

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing: May 15, 2002
Date of Decision: May 30, 2002

IN THE MATTER OF sections 91, 92, 94, 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 appeals filed Mr. Blair Carmichael, Mr. David Doull, the Lake Wabamun Enhancement and Protection Association, and Mr. Nick Zon, with respect to Amending Approval 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: Adjournment Motion: *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 Amending Approval under the *Environmental Protection and Enhancement Act* and a Water Licence Amendment under the *Water Act* to TransAlta Utilities Corporation with respect to the construction, operation, and reclamation of a Water Treatment Plant at Lake Wabamun. The purpose of the plant is to mitigate the effects of TransAlta's other operations at the Lake.

The Board had scheduled a hearing for May 15 and 16, 2002. Shortly before the hearing the Lake Wabamun Environmental Protection Association ("LWEPA") made a motion to expand the scope of the hearing to more broadly consider water quality issues as a result of recent reports of fish mortality and significant exceedances of heavy metals at Lake Wabamun. The Board asked for written submissions from the parties in response to this request and also heard oral arguments at the beginning of the hearing. The Board also heard oral evidence from two employees of Alberta Environment, one of whom is responsible for the investigation into the reports of fish mortality and exceedances of heavy metals.

Considering all of the arguments, including the evidence of the witnesses, the Board decided to adjourn the hearing for 90 days to permit Alberta Environment to complete its investigation and report back to the Board and the parties (subject to the privileges that may apply to investigations and/or prosecutions). The Board decided that while, at this time, there is no reason to expand the scope of the hearing, the Board's function is to provide the Minister with the most thorough and complete report and recommendations that it can. Given the fact that more information will shortly be available, that according to one of the Alberta Environment witnesses may be relevant to the issues the Board is trying to decide, the Board is required by the principles of natural justice and procedural fairness to adjourn the hearing until this information on fish and heavy metals is available.

In making this decision, the Board is mindful that it must balance two competing interests – efficiency and thoroughness. However, in the absence of any prejudice to any of the parties (and all parties noted that there was no prejudice against them save TransAlta's witnesses being present), the Board decided it was appropriate to adjourn the hearing. At the conclusion of the 90 days, and subject to whatever motions are proper at that time, the Board will proceed with the hearing.

HEARING 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; and the Lake Wabamun Enhancement and Protection Association represented by Mr. Locke Boros and Ms. Linda Duncan.

Directors: Mr. Rick Phaneuf, Acting Director, and Mr. Daryl Seehagel, 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.

Intervenor: Mr. Pat Spilsted.

NOT APPEARING

Appellants: Mr. Nick Zon.

* Mr. Carmichael left immediately after his presentation with respect to the preliminary motion and did not participate further in the proceedings.

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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 at the N ½ 20-52-4-W5M and SE ¼ 29-52-4-W5M at Lake Wabamun, 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

[3] The Board acknowledged the Notice of Appeal from Mr. Blair Carmichael on August 31, 2001, and requested the Approval Holder and the Director 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 Director provide a copy of all correspondence, documents, and materials relevant to this appeal (the “Record”) by September 21, 2001.⁵

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.

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

A. EPEA Appeals

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

[5] On September 5, 2001, the Director wrote 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 Director that the appeals should be held in abeyance.

[6] On September 7, 2001, the Board notified the Parties 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").⁶

[8] The Board notified the Parties on November 23, 2001, that it had reviewed the submissions from the Directors, Approval Holder, and Mr. David Doull, and determined that the Government of Alberta had not participated in a review under CEAA.⁷

Parties in these appeals.

⁶ 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?"

⁷ 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 and Enhancement Act* is inapplicable in this circumstance...."

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.⁸ 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.⁹

[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 this matter had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

C. *Preliminary Meeting*

[12] A preliminary hearing 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, that the issues to be dealt with at the hearing would be:

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

⁸ Mr. Zon did not file an appeal of the *Water Act* Licence.

⁹ The Board received a copy of the Water Record on April 10, 2002, and copies were forwarded to the other Parties to these appeals.

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.

