

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – November 23, 2001

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

-and-

IN THE MATTER OF an appeal filed by Mr. John Oxenford on
behalf of ConCerv with respect to Amending Approval 1395-01-01
issued to EPCOR Power Development Corporation and EPCOR
Generation Inc. by the Director, Northeast Boreal Region,
Regional Services, Alberta Environment for the expansion of the
Rossdale thermal electric power generating plant.

Cite as: *ConCerv v. Director, Northeast Boreal Region, Regional Services, Alberta
Environment re: EPCOR Power Development Corporation and EPCOR
Generation Inc.*

EXECUTIVE SUMMARY

An appeal was filed by Mr. John Oxenford on behalf of ConCerv with respect to Amending Approval 1395-01-01 issued by Alberta Environment to EPCOR Power Development Corporation and EPCOR Generation Inc. for the expansion of the Rossdale thermal electric power generating plant in Edmonton, Alberta.

After discussions between Alberta Environment and EPCOR, the Amending Approval was cancelled and as a result, the Board considers the matter moot and is dismissing the appeal.

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I. BACKGROUND

[1] On December 10, 1996, the Director, Northeast Boreal Region, Regional Services, Alberta Environment (the “Director”) issued Approval No. 1395-01-00 (the “Approval”) to Edmonton Power Inc. (the predecessor to EPCOR) for the operation of the Rossdale thermal electric power generating plant. On August 10, 2001, Amending Approval No. 1395-01-01 (the “Amending Approval”) was issued by the Director to EPCOR Power Development Corporation and EPCOR Generation Inc. (collectively “EPCOR”). The Amending Approval amended specific conditions of the original Approval which authorized the construction of a 170 MW gas turbine generator, designated as Unit 11 (“RD 11”) at the Rossdale Power Plant in Edmonton, Alberta.

[2] On August 31, 2001, Mr. John Oxenford, President of the Concerned Citizens for Edmonton’s River Valley (“ConCerv”) filed a Notice of Appeal with the Environmental Appeal Board (the “Board”) on behalf of the members of ConCerv (collectively the “Appellants”) objecting to the expansion of the Rossdale facility. The Board acknowledged receipt of the Notice of Appeal on September 6, 2001, and at that time requested a copy of all documents relevant to this appeal (the “Record”) from the Director and available dates from the parties for a possible mediation meeting/settlement conference or hearing.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective Board’s legislation. On September 12, 2001, the NRCB replied in the negative.

[4] On September 20, 2001, the Board acknowledged a letter from the Director dated September 17, 2001. The Director’s letter included part of the Record however advised that due to the volume of material, additional time would be needed to compile and index items. The Director’s letter also states:

“I wish to advise the Board that environmental implications of EPCOR’s project was the subject of an extensive public hearing before the Alberta Energy & Utilities Board (AEUB). The Appellant, ConCerv, participated fully at this hearing with legal counsel and experts on environmental issues. In addition, Alberta Environment provided expert

evidence through a witness panel on the full range of environmental issues. ...In light of the foregoing, it is Alberta Environment's position that the EAB must dismiss the current appeal pursuant to s. 87(5)(b)(i)."

The Board's letter also acknowledged a letter from the Appellants who provided available dates for a mediation meeting/settlement conference. The Appellants' letter advised:

"ConCerv notes that the correspondent from EPCOR is Dr. David Lewin and presumably he would be EPCOR's representative in the mediation process. Unfortunately, there is a major unresolved issue between Dr. Lewin and ConCerv that is waiting on some initiative by Dr. Lewin to be resolved. Until that occurs, ConCerv would have a great deal of difficulty participating in any discussions that included Dr. Lewin as a participant and we would ask that EPCOR be represented by an alternate."

In response to the Director's submission, the Board advised the parties that the Director's preliminary motion would be dealt with via written submissions only and set a schedule for the parties to provide their submissions.

[5] In response to the Board's letter of September 6, 2001, the AEUB advised that ConCerv participated in a public hearing before the AEUB and provided a copy of AEUB Decision 2001-33. On October 3, 2001, the Board acknowledged the AEUB's letter and provided a copy to the parties. The Board's letter also acknowledged receipt of letters from the Director dated September 28 and October 2, 2001, requesting an extension to the submission deadline due to the amount of work to be completed. The Board's letter granted the Director's request as no objections were heard by any of the parties.

[6] On October 4, 2001, the Board received a letter from the Appellants requesting clarification on the following statement:

"I bring to your attention comments made at the Mayoral forum at St. Joseph's School on October 3, 2001, by Edmonton's Mayor, Mayor Bill Smith. At that forum, in referring to the RD11 expansion he commented...'the expansion will not be going ahead'. As Edmonton City Council is the owner of EPCOR, one presumes that the Mayor is speaking with some authority on the matter....I would therefore ask that you clarify the situation and advise all parties accordingly."

On the same day, the Board requested written comments from the parties by October 9, 2001.

[7] On October 23, 2001, the Board provided a copy of the Record sent by the Director in correspondence dated October 3, 9 and 12, 2001, to the parties for their information.

