

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting: April 17, 2002

Date of Decision: June 25, 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 sections 114 and 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Mr. Blair Carmichael, Mr. David Doull, the Lake Wabamun Enhancement and Protection Association, and Mr. Nick Zon, with respect to Approval Amendment No. 18528-00-03 issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment to TransAlta Utilities Corporation, and with respect to *Water Act* Licence Amendment No. 00037698-00-02, issued by the Director, Central Region, Regional Services, Alberta Environment to TransAlta Utilities Corporation.

Cite as: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment, re: TransAlta Utilities Corporation.*

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* and a Licence under the *Water Act* to TransAlta Utilities Corporation with respect to the construction, operation, and reclamation of a Water Treatment Plant at Wabamun Lake, west of Edmonton, Alberta. The purpose of the plant is to mitigate the effects of the other TransAlta operations on the Lake.

The Board received a total of eight appeals respecting the Wabamun Lake Water Treatment Plant – five with respect to the Approval and three with respect to the Licence. The majority of these appeals were filed by persons who have appeared before the Board previously with respect to TransAlta's operations at Wabamun Lake.

After reviewing the submissions and hearing the presentations of the Parties to these appeals, the Board has determined that it will consider the following issues at the hearing of these appeals:

- Issue 1: the adequacy of the water balance model and the factors (e.g. surface runoff) that it relies upon as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
- Issue 2: the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;
- Issue 3: the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the License to the quality required by the Approval; and
- Issue 4: the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.

BEFORE:

William A. Tilleman, Q.C., Chair;
Dr. Steve E. Hrudehy; and
Frederick C. Fisher, Q.C.

APPEARANCES: Appellants:

Mr. Blair Carmichael; Mr. David Doull; Mr. Nick Zon; and the Lake Wabamun Enhancement and Protection Association, represented by Ms. Linda Duncan and Mr. Locke Boros.

Department:

Mr. Daryl Seehagel, Director, and Mr. Rick Phaneuf, Acting Director, Northern East Slopes Region, Regional Services, Alberta Environment, and Mr. Larry Williams, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder:

TransAlta Utilities Corporation, represented by Mr. Ronald M. Kruhlak and Mr. Corbin Devlin, McLennan Ross.

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I. BACKGROUND

[1] On July 30, 2001, the Director, Northern East Slopes Region, Regional Services, Alberta Environment (the “Directors”¹) issued Amending Approval No. 18528-00-03 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12² (the “Act” or “EPEA”) to TransAlta Utilities Corporation (the “Approval Holder”), repealing and replacing Approval No. 18528-00-01 and Amending Approval No. 18528-00-02, for the construction, operation, and reclamation of a Class III potable water treatment plant (the “Wabamun Lake Water Treatment Plant”) at the N ½ 20-52-4-W5M and SE ¼ 29-52-4-W5M at Wabamun Lake, west of Edmonton, Alberta. On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued Licence Amendment No. 00037698-00-02 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3,³ to the Approval Holder with respect to the same facility.

[2] The Environmental Appeal Board (the “Board”) received Notices of Appeal on August 30, 2001, from Mr. Blair Carmichael and Mr. David Doull, on August 31, 2001, from the Lake Wabamun Enhancement and Protection Association (“LWEPA”), and on September 4, 2001, from Mr. Nick Zon (collectively the “Appellants”). The Board also received a Notice of Appeal from Enron Canada Power Corporation (“Enron”) on August 30, 2001.⁴

A. EPEA Appeals

[3] The Board acknowledged the Notices of Appeal from Mr. Blair Carmichael on August 31, 2001, and requested the Approval Holder and the Directors respond to his request that the appeal under EPEA be held in abeyance until the Licence under the *Water Act* had been issued. In this same letter, The Board requested that the

¹ As the appeals are in respect to both the Amending Approval, issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment (designated a Director under EPEA) and the Licence Amendment, issued by the Director, Central Region, Regional Services, Alberta Environment (designated a Director under the *Water Act*) reference will be made to the “Directors” in this Decision.

² As of January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, has replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

³ As of January 1, 2002, the *Water Act*, R.S.A. 2000, c. W-3, has replaced the *Water Act*, S.A. 1996, c. W-3.5.

⁴ The appeal filed by Enron was dismissed by the Board on March 14, 2002.

Directors provide a copy of all correspondence, documents, and materials relevant to this appeal (the “Record”) by September 21, 2001.⁵

[4] On August 31, 2001, the Board acknowledged the Notices of Appeal filed by Mr. David Doull and LWPEA, and on September 5, 2001, it acknowledged receiving the Notice of Appeal from Mr. Nick Zon.

[5] On September 5, 2001, the Directors wrote to the Board concurring with the requests to hold the appeals in abeyance pending the finalization of the *Water Act* Licence. On September 7, 2001, the Board received a letter from the Approval Holder in which it agreed with the Directors that the appeals should be held in abeyance.

[6] On September 7, 2001, the Board notified the Parties⁶ that it would hold the appeals in abeyance pending the issuance of the *Water Act* Licence.