[13] On May 8, 2002, the Board received submissions on the above issues from the Director and the Approval Holder. Mr. David Doull and LWEPA filed their submissions on May 9, 2002.¹⁰

[14] The Board received an intervenor request from Mr. C.G.P. Spilsted on April 25, 2002. The Board requested the Parties "...provide written comments to the Board with respect to Mr. C.G.P. Spilsted's potential participation at the hearing of these appeals...." Upon reviewing the request and the Parties' submissions, the Board decided that Mr. C.G.P. Spilsted would be given limited intervenor status at the hearing.¹¹

D. New Evidence Motion

[15] On May 9, 2002, the Board received a letter from LWEPA regarding "...water quality concerns with respect to recent developments at Lake Wabamun, made public May 8, 2002." LWEPA continued:

"We respectfully submit that [it] is incumbent on the Board to broaden the scope of the hearing to include water quality in general. By doing so, the Board will ensure it receives sufficient and full disclosure in matters related to water quality. We therefore request that in the matters before the Board at the hearing scheduled for May 15 and 16, 2002, that [the] hearing be expanded to [include] water quality in general and not limited to the narrow scope of water quality of the Sundance cooling pond."

[16] The motion by LWEPA was apparently triggered by media reports that there had been fish mortality and heavy metals found at Lake Wabamun.¹²

¹⁰ No submissions were received from Mr. Carmichael or Mr. Zon.

¹¹ See letter from the Board to the Parties and Mr. C.G.P. Spilsted, dated May 9, 2002.

¹² "Officials probe fish kill, heavy metals near plant." *Globe & Mail* (National Edition), May 10, 2002, page A7:

"Alberta Environment has confirmed it is investigating dead fish and heavy metals in the water near a TransAlta Utilities power plant on Wabamun Lake.

Three types of heavy metals were found in the lake bottom near the plant's intake canal and 2,000 dead fish floated to the surface in the past six months, department spokesman Kim Hunt said.

[17] The Board wrote to the Parties on May 10, 2002, asking for their response to the following questions:

- “1. Should the Board ‘...broaden the scope of the hearing to include water quality issues in general...’?”
2. If the Board broadens the scope of the hearing, will an adjournment of the hearing, currently planned for May 15 and 16, 2002, be necessary?”

[18] The Approval Holder responded on May 13, 2002, stating:

“...It is submitted that Mr. Boros’ request arises from media reports of heavy metals and fish mortality of undetermined cause, not from the EPEA Approval and Water Licence under appeal.

Secondly, it is submitted that there is no evidence to support a *reconsideration* of the issues to be determined at the hearing. That is, there is only speculation that the issues recently reported in the media relate to any TransAlta activity at Lake Wabamun.... It is submitted that the Board must require some reasonable threshold of evidence to be met – and connection to the project under appeal to be established – before an issue warrants the expense of a hearing or reconsideration.

Thirdly, and most importantly, it is submitted that it would be inappropriate for this Board to act as a quasi-investigator of the matters reported in the media. The media reports indicate that the matter is under consideration by Alberta Environment. It would be contrary to principles of natural justice for this Board, which serves an appellate function, to initiate or preempt the investigative role of Alberta Environment, if any investigation is warranted. Including these issues at this hearing might predetermine the results of an Alberta Environment investigation, if any investigation is warranted, and undermine future statutory rights of appeal....

...Mr. Boros’ request does not meet the minimum threshold of evidence or connection to the project under appeal for the Board to grant reconsideration of the issues. In any event, it would be inappropriate for the Board to undertake an investigation of matters presently under consideration by Alberta Environment that have not resulted in any decision subject to appeal.”

[19] The Directors provided their submission on May 13, 2002. In it they stated:

“It is the position of the Directors, that the issues prescribed by the Board to which evidence should be received at its hearing of May 15th and 16th be restricted to those set out in the Board’s letter of April 25. The hearing is a matter that is related to the expansion of the Water Treatment Facility and the mitigation efforts that this Facility represents. The matter raised in the letter of May 8 from Mr. Boros is not related to these issues....”

[20] Mr. C.G.P. Spilsted, in his letter of May 12, 2002, stated:

“...while the issues outlined in your department letter of May 2, 2002 are important, they cannot be dealt with in isolation to the more basic answers now required. I believe a new expanded meeting or inquiry should immediately take place.”

[21] In his response to the questions, Mr. David Doull responded by agreeing that the scope of the hearing should be broadened to include water quality issues in general and that the hearing should be adjourned until such time that Alberta Environment has released more information on its investigation of Lake Wabamun and all the Parties have had an opportunity to review the findings.¹³

[22] Mr. Nick Zon provided his comments to the Board on May 13, 2002.¹⁴ In his letter he stated that he has “...always advocated that in order for anyone to make proper decisions, they must have all the information and that information must be correct.”¹⁵ He further stated that the hearing should be adjourned until all the testing and information is available for the Board’s consideration.

