.) 287 (A.E.A.B.) at paragraph 21, E.A.B. Appeal No. 95-025, the Board dismissed a Notice of Appeal filed by the Lesser Slave Lake Indian Regional Council stating:

“The Alberta Court of Appeal held in *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory and Appeal Board)*, [(1996), 34 Admin.L.R. (2d) 167 at paragraph 12] that for the purpose of establishing a direct effect, it is not enough for a corporate body to merely represent the interests of those who may be directly affected.”

This case was judicially reviewed and then taken to the Court of Appeal. See: *Graham et al. v. Alberta (Director, Chemicals Assessment and Management, Environmental Protection)* (1997), 22 C.E.L.R. (N.S.) 141 (Alta.Q.B.) and (1997), 23 C.E.L.R. (N.S.) 165 (Alta.C.A.).

¹¹ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 38, E.A.B. Appeal No. 94-017. See also: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

¹² *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), E.A.B. Appeals No. 01-045, 01-046, 01-047-D at paragraph 24.

¹³ Section 29 of the Board’s Rules of Practice provide:

“Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

[16] In *Bailey*, following a review of a number of cases involving groups filing an appeal, the Board stated:

“The cornerstone of all of the cases is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 84 [(now section 91)] of the Act [(EPEA)], individual members of the organization should also file - either jointly with the organization or separately. There will be cases, such as *Hazeldean*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced that the majority of the individual members of the organization are individually and personally impacted by the project.”¹⁴

[17] The important issue to the Board’s jurisdiction is how the decision will affect individuals. As this is the starting point for the Board, if a group files a Notice of Appeal, the Board needs to know who the members are and how each will be affected by the decision. The onus to show how a group is directly affected has an additional element to prove, as the group must show how individual members are directly affected. It is not enough for the group to make general statements as to how the members are directly affected. The Board needs a clear indication of who the members of the group are, where they live in relation to the matter in the appeal, and how each will be personally affected by the application. Without this type of information, and unless the legislation changes, the Board will likely not grant party status.¹⁵ Although in the Appellant’s submission there is a list of the members who sit on the board of directors,¹⁶ there is no indication as to whether there are additional members of BLESS, who they are, and how they are directly affected by the Director’s decision. Even with respect to those

¹⁴ Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 53, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) E.A.B. Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID (“*Bailey*”). *Hazeldean Community League et al. v. Director of Air and Water Approvals, Alberta Environment* (May 11, 1995), E.A.B. Appeal No. 95-002 (“*Hazeldean*”). See also: Re: *AEC Pipelines Ltd.* (2001), 38 C.E.L.R. (N.S.) 14 (A.E.A.B.) at paragraphs 59 to 69, (*sub nom. Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*) E.A.B. Appeal No. 00-073.

The relevant part of section 91 of EPEA provides:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances: (a) where the Director issues an approval ... a notice of appeal may be submitted (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director’s decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)...”

¹⁵ See: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.*, E.A.B. Appeal No. 01-076-D.

¹⁶ See Appellant’s submission, dated October 1, 2001.

members who are listed, there are no specific arguments as to how these individuals are directly affected.¹⁷

[18] As stated in *Bildson*,¹⁸ the appellant must be directly affected – not someone else - and it is not enough to make statements that illustrate that the community in general will be affected.

“Thus, an appellant cannot have standing because other people are ‘directly affected,’ at least, if the appellant does not prove he is also ‘directly affected.’ Similarly, an appellant cannot base his standing on a general interest or desire to prevent any environmental harms resulting from the approved project; the appellant must show that those harms ‘directly affect’ the appellant. Thus, in *Kosutch*, the Board stated that it would not grant standing to an appellant simply because the appellant shared ‘the abstract interest of all Albertans in generalized goals of environmental protection.’ [*Kosutch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 38, E.A.B. Appeal No. 94-017.]

[19] A substantial number of the members must be directly affected before standing will be given to the group. For example, in *Hazeldean* more than half of the individual members could show that they were directly affected by the decision of the Director.¹⁹ As stated in *Bailey*, it is advisable that a group files an appeal in *conjunction* with an individual who is directly affected. None of the known members of BLESS had filed an individual Statement of Concern or a Notice of Appeal.

¹⁷ See: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.*, E.A.B. Appeal No. 01-076-D.

¹⁸ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Ltd.*, E.A.B. Appeal No. 98-230-D.