[7] On November 9, 2001, the Board requested the Parties comment on the issue as to whether or not the Government of Alberta had participated in a public review under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”).⁷

[8] The Board notified the Parties on November 23, 2001, that it had reviewed the submissions from the Directors, the Approval Holder, and Mr. David Doull, and determined that the Government of Alberta had not participated in a review under CEAA.⁸

⁵ The Director provided a copy of the Record on September 21, 2001, and copies were forwarded to the other Parties to these appeals.

⁶ The “Parties” to this appeal are Mr. Blair Carmichael, Mr. David Doull, Mr. Nick Zon, LWPEA, the Approval Holder, and the Directors. The Board notes that subsequently, Mr. Zon’s appeal has been dismissed, and Mr. Carmichael’s appeal has been withdrawn. See: *Zon v. Director, Northern East Slopes Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 31, 2002), E.A.B. Appeal No. 01-085-D, and *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (June 13, 2002), E.A.B. Appeal Nos. 01-080 and 01-134-DOP.

⁷ In the Board’s letter to the Parties dated November 9, 2001, the Board asked:

“...the Board would like to receive comments from the parties on the questions:

1. Has the Government of Alberta participated in a public review under the Canadian Environmental Assessment Act (CEAA) in respect of the matters included in these notices of appeal?
2. If the Government of Alberta has not participated in a public review under CEAA in the past, are there plans to do so in the future?
3. If the Government of Alberta has participated in a public review under CEAA or plans to do so in the future, how does this affect the Board’s process?”

⁸ In its letter to the Parties dated November 23, 2001, the Board stated:

“The Board thanks the parties for their assistance in this regard. Based on this information, it would appear that section 87(5)(b)(ii) [now section 95(5)(b)(ii)] of the *Environmental Protection*

B. *Water Act Appeals*

[9] On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued the Licence under the *Water Act* to the Approval Holder. The Board received Notices of Appeal with respect to the Licence on March 28, 2002, from Mr. Blair Carmichael, on April 3, 2002, from LWEPA, and on April 8, 2002, from Mr. David Doull.⁹ The Directors and Approval Holder were notified of the appeals, and the Board requested the Directors forward a copy of all the documents related to these appeals (the “Water Record”) to the Board.¹⁰

[10] The Board notified the Parties on April 4, 2002, confirming that it would deal with the Licence appeals in conjunction with the Approval appeals.

[11] The Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board, regarding both the EPEA appeals and the *Water Act* appeals, asking whether these matters had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

[12] A preliminary meeting was held on April 17, 2002, to determine the issues to be dealt with at the hearing scheduled for May 15 and 16, 2002. The Board notified the Parties on April 19, 2002, of the issues to be dealt with at the hearing. The following are the reasons for the Board’s decision.

II. SUMMARY OF SUBMISSIONS

A. Notices of Appeal

1. Mr. Blair Carmichael and Mr. Nick Zon

[13] In Mr. Blair Carmichael’s Notice of Appeal with respect to the Approval,¹¹ the issues identified were the conditions and penalties related to the volume of water the Approval Holder is allowed to pump. Concern was also expressed with the issuance of the Approval, and

and Enhancement Act is inapplicable in this circumstance....”

⁹ Mr. Nick Zon did not file an appeal of the *Water Act* Licence.

¹⁰ The Board received a copy of the Water Record on April 10, 2002, and copies were forwarded to the other Parties to these appeals.

¹¹ See: Notice of Appeal, filed August 30, 2001.

the corresponding appeal period, before the terms and the conditions under the *Water Act* were made known. Mr. Nick Zon concurred with Mr. Carmichael's list of issues.

[14] With respect to the Licence issued under the *Water Act*, Mr. Carmichael stated his concerns as:

- “1. the parameters being used to establish historical debt;
2. ‘annual ongoing impact’ and the parameters for determining it;
3. changes to the Wabamun Lake water balance model;
4. pumping requirements have no provision for making up deficiencies; and
5. this approval is not properly tied to the requirements under the EPEA.”

[15] The relief requested by Mr. Carmichael was to have the requirements under the *Water Act* and EPEA linked so that a default under one constitutes a default under the other; a provision to shut down the facility if it fails to meet the pumping requirements of the Acts; and in the alternative, \$27,500,000 in damages.

[16] Mr. Nick Zon did not submit a Notice of Appeal with respect to the issuance of the Licence under the *Water Act*.

2. Mr. David Doull

[17] In the Notice of Appeal filed by Mr. David Doull with respect to the Approval, a number of issues were identified. Mr. Doull was concerned with the refilling of the Lake and the mitigation of the operational impacts on the Lake. Mr. Doull also had concerns with the Approval Holder's past history at running the plant at “100%”.¹² Mr. Doull did not think the trial conducted by the Approval Holder was of long enough duration to “...determine if the system will produce quality water.” Mr. Doull also stated that performance conditions should be included in the Approval. Another issue was whether the Director could guarantee the Approval Holder's technology would work. In addition, Mr. Doull was concerned with the

¹² In Mr. Doull's Notice of Appeal, he states:
“TAU's [(the Approval Holder)] past history at running the plant at 100% has not been successful.” [Emphasis in original.]

time provided to review the Approval and the inability, at that point in time, to review the Licence under the *Water Act*.