[23] Therefore, the Board forwarded a letter to the Parties on May 14, 2002, stating:

“The Board has decided that it would like to receive further arguments on these questions at the beginning of the hearing scheduled for May 15 and 16, 2002. At that time, the Board would also like to consider the questions:

3. Does the Board currently have sufficient information regarding the issues surrounding heavy metals and the fish mortality to determine whether to ‘...broaden the scope of the hearing...’?
4. If the Board does not have sufficient information regarding these issues, should the Board adjourn the May 15 and 16 hearing, until such time that it has enough information to make this determination?
5. If the Board adjourns the hearing, what effect would an adjournment have on the parties to these appeals?”¹⁷

¹³ See letter from Mr. David Doull, dated May 13, 2002.

¹⁴ Mr. Nick Zon did not appear at the hearing on May 15, 2002, to provide oral submissions.

¹⁵ See e-mail letter from Mr. Nick Zon, dated May 13, 2002.

¹⁷ The questions being referred to were those included in the Board’s letter to the Parties, dated May 10, 2002. The questions were:

- “1. Should the Board ‘...broaden the scope of the hearing to include water quality issues in general...’?
2. If the Board broadens the scope of the hearing, will an adjournment of the hearing

[24] The Board convened the hearing on May 15, 2002, and received oral submissions from the Parties on these additional questions.

II. SUMMARY OF ORAL SUBMISSIONS

[25] The Directors reiterated that there is no connection between the issues presently under review by Alberta Environment and the expansion of the water treatment facility. The area where the heavy metals were found is approximately five kilometres from the treatment plant. The Director continued by stating that there is sufficient evidence to indicate that the fish mortality and the heavy metals are not related to the treatment plant expansion. Alberta Environment is continuing with its review of the fish mortality and heavy metals, independent of the hearing and the expansion. Incidentally, the Directors indicated that they would not be affected by an adjournment.

[26] The Approval Holder argued that LWEPA had no basis on which to add an issue at the hearing, and that it was inappropriate for the Board to launch into an investigation of an Alberta Environment matter. The Approval Holder continued by stating that no evidence was presented to the Board for it to consider a reconsideration, and the recent speculations in no way related to the treatment plant. As the Approval Holder did not believe the Appellants had presented enough information to the Board, it submitted that the application should be dismissed.

[27] In his submission, Mr. Blair Carmichael stated that it was imperative that the issues be expanded to include water quality as water quality and quantity are intertwined. He also indicated that there were concerns regarding heavy metals for a number of years, and the Board needs to consider all of the facts.

[28] Mr. David Doull stated that he would like the scope of issues be expanded as water quality is a very important issue. He supported an adjournment. He expressed concerns that if the matter is not heard now, individuals would not have an opportunity to bring the matter back to another forum.

[29] Mr. C.G.P. Spilsted believed that water clarity and quality should be included, and if it is added as an issue, a new hearing should be held.

[30] LWEPA argued that it was not their intent to include water quality in general as an issue in the hearing, but rather, water quality in relation to this facility. LWEPA continued by stating that it does not have the resources to bring in new evidence relating to the issues of fish mortality and heavy metals, though they were certainly concerned about it. They also expressed concerns that they only became aware of the problem through the media. The new information was not available to LWEPA, the Board, or the Directors when the Approval and Licence were issued, and therefore, LWEPA submitted that the Board should hear the evidence and then decide the relevancy. According to LWEPA, there are thousands of questions, and they want to hear the experts' explanations regarding such issues as where the contaminants are coming from and if different sampling procedures should be implemented. LWEPA also recognized that they cannot bring all the approvals into the hearing and show how they interrelate. They expressed concerns that once an approval is issued, Alberta Environment is reluctant to open it up again. Thus, this is the last opportunity to discuss these matters.

III. DISCUSSION

[31] This is a decision to determine if an additional matter with respect to water quality should be included in the hearing of the appeals. In recent media reports, there was an indication heavy metals were present in the sediment of Lake Wabamun. At the hearing, the Board confirmed the issues being investigated by Alberta Environment were a result of approximately 2000 fish that died near the power plant site over the past six months and the presence of three heavy metals, two with concentrations that were three times the federal guidelines and one that exceeded Alberta's guidelines.

