

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 28, 2004

Date of Reconsideration Decision – November 17, 2004

IN THE MATTER OF sections 91, 92, 95 and 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Wood Buffalo First Nation with respect to *Environmental Protection and Enhancement Act* Approval No. 48263-00-00 issued to ConocoPhillips Canada Resources Corp., by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Reconsideration Request: *Wood Buffalo First Nation v. Director, Northern Region, Regional Services, Alberta Environment* re: *ConocoPhillips Canada Resources Corp.* (17 November 2004), Appeal No. 03-147-RD (A.E.A.B.).

BEFORE:

Dr. Frederick C. Fisher, Q.C., Chair.

WRITTEN SUBMISSIONS:

Appellant:

Wood Buffalo First Nation, represented by Mr. John Malcolm, Interim Chief, Wood Buffalo First Nation.

Director:

Mr. Kem Singh, Director, Northern Region, Regional Services. Alberta Environment, represented by Mr. Randy Didrikson and Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder:

ConocoPhillips Canada Resources Corp., represented by Mr. Randall W. Block, Borden Ladner Gervais LLP.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 48263-00-00 on November 7, 2003, to ConocoPhillips Canada Resources Corp. for the construction, operation, and reclamation of the Surmont enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Fort McMurray, Alberta.

The Board received a Notice of Appeal from the Wood Buffalo First Nation appealing the Approval.

The Board conducted a Preliminary Meeting via written submissions on the issue of whether the Wood Buffalo First Nation had an opportunity to participate in a hearing before the Alberta Energy and Utilities Board (“AEUB”) at which all matters included in the Notice of Appeal were adequately dealt with.

The Board determined the Wood Buffalo First Nation did receive notice of, and did participate in an AEUB review of the matter, and all issues identified in the Notice of Appeal were adequately dealt with by the AEUB. Therefore, the Board dismissed the appeal.

The Wood Buffalo First Nation submitted a reconsideration request of the Board’s decision. After reviewing the submissions from the parties from the original appeal and the reconsideration request, the Board determined no new evidence was presented by the Wood Buffalo First Nation, and they did not raise any substantial error in law.

Therefore, the Board denies the reconsideration request.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUBMISSIONS	4
	A. Appellant.....	4
	B. Approval Holder	5
	C. Director	6
III.	ANALYSIS.....	6
	A. Statutory Basis	6
	B. Discussion	8
IV.	CONCLUSION.....	12

I. BACKGROUND

[1] On November 7, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 48263-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to ConocoPhillips Canada Resources Corp. (the “Approval Holder”), for the construction, operation, and reclamation of the Surmont enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Fort McMurray, Alberta.

[2] On December 11, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Wood Buffalo First Nation (the “Appellant” or “WBFN”) appealing the Approval.

[3] On December 15, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal, and the Parties provide available dates for a mediation meeting or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative.

[5] On December 23, 2004, the Approval Holder raised motions with respect to the directly affected status of the Appellant and the review completed by the AEUB.

[6] On January 2, 2004, the Director notified the Board of the following preliminary issues associated with the appeal:

- “1. The legal status of the Wood Buffalo First Nation (WBFN);
2. Whether WBFN is directly affected including issues in relation to WBFN membership;
3. The validity of the appeal in light of prior Alberta Energy and Utilities Board proceedings;

4. Whether the appeal is frivolous and vexatious; and,
5. The appropriate legal forum for determination about assertions of aboriginal and treaty rights.”

[7] On January 13, 2004, the Board received a letter from the AEUB, advising that the AEUB:

“...did receive an application from ConocoPhillips Canada Corp. for the Surmont Commercial Oil Sands Scheme. The [AEUB] also received a number of objections with respect to the application, including an objection from John Malcolm of the Wood Buffalo First Nation. The [AEUB] dismissed all the objections on the basis that the objectors did not have standing, pursuant to s.26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the [AEUB] issued its approval on May 15, 2003.”

[8] On January 15, 2004, the Board acknowledged receipt of the AEUB’s letter and requested copies of (1) the AEUB Approval, (2) the AEUB decision, and (3) copies of the objections received by the AEUB from the Wood Buffalo First Nation, including the letters and documents from the AEUB in relation to the dismissal of the objections.

[9] On January 14, 2004, and January 15, 2004, the Approval Holder submitted to the Board that the motion regarding the validity of the appeal in light of prior AEUB proceedings should be heard prior to the remaining motions raised by the Director and the Appellant’s stay request are considered. The Board requested the Parties provide their comments with respect to the Approval Holder’s motion.

[10] On February 2, 2004, the Board received the requested documents from the AEUB, including Approval No. 9426 issued to the Approval Holder.

[11] The Board notified the Parties on February 10, 2004, that:

“Upon review of the letter and attachments from the [A]EUB, the Board has decided to deal with the [A]EUB matter pursuant to section 95(1)(b)(i) of the *Environmental Protection and Enhancement Act*. The Board will decide whether to deal with the remainder of the issues once it issues its decision in the [A]EUB matter.”

[12] On February 17, 2004, the Board received a copy of the limited return of the Record and on February 18, 2004, forwarded a copy to the Appellant and the Approval Holder. Additional documents were provided on May 13, 2004, and copies were forwarded to the other Parties.