[18] In Mr. Doull's Notice of Appeal with respect to the Licence, he identified the following issues:

1. there was no consideration given to stakeholders' concerns;
2. the amount of water required to be pumped back into the Lake is not defined as to annual inputs and could ultimately be left to the final year;
3. too much discretion is left to the Director to amend the Licence;
4. the numbers in the water balance do not add up;
5. the water balance model and associated documents should be available to all individuals who filed Statements of Concern;
6. quantities of water are forecasted volumes;
7. what the consequences would be if the Approval Holder does not meet the volumes listed;
8. the volume of water pumped or not pumped will affect the enjoyment of his lake front property;
9. the low lake levels for 12 years; and
10. if there are any "ties to a licence issued under the '*Water Resources Act*'" and therefore no ability to file an appeal to this Board.

3. Lake Wabamun Enhancement and Protection Association

[19] The concern of LWEPA, as stated in the Notice of Appeal filed in response to the Approval, was that the Approval Holder is not accountable for returning water on an annual basis as it is not enforceable until December 31, 2006. It was LWEPA's understanding that the conditions in the Approval were to be legally binding and enforceable and were to take into account cumulative impacts. LWEPA also requested that the Approval "...ensure the obligations to divert, treat and return water to the lake are transferable to any future purchasers

or operators of any current TAU [(the Approval Holder)] facilities operating on or within the Wabamun Lake Watershed.”¹³

[20] With respect to the Licence under the *Water Act*, LWEPA stated that it was concerned that the historical debt was calculated incorrectly. LWEPA also requested an independent review of the water balance model and the input data, as it did not have adequate opportunity to analyze the documentation and model previously. LWEPA also included a list of items that it wanted included in the Approval to “...reflect the various operations and facilities covered by the Draft Amendment.”¹⁴ LWEPA requested that the information listed must be recorded and reported annually and made available to the public. LWEPA also questioned the diversion of surface water runoff from the Highvale Mine area and why the lake level had not increased significantly after a major rainfall event in July 2001. Finally, LWEPA stated that other related approvals should be amended to ensure consistency in the obligations imposed, and the Licence should be referenced in the EPEA Approval.

¹³ See: LWEPA Notice of Appeal, dated August 31, 2001.

¹⁴ The items stated in the Notice of Appeal were:

- “h) the total annual quantity of surface water runoff diverted away from Wabamun Lake by any of the operations and facilities defined under Clause 2 b).
- i) the total quantity of water lost from Wabamun [L]ake due to increased evaporation caused the addition of heated water to Wabamun Lake by [any] of the operations or facilities defined under Clause 2 b);
- j) the total annual quantity of water diverted directly from Wabamun Lake by any of the operations or facilities defined under Clause 2 b);
- k) the total annual quantity of ground water diverted away from Wabamun Lake by any of the operations or facilities defined under Clause 2 b);
- m) the estimated mean weekly water levels that would have occurred on Wabamun Lake without the influences on the water system of Wabamun Lake from the operations or facilities defined in Clause 2 b);
- n) the actual mean weekly quantity of water that discharged from Wabamun Lake into Wabamun Creek; and
- o) the estimated mean weekly quantity of water that would have discharged from Wabamun Lake into Wabamun Creek without the influences on the water system of Wabamun Lake from the operations or facilities defined in Clause 2 b).” [sic]

B. Submissions

1. Mr. Blair Carmichael

[21] Mr. Blair Carmichael's submission referred back to his Notice of Appeal. He stated that the issues the Board should consider are the water levels, the weir elevations, that the pumping guidelines be made conditions of the Approval and the Licence, and that the Approval and the Licence be intertwined.

2. Mr. David Doull

[22] In Mr. David Doull's submission, he stated that the issues which should be heard before the Board were:

- “1. ...the total lack of consideration by Alberta Environment for stakeholder concerns during their expedited review process for [the Approval];
2. ...major concerns about ‘Water Quality Issues’ pertaining to [the Approval];
3. ...major concerns about the total lack of consideration by Alberta Environment for stakeholder concerns during their expedited review process for [the Licence]; and
4. ...concerns about ‘Water Quality Issues’, pertaining to [the Licence].”

3. Lake Wabamun Enhancement and Protection Association

[23] The issues presented in LWEPAs submission were:

1. legal enforceability of mitigation measures with respect to the Approval Holder restoring water levels in Wabamun Lake, the requirement of returning a specified amount of water annually to the lake, and mechanisms in place to bind current and future owners of all existing Approval Holder facilities impacting the Wabamun Lake watershed;
2. obligation to report water diversion information and what the flows to Wabamun Creek would have been without the impacts of the facilities on the Lake;

3. accuracy of historical data including the model and calculations based on the model. The Appellant requested an independent review of historical diversion statistics, evaporation impacts, and inputs into the water balance model; and
4. consistency of obligations in all approvals and licences.

4. Directors

[24] The Directors stated in their submission that some of the issues are not within the Board's jurisdiction, such as water quantity issues raised under EPEA. The Directors also stated that many of the other issues were "framed in general, sweeping terms." In their submission, the Directors stated that there was no supporting evidence or sufficient information given by the Appellants to which the Directors could respond.