[32] Pursuant to sections 95(2), (3), and (4) of EPEA, the Board is allowed to make the determination of issues prior to a hearing.¹⁸ It reviewed the submissions and presentations

¹⁸ Section 95(2), (3), and (4) 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 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

from the Parties and heard evidence from two witnesses from the Directors¹⁹ to determine if the issue of water quality should be added in light of the recent reports in the media. 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. Therefore, the Board must determine if water quality should be added as an issue prior to the commencement of the hearing.

[33] The issues to be heard at the hearing were provided to the Parties in a letter dated April 19, 2002. The issues were:

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;
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 License 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

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 Mr. Daryl Seehagel, Director, Northern East Slopes, Regional Services, Alberta Environment, and Mr. Neil Scott, Director, Central Region, Regional Services, Alberta Environment, appeared before the Board and provided sworn testimony. Mr. Seehagel was responsible for the EPEA Approval and Mr. Scott is responsible for the ongoing investigation into the fish kills and heavy metals at Wabamun Lake.

Wabamun Lake.

[34] Under section 95(2) of EPEA, the Board has the authority to determine the issues that will be heard at a hearing. Section 95(2) states:

“...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 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....”

[35] In *Williams v. Inspector, Land Reclamation Division, Alberta Environmental Protection re: Gulf Canada Resources Ltd.* (“*Williams*”), the Board interpreted this section as allowing the Board to consider information that becomes available after the decision subject to the appeal was made. In *Williams*, the Board granted an appeal against the issuance of a reclamation certificate on the basis of evidence that came to light after the reclamation certificate was issued. The Court of Queen’s Bench upheld the Board’s decision, stating:

“This new information which came before the Board was properly before the Board pursuant to the Act. The applicant argues that to consider this information was contrary to the criteria set up by the Act. I disagree. In my view, the Board was following the same criteria and undertaking the same process which the inspectors and the director would have followed. Had this information been available at the time to the inspectors about the discernable growth problem and the pockets of white substance on the surface of the soil, I am satisfied that the inspectors would have come to a different conclusion and would likely have directed, as the Board did, that the applicant provide additional information to deal with these issues with its application for a Reclamation certificate.”

[36] Similar circumstances exist in these appeals. Throughout the application process, the issue of heavy metals arose. In communication between the various departments of Alberta Environment, there was concern regarding the potential effect the metals could have on the water quality at Lake Wabamun.²⁰ After receiving the application to amend the approval, Alberta Environment identified several areas that needed clarification. Included in the list were

²⁰ See letter from Mr. Richard Casey, Water Services Branch, Water Management Division, Alberta Environment, to Mr. Renato Chiarella, Municipal Engineer, Northern East Slopes, dated May 29, 2001, page 338 of the Record.

questions pertaining to the quality of water being released into Wabamun Lake. These questions included:

- “23. Please verify the predictions already made for the mass loads of some chemicals (e.g., sulphate and aluminum) from the WTP and their potential impacts on the water quality of Wabamun Lake. How do these predictions compare to current conditions in the lake.
24. Determine future predictions for all chemical variables measured each month in the treated water. Account for mass loads of chemical variables from the WTP, annual changes relative to the proposed schedule for the WTP to restore water levels, and the potential concentrations of these variables in Wabamun Lake. Conservative or worst-case assumptions and appropriate water balance estimates should be used in the assessment. Where applicable, the Water Quality Section can provide water quality data for the lake.
25. Compare the current and predicted water quality data of Wabamun Lake to water quality guidelines for the protection of freshwater aquatic life....
26. If relevant to the above assessment, anticipated changes in water chemistry of the intake water caused by the recent Uprates change to the Sundance power plant (e.g., increased temperature leading to potentially greater concentrations of ions and contaminants in the cooling pond) should be taken into account.
27. Include a discussion of the potential effects of any treatment chemicals or waste streams into the cooling pond and WTP that will affect the quality of the WTP discharge.
28. Assess the implications of changes to water quality of Wabamun Lake on aquatic biota and the lake ecosystem.
29. Concern with the water quality of the WTP discharge (related to increased ions and wastewaters entering the cooling pond) could be reduced if North Saskatchewan River water was diverted directly to the WTP, bypassing the cooling pond. Will there be a decrease in the concentrations of parameters from the water treatment plant into Lake Wabamun (including but not limited to): mercury and methyl mercury, live organisms, and total dissolved solids? Please indicate the pros and cons of pumping water directly from the North Saskatchewan River versus pumping from the cooling pond and with respect to cost, treatment requirements and impacts on the Wabamun Lake ecosystem?”²¹

²¹ See letter from Alberta Environment to Trans Alta, dated June 4, 2001, page 192 of the Record. TransAlta provided its responses to the supplemental questions on June 7, 2002. See section 2.1.9 of the Record.