[8] On October 24, 2001, the Board wrote to the parties in response to letters it received from the Appellants on October 23, 2001. The Appellants' letter provided additional information regarding Mayor Bill Smith's comments regarding the EPCOR expansion, confirmed that the appeal had been filed by ConCerv and not by Mr. Oxenford personally, advised that the EPCOR expansion was not voted on by Edmonton City Council, confirmed that ConCerv obtained leave to appeal the decision of the AEUB to the Alberta Court of Appeal, and advised the Minister of Community Development made a decision respecting the designation under the *Historical Resources Act*¹. The Appellant's letter stated:

“...any effort by the Environmental Appeal Board to review the RD11 project is now pointless. There is general agreement that RD11 will not be built. ConCerv suggests that an appropriate action by the EAB would be to defer any review hearings on RD11 until it is clear what alternate proposals, if any, are going to be brought forward by EPCOR.”

One of the letters provided a number of press releases issued by Alberta Community Development indicating that portions of the EPCOR “...site have been designated as Provincial Historic Resources.” The press release indicated that the designation would still allow the Minister to consider the possible development of the RD11 generator, if requested by EPCOR and essentially made the present RD11 application null and void. The Board advised the parties that it also had before it the Amending Approval, with no indication from the Director or EPCOR that it has or would be cancelled. As a result, the Board advised it would proceed with the appeal before it and continue with its submission process to address the Director's motion.

[9] In response to a telephone conversation with the Appellants on October 24, 2001, requesting the appeal be placed in abeyance, the Board advised the parties that based on its review of the historical resources designation, it appeared that EPCOR had withdrawn its application for approval from the AEUB. As a result, the Board requested the Director and EPCOR provide a status on the Amending Approval by October 26, 2001.

[10] On October 25, 2001, the Director informed the Board that EPCOR and the Director were in the process of scheduling a meeting to discuss the Amending Approval and requested the Board hold the appeal in abeyance pending that meeting.

1 RSA 1980, c. H-8.

[11] On October 29, 2001, the Board acknowledged receipt of a letter from the Director of the same day that outlined the meeting between the Director and EPCOR would take place on November 1, 2001. The Board also acknowledged a letter of October 26, 2001, and press releases from EPCOR.

[12] The Appellants, on October 31, 2001, wrote to the Board and advised:

“It is ConCerv’s understanding that EPCOR proposes to continue operation at Rossdale at least for the immediate future...ConCerv therefore wishes to continue its appeal with the intention that Approval 1395-01-01 be revoked....

ConCerv contends that many issues of substance pertaining to this approval were either not dealt with adequately, or, in some cases, were not dealt with at all.”

The Board acknowledged the letter on November 2, 2001, and provided a copy to the parties.

[13] On November 4, 2001, Ms. Elaine Solez, President of the Central Area Council of Community League, a funded intervener at the AEUB hearing on EPCOR’s application to expand the Rossdale generating plant, requested that her organization be kept informed about the Board’s process and decisions regarding this appeal. The Board granted Ms. Solez’s request on November 5, 2001.

[14] In response to a letter from the Director dated November 9, 2001, advising the Board that a conclusion had been reached between the Director and EPCOR and that a status report would be provided once finalized, the Board acknowledged the letter and provided a copy to the parties to the appeal.

[15] On November 15, 2001, the Director wrote to the Board advising the Amending Approval was cancelled. A copy of the Director’s letter to Mr. Les Johnston of EPCOR, dated November 15, 2001, was provided to the Board and stated:

“Approval No. 1395-01-01, issued in relation to the Rossdale Unit 11 Project, is cancelled pursuant to s. 67(3)(b) of *the Environmental Protection and Enhancement Act*. The cancellation is effective November 15, 2001. I will be providing public notice of the cancellation in accordance with s. 10 of the *Environmental Protection Enhancement Approvals Registration Procedure Regulation*.

Environmental Protection and Enhancement Act Approval No. 1395-01-00, as it existed before Approval No. 1395-01-01 was issued, remains in full force and effect.”

[16] On November 19, 2001, the Board wrote to the parties providing them a copy of the cancellation letter. The Board also informed the parties that due to the cancellation taking place, the Board considered the appeal moot and would be dismissing the appeal. The parties were requested to provide concerns to the Board regarding the dismissal and if no objections were received, the Board would dismiss the appeal. No objections were received.

II. DECISION

[17] Section 87(5)(a) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the “Act”) states:

87(5) The Board

- (a) may dismiss a notice of appeal if it considers the notice of appeal to be frivolous or vexatious or without merit,
- (i.2) for any other reason the Board considers that the notice of appeal is not properly before it,

[18] The Board hereby exercises its discretion under section 87(5)(a) of the Act and dismisses the Notice of Appeal filed by the Appellants, as the appeal is either moot, not properly before the Board or without merit. The Board is closing its file.

Dated on November 23, 2001, at Edmonton, Alberta.

William A. Tilleman, Q.C.