[25] With respect to the issue of water quality, the Directors did not consider this an issue that should be heard as the Approval contained water quality limits on the treated water released to Wabamun Lake, and the Appellants did not raise any new evidence or new information regarding the inadequacy of the limits in protecting water quality.

[26] The Directors submitted that the issue of the proposed technology, design, and capacity had been adequately dealt with in the Approval and the Licence. The Directors reiterated the lack of evidence or information to suggest the Approval Holder's proposal was unreasonable or if there was a viable alternative.

[27] The Directors submitted that water quantity issues should only be considered under the Licence and not the Approval. With respect to the issue of requiring the mitigation of past pumping deficiencies, it was the Directors' position that the cumulative pumping requirements in the Licence addressed the issue.

[28] The Directors addressed legal issues raised in the Notices of Appeal. The first legal issue involved the Appellants' request that enforcement consequences should be included as part of the Approval conditions. The second legal issue was the matter of linking the obligations under the Wabamun Lake Water Treatment Plant Approval to the operations of other facilities around Wabamun Lake and making these obligations binding on future owners of these other facilities. The Directors submitted that this would effectively amend other

approvals that are not the subject of these appeals, and therefore, should not be considered by the Board. The third legal issue addressed by the Directors was with respect to the Appellants' issue of "...linking the ability to generate power to the ability of the Water Treatment Plant to meet its performance requirements." The Directors stated that the operations fell within the definition of "annual ongoing impact," and therefore, the link had been established, defeating the necessity to consider the issue in a hearing. As for the Appellants' submission that the Approval and the Licence should be connected, the Directors submitted that the Approval had already accomplished this as one of the conditions in the Approval is that the Approval Holder is to "...discharge water in accordance with the conditions of the *Water Act* amended licence."

[29] In response to the Appellants' concerns regarding water quantity, the Directors submitted that the water balance model developed by the Approval Holder was reviewed and accepted by the Directors and was reviewed by LWEPA's own independent expert (provided to them by the Approval Holder, Dr. Thian Gan). The Directors argued that the Appellants have not presented any evidence or information to suggest that the model was unreasonable.

[30] The Directors submitted that the issues of past performance and capacity of the Wabamun Lake Water Treatment Plant are irrelevant, and these issues were addressed during the appeal of the Wabamun Power Plant EPEA Approval renewal,¹⁵ and the Appellants had provided no new information.

[31] With respect to the availability of the annual water return, the Directors submitted that the information would be publicly available as required under the *Water (Ministerial) Regulation*, A.R. 205/98.

[32] According to the Directors' submission, the alternative presented by one of the Appellants, that damages should be awarded to him, is not within the Board's jurisdiction.

[33] The Directors' final position was that there were no issues within the Notices of Appeal that merit a hearing as no evidence was presented to support the Appellants' assertions.

¹⁵ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID ["Bailey"].

5. Approval Holder

[34] The Approval Holder, in response to the Appellants' submissions, stated that the issue of historical debt and its calculation had been dealt with previously in the Wabamun Power Plant EPEA Approval appeal.¹⁶ With respect to incorporating penalties into the Approval, the Approval Holder again stated that the issue had been dealt with, and rejected, in the *Bailey* hearing.¹⁷

[35] The Approval Holder submitted that the volume of water to be added to the Lake had been addressed in the Licence. The Approval Holder is to pump 80,000,000 m³ into the Lake over four years, allowing for some flexibility. According to the Approval Holder, it would not benefit the Appellants to have a certain amount of water mandated per year. The Approval Holder stated that the "...technology was selected and construction fast-tracked..." to allow the Approval Holder to add additional water to the Lake as soon as possible as the Appellants had requested.

[36] As for the information requested by the Appellants to be included in the reporting requirements, the Approval Holder stated that the information is already a part of the Approval Holder's annual return, and the issue is therefore moot.

[37] The Approval Holder stated in its submission that other issues brought forward by the Appellants had been dealt with in the Approval and the Licence. The Approval Holder considered other issues moot as information requests and queries had been addressed.

III. DISCUSSION

[38] This is a decision to determine which matters will be included in the hearing of the appeals. Pursuant to sections 95(2), (3), and (4) of EPEA, the Board may make the determination of issues prior to a hearing.¹⁸ The Board requested submissions and

¹⁶ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

¹⁷ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

¹⁸ Sections 95(2), (3), and (4) of EPEA state:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the

presentations from the Parties to clarify issues and positions. Once the Board determines which issues will be heard at the hearing, pursuant to section 95(4), the Parties cannot make representations on matters that the Board has not included.

[39] During the preliminary meeting, the Board asked all Parties if they were aware of any proceeding under the *Canadian Environmental Assessment Act* (“CEAA”). Under section 95,¹⁹ the Board, in determining which issues are to be included in the hearing, may consider whether the Alberta Government has participated in a public review process under CEAA, and if all matters were presented, the Board must dismiss the appeal. All Parties responded in the negative. However, the Board requested that if any of the Parties should become aware of any involvement under the CEAA process, to notify the Board immediately.

regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of an appeal, and in making that determination the Board may consider the following: ...

- (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
 - (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);
 - (c) whether the Director has complied with section 68(4)(a);
 - (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
 - (e) any other criteria specified in the regulations.
- (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

¹⁹

Section 95 of EPEA states:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following...