[37] In Mr. David Doull's Statement of Concern, filed May 16, 2001, he requested information concerning the make-up of the cooling ponds, including chemicals and metals.²² Mr. Blair Carmichael, in his filed Statement of Concern, expressed concerns regarding performance guidelines in the Approval.²³ In the Statement of Concern filed by LWEPA, there were concerns with respect to the potential for leachate from the settling ponds going into the lake.²⁴

[38] All of these concerns relate to the quality of water, and although not expressly stated, metals in the released water would fall under their concerns of water quality.

[39] The issue of water quality was also expressed in Mr. Doull's Notice of Appeal, where he makes reference to the proposed plant being capable of producing quality water.²⁵ Although water quality of Lake Wabamun was not specifically included as one of the issues for the hearing, it was discussed at the preliminary hearing. In fact, the Chair discussed the issue of *res judicata* and how it might or might not apply, stating:

“...I think it was in this hearing where we talked about issue estoppel, wasn't it, or *res judicata* and whether or not those principles generally and the courts have suggested for the benefit of all of us they do also apply to administrative tribunals, which generally means that if the same issues are back before a tribunal and by the same parties absent fraud or *some other new evidence that could not have been discovered before then* it is for several public policy reasons against good judgment for the Board or the court to rehear and re-litigate those issues.”²⁶
(Emphasis added.)

[40] We are faced with new information regarding the fish kills and the heavy metals that quite obviously was not obtainable prior to the issuance of the Approval and the Licence. Therefore, we no longer have the required elements to claim that issue estoppel or *res judicata* applies in this case.²⁷

²² See Mr. Doull's Statement of Concern, dated May 16, 2001, page 71 of the Record.

²³ See Mr. Carmichael's Statement of Concern, dated April 26, 2001, page 70 of the Record.

²⁴ See LWEPA's Statement of Concern, dated May 11, 2001, page 84 of the Record.

²⁵ See Mr. Doull's Notice of Appeal, filed August 30, 2001.

²⁶ See Preliminary Hearing Transcript, page 66.

²⁷ Three requirements are required to determine if estoppel applies in the circumstances. These requirements, as defined in the Supreme Court of Canada case of *Angle v. Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 S.C.R. 248, are:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and,

[41] Also in the hearing, the Approval Holder stated that if the Appellants were concerned with the "...quality of water being returned out of the cooling pond and that we're now sending more of it, I would agree with you that would be an issue worth debating."²⁸ Although the quality issue may not have been fully addressed at the preliminary hearing, it is only reasonable to assume that, *as the recent information was not before the Appellants*, one could not expect them to anticipate it as an issue.²⁹

[42] It is important to note that the Appellants did have concerns regarding the availability of the monthly reports that were to be issued by the Approval Holder.³⁰ The fourth issue included reports to interested individuals, and it can only be presumed that this would include water quality information. The water that is to be added to increase water levels is expected to be of reasonable quality, and whether the metal issue would have been evident in the report, we cannot guess. However, we cannot dismiss the possibility that providing the reports might have assisted the Appellants in presenting water quality as an issue.

[43] The Director, in his submission at the Preliminary Hearing, suggested that the EPEA approval "...deals particularly with respect to water quality. That is that the water that is processed by the plant must meet specific water quality criteria."³¹ He further stated:

"Mr. Doull in his submission states that he has major concerns over water quality issues. That falls within the ambit of the Environmental Protection and Enhancement Act approval that has very clear and specific criteria as to the quality of water and the quality that must be achieved before that water can be released into Wabamun Lake.

We've not received any detailed information that any particular requirement is lacking. Mr. Doull talked about concerns over the makeup, and Dr. Hruddy talked in terms a moment ago of the water originating from the cooling pond. It is the quality of water being discharged that is being regulated. It is ensuring the

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.

²⁸ See Preliminary Hearing Transcript, page 72.