¹⁹ In *Hazeldean*, the Board noted:

“The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community’s representations. Seventy-five of 105 people who completed this survey indicated that they were concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time.... Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased air emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.”

[20] In a letter forwarded by electronic mail dated November 28, 2001, the Appellant stated that it would be willing to provide the name of an individual member if the Board did not accept the Appellant's application. However, this was too little, too late. At that point of time, the appeal period had expired, and it would be prejudicial to the other parties in an appeal to have a group file a Notice of Appeal, and then later, after the appeal period had expired, suddenly have individuals stepping into the appeal process. All parties to an appeal, including industry and government, must be given the chance to know the case they are facing. Also, without a clear indication of who the group members are, the Board has no way of knowing if the name being brought forward is representative of the other members of the group, where she live, works, plays and so on. According to the Appellant in its rebuttal submission, "...BLESS gives the authority to communicate on behalf of the [BLESS] Board with regard to any specific issue to either the appropriate chairperson, or else the President or Secretary."²⁰ Although this gives the president or secretary the authority to represent the other members of the BLESS Board, there is no indication that they have been authorized to act on behalf of the other members of BLESS, whoever they may be, to file this appeal. The position the person holds in this type of group is of little concern to the Board. What is important is whether the person is, in her own right, directly affected.

[21] The Board applauds the efforts the members of BLESS have taken in the past, and we hope will continue to in the future, to increase public awareness of the environment and have taken steps to allow other citizens to appreciate the area around Big Lake. However, the issues brought forward in the Notice of Appeal do not delineate how the decision of the Director affects the individual members of the group any more than the general population. The submissions do not make the proximate and direct connections that are required to find that BLESS is directly affected.

[22] In its submissions, BLESS refers to the projects that it has accomplished over the past years and its present efforts to protect Big Lake and the Sturgeon River at the east end of the lake. Some of the examples included in its submission, which we applaud are:

1. members of BLESS monitor lake levels for Alberta Environment;

²⁰ See Appellant's rebuttal submission received October 11, 2001.

2. directors from BLESS have met with oil and gas companies to ensure proper water quality controls are in place;
3. directors from BLESS have made representations to government regarding proposals to infill areas around the lakeshore or to drain water from the lake;
4. educational programs held by BLESS through the spring and summer at the lake and in the schools from January to June;
5. involvement in getting Big Lake designated as a globally significant Important Bird Area (“IBA”) and now is the regional coordinator for the Big Lake IBA Conservation Plan;
6. manually removing purple loosestrife from the banks of the Sturgeon River;
7. raised money to build a shelter and viewing platform;
8. assisted in constructing a walking trail along the river;
9. involved in the cleanup of the riverbanks downstream of the lake; and
10. conducts bird surveys of the area and public birding walks.²¹

[23] The Appellant has not demonstrated any type of unique interest that is being affected over and above the community, though the organization may be one of the most ecologically important groups in the St. Albert area. The BLESS submissions are a collection of projects and they do not speak factually to any proximate and direct connection between this project site and the *individual* members of BLESS. Therefore, unfortunately, the BLESS submissions do not meet the requirements discussed in *Bailey* that require an appellant to “demonstrate the personal impact required by section 91” or *Hazeldean* that requires the Board to be “...clearly convinced that the majority of the individual members of the organization are individually and personally impacted...”²² As stated, in this case we do not even really know who the individual members of the organization are.

[24] The Appellant’s acknowledge that some of the members do not even live near the site and that their activities would probably continue even if the Approval Holder completes the

²¹ See Appellant’s submission, dated October 1, 2001.

²² Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 53, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*) E.A.B. Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID. *Hazeldean Community League et al. v. Director of Air and Water Approvals, Alberta Environment* (May 11, 1995), E.A.B. Appeal No. 95-002.

work as allowed under the Approval.²³ Without knowing who the members are and where they are located in relation to the project site, the Board does not know if “some of the members” refer to just a few, half or nearly all of the membership. Statements made without further clarification do not provide the Board with details as to how the individual members are directly affected.

[25] Thus, in the Board’s view, the submissions of the Appellant do not provide sufficient evidence upon which to base a finding that any of the individual members of BLESS or BLESS as a group are directly affected.

III. DECISION

[26] Pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal of the Big Lake Environmental Support Society.

Dated on May 10, 2002, at Edmonton, Alberta.

“original signed”

William A. Tilleman, Q.C.

²³ See Appellant’s submission, dated October 1, 2001.