- (d) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada)...
- (5) The Board
- (b) shall dismiss a notice of appeal if in the Board’s opinion
 - (ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all matters included in the notice of appeal.”

[40] The Parties in these appeals have appeared before this Board on previous occasions with respect to issues concerning the Approval Holder's activities at Wabamun Lake.²⁰ During these previous hearings, the Board evaluated the issue of standing of these Appellants. In the appeal heard in 1997, the Board determined that as the "Appellants own property either on the lake or, in one case, one lot away from the lake, and all use the environmental amenities of the lake, the Board has decided that all the remaining Appellants are, in some manner, directly affected by the TransAlta Approval [and Licence] and can proceed to the appeal."²¹

[41] In the appeals heard in 2001, the Board determined that "since none of the factual circumstances have changed, these parties are still directly affected and, as a result, are granted standing with respect to the appeals currently before the Board."²² In the *Bailey* case, the Board considered if LWEPA was directly affected and if standing should be granted to this organization. The Board determined that there was sufficient evidence that LWEPA should have status in the appeals as the members surrounded and used the lake. The Board stated:

"...LWEPA was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process. As a result, even if the Board did not have Notices of Appeal from Mr. Doull and Mr. Paron before it, the Board believes that LWEPA is a proper party to these proceedings."²³

²⁰ *Nick 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; *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011.

²¹ *Nick 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. In this appeal, the Appellants given standing included: Mr. Dwayne Zon, Dr. Balder Von Hohenbalken, Mr. Nick Zon, Mr. Charles Spilsted, Mr. Stu Chase, Mr. Gary Gylytiuk, Mr. James Paron (represented by Mr. Samuel Kravinchuk), Mr. David Doull, Mr. Blair Carmichael, and Mr. Brad Cowley. LWEPA was granted the opportunity to participate through written arguments only.

²² *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID at para. 43. The parties referred to by the Board included Ms. Gwen Bailey, Mr. Nick Zon, Mr. Blair Carmichael, Ms. Donna Thomas and the Summer Village of Kapasiwin, Mr. James Paron, Mr. David Doull, and the Summer Village of Point Allison.

²³ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID at para. 56.

[42] The Board maintains that the Appellants in these current appeals still have standing as outlined in the previous decisions.²⁴ As the circumstances have not changed, the Appellants remain directly affected by the decisions of the Directors in these appeals.

[43] The Board acknowledges that Mr. Pat Spilsted was also in attendance at the preliminary meeting. The Board had requested the Parties provide names of individuals who may have an interest in these appeals.²⁵ Mr. Spilsted's name was provided to the Board by the Appellants. At the time of this preliminary hearing, the Board had not received any indication from Mr. Spilsted that he wanted to participate in this meeting. Although he did not make a presentation to the Board on this occasion, it does not preclude him from participating in the substantive hearing. Once the notice of the hearing is given, he may make an application to the Board for intervenor status in the substantive hearing.²⁶

[44] The Board agrees with the Directors when it was stated that the principle of the process is to develop a better approval. However, the Directors must also realize that the term "better" is subjective, and what one person may consider better may not necessarily mean the same thing to another person. The fact that it may be a better approval does negate an individual's right to challenge the approval if they disagree with the Director or if they know of ways to improve the approval. That is why we are here.

[45] The Appellants believed that a site visit by the Board would be beneficial to understanding the effects on the Lake. The Board notes that the Approval Holder has conceded that its activities on Wabamun Lake have had an impact on the lake. As the Approval Holder has stated this, the Board accepts that there is a noticeable impact, and a site visit is not necessary to confirm this matter.

²⁴ The Board notes that subsequent to this finding, Mr. Zon's appeal has been dismissed, and Mr. Carmichael's appeal has been withdrawn. See: *Zon v. Director, Northern East Slopes Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 31, 2002), E.A.B. Appeal No. 01-085-D, and *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (June 13, 2002), E.A.B. Appeal Nos. 01-080 and 01-134-DOP.

²⁵ See: Board's letter, dated April 9, 2002.

²⁶ The Board notes that it has subsequently granted Mr. Spilsted limited intervenor status. See: Board's letter, dated May 9, 2002.

[46] The Board believes that it does not have the jurisdiction to include enforcement provisions of the type being requested by the Appellants into the Approval. As stated in section 98 of EPEA:

- “(2) In its decision, the Board may
- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
 - (b) make any further order the Board considers necessary for the purposes of carrying out the decision.”

[47] The Directors do not have the authority under EPEA nor under the *Water Act* to include enforcement provisions in an approval or licence. The Director is limited in what he can do with an approval by the existing legislating structure. There is a hierarchy in the legislative framework with the Constitution²⁷ at the pinnacle, federal and provincial legislation below it, regulations below that, approvals and licences beneath that, and guidelines at the bottom of the structure. Each of the lower levels must comply with *all* of the preceding levels. Therefore, any guidelines established must comply with any requirements in the approvals and licences, the regulations, all federal and provincial acts, and the Constitution.

[48] The Board had previously reviewed the issue of incorporating enforcement penalties into an approval or a licence. As the Board stated in *Bailey*:²⁸

“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.