²⁹ Mr. Doull, in his rebuttal submission at the Preliminary Hearing, stated:

"Water quality issues, I want to see that in there because of the water is being taken from the cooling pond, and that's where the problems lie." See Preliminary Hearing Transcript, page 101.

³⁰ As a term and condition attached to the Approval, the Approval Holder is required to provide monthly reports to the Director regarding specific water parameters. These include total mercury, aluminum, arsenic, lead, and cadmium. See section 1 of the Record.

³¹ See Preliminary Hearing Transcript, page 77.

quality that goes into Wabamun Lake meets the standard that is set out in that approval that is the relevant consideration. And if there are flaws in the quality criteria that have been put forward, we haven't seen them...."³²

[44] With the fish mortality and the heavy metals coming to light, we expect the Director to finish the investigation, file his reports, and then allow the Appellants to argue the water quality point if and when they have more information.

[45] The Director, in his written submission, had also referred to the issue of water quality. The Director stated that as the Appellants had not raised any new information or provided new evidence regarding the inadequacy of the limits required in the Approval, the Board should not hear the issue.³³

[46] For now, we agree with the Director. The quality of the water returned to Lake Wabamun must meet specific standards and is referred to in the third issue. However, it is apparent, based on the presence of high levels of heavy metals in the lake, that the standards are not being reached for some reason. The Board considers it a serious issue and of particular interest to the public, and we feel the information should be shared with the Board and the Appellants before finally deciding the matter. New information is forthcoming regarding the issue of metals in Wabamun Lake that could be helpful to the Board's final analysis and it is certainly relevant to our jurisdiction under section 2(d) of the Act.³⁴ We can not prejudge it, but we will await the investigation.

[47] This was confirmed in the hearing when the witnesses presented by the Directors were questioned about the present investigation. The Board asked Mr. Neil Scott if data were being collected. Mr. Scott confirmed that people who report to him were at the Lake taking samples the day of the hearing at the south end of the Lake near the Sundance plant. When asked if the data being collected could ultimately be information that might have a bearing on

³² See Preliminary Hearing Transcript, pages 85 and 86.

³³ See Director's Submission, dated April 11, 2002.

³⁴ Section 2(d) of EPEA states:

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

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions...."

what the Board was trying to decide, Mr. Scott stated that he suspected that it would. Specifically, the discussion was as follows:

“Dr. Hrudey: You are continuing to collect data and you are collecting data today on the south side of the lake?
Mr. Scott: That is correct.
Dr. Hrudey: Next to the Sundance Plant?
Mr. Scott: Yes, that is correct.
Dr. Hrudey: And that ultimately would be information that might have a bearing on what we are trying to decide?
Mr. Scott: I suspect it would.”³⁵

The Board finds it significant that the Director charged with investigating the fish mortality and heavy metals is of the view that the information he is collecting may have a bearing on the issues this Board is trying to decide.

IV. CONCLUSIONS

[48] With respect to the three questions posed by the Board in its May 14, 2002 letter, the Board has made the following determination. On the first question, the Board finds that there is not sufficient information for the Board to justify broadening the scope of the issues. Based on the information we do have, and without making a final ruling on the issue, we do not see the connection between the fish kill and the heavy metals.³⁶ We also do not see, based on the information available to date, a reason why the hearing issues should be expanded.

[49] Should the hearing be adjourned until such time that the Board has the information to determine if the scope of the hearing should be broadened? The Board has decided the hearing should be adjourned for a short time. We do not know all of the answers on heavy metal and fish, but we believe it is better to adjourn for 90 days, allow the Directors to complete their investigations, and then make an informed decision in proceeding with the hearing. The adjournment is consistent with principles of natural justice and procedural fairness, because there was some confusion as to who has seen certain reports and who has not. The

³⁵ Hearing Tape, May 15, 2002.

³⁶ In the testimony of Mr. Neil Scott and Mr. Daryl Seehagel, it was stated that there has been no link established between the fish kills and the heavy metals in the preliminary findings. Tests done on the fish to this point have been unable to detect heavy metals in the flesh of the fish, but further tests were under way. An outside expert was doubtful that the heavy metals and the fish mortality were connected.

Board notes that both witnesses for the Directors stated unequivocally that there was no connection between the fish kill and heavy metals and the treatment plant, but yet, data were still being collected; the witnesses' statements that there is absolutely no link appears to be premature.

[50] The Board is concerned its hearings be held in an efficient and expeditious manner. Yet, we have to balance two competing interests – to hold a hearing as quickly as possible versus having the best information possible available to the parties, and ultimately the Board, to provide the best information to the Minister. When assessing which interest (expediency versus information) will supercede the other, the Board must look at where the prejudice, if any, will fall. In this case, although an adjournment will delay the actual hearing for 90 days, no Party is significantly prejudiced. The Appellants and Directors stated that they would not be prejudiced if the hearing was adjourned. The Approval Holder did state they had witnesses present and they were prepared to commence with the hearing, but otherwise there is no prejudice.

[51] Once we get this information, the Board will hold hearings as quickly as possible. In this particular case, the Approval was issued on July 30, 2001, and it was agreed by all of the Parties that the hearing should be held in abeyance until the Licence was issued. The Licence was issued on March 8, 2002, and therefore, the appeal period expired on April 8, 2002. The Board held a preliminary hearing on April 17, 2002, to determine the issues. This hearing was scheduled for May 15 and 16, 2002, five weeks after the end of the appeal period. We are moving as quickly as we can.

[52] In hearing appeals, at least of this type, the Board's ultimate job is to prepare a Report and Recommendations for the Minister pursuant to section 99(1) of EPEA.³⁷ The Board is of the view that by taking this additional time to await the results of the current investigation, it will be able to provide the best possible advice to the Minister. It remains the responsibility of

³⁷ Section 99(1) of the Act provides:

“In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.”

Alberta Environment to investigate the cause of the fish kill and how and by whom the heavy metals were released into Lake Wabamun. In other words, the Board does not intend to act as a “quasi-investigator”. However, the new information is an issue of great concern to the public, absent prejudice to the Parties, the Board would be remiss in its obligations if it proceeded in advance of information that could potentially affect the material and data available to Parties which in turn, again, could affect our Report and Recommendations to the Minister. In short, Alberta Environment will do the investigating, and we do expect the results of its investigation to be forwarded to the Parties in these appeals and to this Board. The Board notes the comments made by the Directors regarding this Board’s jurisdiction.³⁸ The Board must also respond to concerns raised by members of the public who bring environmental issues that are based on pending studies that might be relevant. Under EPEA it is the obligation of all Alberta citizens to share the responsibility of protecting the environment,³⁹ and the Board will continue to hear the environmental concerns of all Parties.

[53] Therefore, subject to the privileges associated with section 35(9) of EPEA, the Directors are required to provide all relevant documents regarding their investigation of the issues of fish mortality and heavy metals to this Board and the other Parties to these appeals by noon on August 16, 2002, or sooner if it becomes available more quickly.⁴⁰

[54] Then, if any of the Appellants decide, as a result of the new information, to make a motion regarding the addition of issues, the Board must receive the motion by noon on August 30, 2002. Any rebuttals would be due by noon on September 9, 2002. The Board would then consider the submissions and make a determination on whether to add the issue of water quality

³⁸ See Directors’ submission, dated May 13, 2002, which stated:

“The Board’s jurisdiction as set out in the Environmental Protection and Enhancement Act is to deal with decisions of the Director. The Environmental Appeal Board does not have the plenary jurisdiction to enter into inquiries based upon concerns that are raised by members of the public.”

³⁹ Section 2 of EPEA states:

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

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions.”

⁴⁰ The Board notes that the Directors must abide by the legislation regarding the release of information relating to a matter that is the subject of an investigation or proceeding. Section 35(9) of EPEA states:

“Information relating to a matter that is the subject of an investigation or proceeding under this Act may not be released under subsection (1) or (3).”

to the hearing. Based on this timeline, the hearing is expected to reconvene in late September or early October.

[55] Finally, while the investigation continues, the status quo of the Approval and the Licence exists. The Approval and Licence remain in full force and effect.

V. DECISION

[56] We therefore adjourn the hearing for 90 days or until such time as all relevant documents and results of the current investigation regarding fish mortality and heavy metals in Lake Wabamun are made available. The Directors are required to provide copies of the results and all relevant documents to all of the Parties to these appeals and to the Board according to the above schedule and subject to section 35(9) of EPEA. Following the 90 days, if a motion is received from a Party, the Board will determine if water quality will be added as an issue at the hearing.

Dated on May 30, 2002, at Edmonton, Alberta.

“original signed by”

William A. Tilleman, Q.C.
Chair

“original signed by”

Dr. Steve Hrudehy

“original signed by”

Frederick C. Fisher, Q.C.