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

²⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “Constitution”).

²⁸ *Bailey et al. #2 v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-R.

TransAlta to appeal that enforcement or mitigation action based on a specific case. Again, the Board is not prepared to recommend the type of change requested by the Appellants.”²⁹

Given the way the legislation is designed, including enforcement and/or monitoring penalties into the Approval is wholly without foundation, and the issue is, therefore, without merit and will not be included as an issue in the hearing.

[49] With respect to the issue of the changing Directors and staff at the Approval Holder, the Board has no jurisdiction in this type of issue. Although the Board appreciates the concerns of the Appellants with respect to consistency between the decision-makers, it is a natural occurrence in corporate or government organizations, and there is no way in which the Board can control an individual’s private life.

[50] In the Appellants’ submissions, reference was made to the weir on the Lake. The Board agrees with the Directors that it is not an issue relevant to this appeal as it is not part of the Approval Holder’s infrastructure for the project. However, the Board also notes that the weir is mentioned in the Approval,³⁰ and it was not, therefore, unreasonable for the Appellants to raise the issue. In the oral submissions, the Directors made reference to a letter written in 1996 by the then Minister of Environment. In the letter, the Minister stated that Alberta Environment staff would review the weir elevation in relation to the effects of the Approval Holder’s activities on Wabamun Lake once the lake water level of 724.55 metres above sea level is reached.³¹ This decision is not within the scope of these appeals and therefore, not part of the Board’s review of this matter.

²⁹ *Bailey et al. #2 v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-R at para. 106-107.

³⁰ See: Approval, conditions 4.1.3-4.1.5.

³¹ The letter was addressed to the Wabamun Lake Task Group from the Office of the Minister and dated March 18, 1996. The letter states:

“The outlet weir elevation issues has been thoroughly investigated on numerous occasions in the past. While I respect the fact that some lake shore residents, as well as some members of the Task Group, believe it is an issue that merits further attention, I do not foresee the province reopening public discussion of the outlet weir elevation issue in 1996. However, this does not mean that the situation will not be carefully monitored. I have asked staff to undertake an inspection of Wabamun Lake at the time when the water level rises to the weir crest. Following that inspection, I will consider what further action is appropriate.”

[51] The Appellants expressed concern regarding successor owners and their obligations under the Approval and the Amendment. Under EPEA and the *Water Act*, there are restrictions on the transfer of approvals and licences. Section 75 of EPEA states:

“(1) No person shall transfer, sell, lease, assign or otherwise dispose of an approval or registration except in accordance with the regulations.

(2) The Director may impose any terms and conditions that the Director considers appropriate in respect of the transfer, sale, lease, assignment or other disposition of an approval or registration.”

Therefore, if any change in ownership occurs, the Director has the authority to add any conditions on the sale that he deems appropriate.

[52] The *Water Act* also requires approval holders and licensees to notify the Director of any intent to dispose of the land or undertaking to which an approval or licence applies.³² Under the *Water Act*, if notification of the transfer of the land or undertaking is not provided, the parties in the transaction can be faced with a water management order. This allows the Director some control as to the obligations of the succeeding owners.

³² Section 80 of the *Water Act* states:

“(1) Unless exempted in the regulations, if an approval holder, preliminary certificate holder, licensee or registrant disposes of land or an undertaking to which an approval, preliminary certificate, licence or registration is appurtenant, the approval holder, preliminary certificate holder, licensee or registrant must notify the Director in writing of that disposition in a form and manner satisfactory to the Director.

(2) If the owner of land to which an approval, preliminary certificate or licence is appurtenant is not the approval holder, preliminary certificate holder or licensee and the owner of the land disposes of the land or the undertaking, the owner and the approval holder, preliminary certificate holder or licensee must notify the Director in writing of that disposition in a form and manner satisfactory to the Director.

(3) If an owner of land, approval holder, preliminary certificate holder, licensee or registrant who disposes of land or an undertaking to which the approval, preliminary certificate, licence or registration is appurtenant fails to provide notice to the Director in accordance with this section, the owner of the land, approval holder, preliminary certificate holder, licensee or registrant and the purchaser of the land or undertaking to which the approval, preliminary certificate, licence or registration is appurtenant

(a) are jointly and severally liable for carrying out the duties and responsibilities specified in the approval, preliminary certificate, licence or registration, and

(b) are subject to the duties and obligations under this Act including those related to the approval, preliminary certificate, licence or registration.

(4) In addition to the ability to issue a water management order to a person who has purchased land or an undertaking to which an approval, preliminary certificate, licence or registration is appurtenant, if the Director has not received a notification under this section, the Director may issue a water management order to the land owner, approval holder, preliminary certificate holder, licensee or registrant who has disposed of the land or undertaking....”

[53] It is also reasonable to assume that common business practices would dictate that parties on both sides of a contract would ensure all liabilities and assets would be considered prior to the signing of the agreement. As a result, the arguments presented by the Appellants on the issue of enforcement of the conditions on future owners will not be heard at the hearing.

[54] The Board is concerned with the Directors' argument that no evidence was presented by the Appellants in their submissions. In the preliminary stages of the process, the Appellants are not required to give their evidence. Evidence of the issues identified in the Notices of Appeal will be required and expected in the Appellants' submission and presentation at the hearing. The Director and Approval Holder will be given the opportunity to respond to the evidence after the Appellants have provided their submissions.

[55] The historic level calculations provided by the Parties has raised the issue of the proper assessment of the matter. All Parties agree there has been a drawdown of the water in the Lake, but there are major discrepancies as to the actual amount owing.³³ Even the Approval Holder has changed its estimate of the amount owing to the Lake. Before any determination can be made with respect to the correctness of the rate of return, the amount owing must be calculated with a higher degree of certainty.

[56] In *Bailey*,³⁴ the Board did not specifically review the issue of absolute quantities of water that had to be returned to the Lake. In fact, when proposals were submitted to amend condition 4.3.27, the suggestions provided by the Approval Holder had no quantity listed, except that the remaining debt should be no more than 30 million cubic metres by December 31, 2004. The conditions incorporated into that approval as a result of the previous hearing, do not stipulate specific amounts of water that must be returned to the Lake. During examination in the *Bailey* hearing, the Board asked the witnesses of the Approval Holder for some assurance the values

³³ The Licence states that there is a 47.2 million cubic metres of water required in the historical debt. In the report submitted by the Approval Holder in its amendment application, it is estimated that the debt, as of December 2000, would be approximately 51.1 million cubic metres. In the Notice of Appeal filed by LWEPa, it had calculated the historical debt to be approximately 57.9 million cubic meters, and when using the data from the Approval Holder's monthly reports, LWEPa calculated the debt to be 60.45 million cubic metres.

³⁴ *Bailey et al. #2 v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 18 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-R.

presented were more than mere targets. The witness responded by stating that the targets were in excess of what was actually required, allowing some flexibility to the repayment of the debt.³⁵

³⁵ The transcript of the hearing in 2001 states:

“Q. DR. TILLEMAN: And now my question is to whomever might best respond to this. What assurances can you give the Board that you will be able to compensate for the historic debt in the lake?”

A MR. SAM: So, I think it was Mr. Lindsay referred to it a little bit yesterday. First I would like to start out to say that we are not happy either that we haven't been able to meet our commitments year-to-date as far as pumping water into the lake based on the 15 million cubic meters per year. What we have found through that experience is that the water treatment plant that was built was somewhat, in our opinion, in uncharted waters that provided a number of challenges for engineering. Given the fact that the water is being transported from one water body to another body presented some challenges around quality of the water. We have some fairly stringent terms and conditions to ensure that we do not transport any undesirable organisms and such across, so we have made a number of improvements to that existing plant. We have learned from it, we made full modifications at the cooling towers, we changed our filtering process, we have added coring, we have then extracted the coring to resolve some of the issues that are coming about.

The plant we are presently, with a clarifier, we are installing two settlers as well as monitors to improve existing plant based on what we learned in the last two to three years, based on experts, based on trial tests. What we have been doing for the last year, year and a half since the PAG recommendation, we don't want to repeat history. We have in the last year and a half, we have assessed a number of different technologies. We have done engineering, we have also done pilot tests at Sundance where we tested new water treatment plants for both quality and quantity. We are doing our detailed engineering right now. We selected a technology based on that pilot testing. So based on that we feel quite confident from what we learned with our experiences in the past, some of the things that we have taken around the pilot testing around this different technology, we feel quite confident we will be able to meet these commitments.

Q. DR. TILLEMAN: In our preliminary meeting and probably yesterday Mr. Kravinchuk focused on one of the concerns with this 4.3.27(c), and what it currently requires you to do is that on or before December 31st of 2006 pump 51 million cubic meters, that would be historical debt, back into the lake. If I go to page 12 of your submission I will read you one sentence, and what it says, it summarizes what you just told me which I am happy to hear and that is, and I now quote the last sentence. TransAlta is confident that if its application, which has been filed pursuant to 4.3.27, that would be the water plant reference, if that application is processed in a timely fashion it will meet the prescribed schedule for returning water. That gives the Board great confidence. But then yesterday we heard I think from Mr. Lindsay that any schedule of annual repayments were merely targets. And what the Board needs is any assurances from you that these are not merely targets. I can appreciate that engineering can do the best it can do in terms of predicting what needs to be done but you have a deadline in this approval of 2006. It is impossible to pump at the last minute, so you have to stagger this backwards several years and that is where you find yourself now. We need some assurances that we need you to explain what you meant by using the word target?

A. MR. SAM: So I think what we are referring to is Mr. Kravinchuk's, and the targets that were set out in our application that is presently in process right now. What we have made in that around assurances and targets is that the purpose that we want to use the targets for, and the first thing I will point out is the targets that are in that application well exceed the commitment we have in the terms and conditions.

As Mr. Lindsay mentioned yesterday, those targets are based on an increase in capacity that we have designed into this new facility to allow us some flexibility and some surety that if we do get some upsets we can still meet these commitments by December 31st, 2006.

So one of the things we have done and the purpose that we want for targeting for internal use is to track if we are on progress or not on progress. So we get some early warning signals to make sure

[57] The Appellants presented valid arguments with respect to the issue of reporting data. In the Licence, a number of items listed in the previous licence have been omitted. The Directors and the Approval Holder argued that similar information is being provided but under different headings or in a different manner. As there is some ambiguity as to whether all the items are still required in the report from the Approval Holder, the Board considers this an issue that should be heard at the hearing. The Board also requests that the Parties provide alternate formats to present the data to determine the most efficient and the most user-friendly format. The Board requests the Parties present evidence regarding the timing of the reports, including if monthly reporting is sufficient to alleviate the concerns of the Appellants.

[58] The Board notes that the Parties are in agreement that the restoration of water levels on Wabamun Lake is the primary issue. The Approval and the Licence deal with the Wabamun Lake Water Treatment Plant that has been identified as the primary mitigation measure for increasing water levels in Wabamun Lake. The principle issue in these appeals is “Will this facility be able to mitigate the impacts on the Lake as promised?”

[59] The Wabamun Lake Water Treatment Plant has been approved on the basis of its ability to mitigate the effects the Approval Holder has had on the Lake, and the Board must be certain that the plant, as designed, will be able to produce the required amount of water, given the quality of the water being taken into the plant, within the specified time period. The underlying rationale for this mitigation measure is constructed on an understanding of the Wabamun Lake water levels derived from a water balance model developed by consultants for the Approval Holder and reviewed by Dr. Thian Gan and by the Directors’ staff. Therefore, the Board will hear evidence with respect to the water balance model used by the Approval Holder, and assessed by the Directors, to determine if it is a reasonable model and all applicable variables have been incorporated in a manner that accurately simulates reality.

that yes, we are going to meet our commitments; or no, we are not. So we can take some proactive action to make sure that we do meet those commitments.

The first thing we built in right now is we have slightly over designed the plant to ensure we do meet that commitment. Obviously based on our historical experience we had upsets that we weren't able to meet what the design rating for that plant was. So we have learned from that and we want to make sure we do have some capacity margin in that new plant. That is what we meant by targets. Targets are both internal for ourselves to make sure we are on track and that is the intent of that.”

[60] As the major principle is to develop a better approval or licence, the model must be tested by inputting the best available information and the most reasonable number of variables. As with any model simulation, the output can only be as good as the input data. If there are parameters that can be included that will substantially reduce the magnitude of error, then the model should be run using those parameters. Because it is virtually impossible to include all parameters that exist naturally into a model, the simulation should include as many parameters as possible to provide as accurate a forecast as possible.

[61] Submissions with respect to water quality will be limited to the effect water quality will have on the Approval Holder's treatment process. As treatment of the water is required before it is added to the Lake, water quality may affect the success and the rate of treatment. Therefore, the Board must consider water quality as it relates to the ability of the water treatment plant to achieve the desired mitigation effect.

[62] Therefore, the issues arising from these appeals are:

1. the adequacy of the water balance model as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
2. the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;
3. the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the licence to the quality required by the Approval; and
4. the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.

[63] These issues have not been addressed specifically in previous hearings before this Board and consequently, are not subject to issue estoppel. Three requirements are required to determine if estoppel applies in the present circumstances. These requirements, as defined in the Supreme Court of Canada case of *Angle v. Canada (Minister of National Revenue – M.N.R.)*³⁶ are:

- “1. that the same question has been decided;

³⁶ [1975] 2 S.C.R. 248.

2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”

[64] In the Approval Holder’s submission, it refers to “the same parties on similar issues.” The Board agrees that the same Parties are involved in these appeals as in previous appeals, and therefore one of the requirements has been satisfied. The second requirement has also been satisfied as it has been determined that decisions of tribunals are considered final.³⁷ However, the Board also agrees with the Approval Holder that these are similar issues, *not the same issues*. As a result, the last requirement has not been satisfied and issue estoppel will not apply on the noted issues. The other issues in the appeals are either not in the Board’s jurisdiction or fall under the estoppel provisions.

[65] The Board appreciates and accepts the Approval Holder’s offer to bring Dr. Thian Gan to the hearing as a witness. As the issue before the Board will be primarily the assessment of the water balance model, we will require those experts who reviewed and evaluated the model to attend the hearing and be available for questioning. As the Directors have not provided any detailed information of its review of the model to the Appellants, Alberta Environment’s experts who critiqued the model for the Directors, as well as the authors of the Klohn Crippen Report, should be made available at the hearing.

IV. DECISION

[66] Pursuant to section 95(2) of the *Environmental Protection and Enhancement Act*, the Board determines that the following matters will be included in the hearing of the Appeal:

- Issue 1: the adequacy of the water balance model and the factors (e.g. surface runoff) that it relies upon as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
- Issue 2: the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;

³⁷ See, for example, *Rosanen v. Rosemount Instruments Ltd.*, [1994] O.J. No. 200.

- Issue 3: the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the License to the quality required by the Approval; and
- Issue 4: the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.

[67] As the Board has determined that these are the only issues to be heard at the hearing, and pursuant to section 95(4), the Parties cannot make representations on matters that the Board has not included.

Dated on June 25, 2002, at Edmonton, Alberta.

“original signed by”

William A. Tilleman, Q.C.
Chair

“original signed by”

Dr. Steve E. Hrudehy

“original signed by”

Frederick C. Fisher, Q.C.