[13] On April 22, 2004, the Board wrote to the Parties advising that the Board had decided to conduct the Preliminary Meeting via written submissions as opposed to an oral Preliminary Meeting, as it was unable to find a common suitable date for all the Parties and the Board. In the same letter the schedule for receiving written submissions was set. The Board stated the issue was "...whether the Wood Buffalo First Nation had an opportunity to participate in a hearing before the Energy and Utilities Board at which all matters included in their notice of appeal were adequately dealt with, pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*."

[14] On April 29 and May 3, 2004, the Board received a request from the Appellant for an extension of 30 days to the deadline for filing their submission. On May 6, 2004, the Board received a letter from the Approval Holder objecting to a 30-day extension, but it was willing to accept a two week extension. The Board notified the Parties on May 7, 2004, that a 17-day extension would be granted to the Appellant, and a revised schedule for providing submissions was provided.

[15] On May 13, 2004, the Appellant wrote to the Board requesting a further extension to file their submission. The Approval Holder objected to an extension. The Board notified the Parties on May 17, 2004, that no further extensions would be allowed.

[16] The Parties provided their submissions between May 20, 2004, and June 3, 2004.

[17] The Board released its decision on June 28, 2004, dismissing the appeal for not being properly before the Board as the Appellant had the opportunity to participate, and did participate, in a review before the AEUB in which all issues were considered and adequately addressed by the AEUB.

[18] On July 30, 2004, the Board received a reconsideration request from the Appellant.

[19] On August 3, 2004, the Board notified the Parties of the reconsideration request and set a schedule to receive written submissions. The Board received submissions from the Parties between September 2, 2004, and September 30, 2004.

II. SUBMISSIONS

A. Appellant

[20] The Appellant requested a reconsideration of the Board's decision on the grounds their aboriginal rights are not being properly acknowledged. They requested the Board rescind or review its decision. They stated they would be "...seeking a judicial review if we are refused proper consultation in a meaningful manner, along with compensation and replevin among other legal matters."¹

[21] The Appellant argued their Treaty Rights, the Canadian Constitution, the 1927 Indian Act, the Canadian Charter of Rights, and the core of Indianness issues are being ignored.

[22] In their submission, the Appellants provided information on individual members and how they use the area.

[23] In their rebuttal submission, the Appellant stated they "...are simply trying to prove we are impecunious and have no professional (*sic*) help."²

[24] The Appellant stated their "...next step to achieve a meaningful consultation process is to provide a constitutional notice for a judicial review. We believe (*sic*) the court system is where we should be in the first place."³

[25] The Appellants argued they are an aboriginal group that is being discriminated against, and new evidence would come from the Supreme Court of Canada in the *Haida* decision.⁴

[26] The Appellants asked that if there is anything the Board can do to help make this a fair process, they would be grateful for the assistance.

¹ Appellant's letter, dated July 29, 2004.

² Appellant's submission, received September 30, 2004.

³ Appellant's submission, received September 30, 2004.

⁴ *Minister of Forests et al. v. Council of the Haida Nation and Weyerhaeuser Company Limited v. Council of the Haida Nation et al.* (Supreme Court of Canada Appeal File No. 29419) ("Haida").

[27] The Appellant concluded by stating they are severely impacted by the project.

B. Approval Holder

[28] The Approval Holder submitted the Appellant did not establish exceptional and compelling reasons that justify a reconsideration of the Board's decision. It stated the onus is on the Appellant to show exceptional and compelling reasons, and "...the standard to be met is very stringent as the Board must exercise its discretion under *EPEA* section 101 with caution and not allow Malcolm/WBFN to simply reargue the same issues a second or even a third time."⁵

[29] The Approval Holder stated the Board's decision was limited to a consideration of whether the Appellant's Notice of Appeal had to be dismissed pursuant to section 95(5)(b)(i) of EPEA. The Approval Holder stated the Board found the Appellant did receive notice of and did participate in the AEUB's review of the project, and as a result, section 95(5)(b)(i) required the Board to dismiss the Notice of Appeal.

[30] The Approval Holder argued the Appellant did not state any grounds in support of their reconsideration request, and did not raise anything relevant to the Board's consideration of the Notice of Appeal under section 95(5)(b)(i) of EPEA. The Approval Holder submitted the Appellant did not suggest they did not receive notice of or participate in the AEUB's review of the project, nor did they suggest the Board failed to consider whether the AEUB adequately dealt with the matters noted in the Notice of Appeal.

[31] The Approval Holder explained:

"The continued relitigation and the multiplicity of proceedings commenced by Malcolm/WBFN on the same matter is contrary to the public interest in maintaining a fair and credible regulatory process. The attendant delays resulting from the Malcolm/WBFN repeated appeals and need for finality require that the Malcolm/WBFN request for reconsideration be denied."⁶

⁵ Approval Holder's submission, dated September 16, 2004.

⁶ Approval Holder's submission, dated September 16, 2004.

C. Director

[32] The Director submitted the Appellant has failed to meet the onus on them to show there are exceptional and compelling reasons for the Board to reconsider its decision, and therefore, the Board should refuse the request to reconsider the decision.

[33] The Director explained the Board's decision considered the question of whether the Appellant had received notice of or participated in a hearing or review before the AEUB. He stated the Board determined the Appellant did have the opportunity to participate in an AEUB review and all matters raised in their Notice of Appeal were adequately dealt with by the AEUB. The Director stated, "...the Board dismissed Mr. Malcolm's appeals as required by section 95(5)(b)(i) of the EPEA."⁷

[34] The Director submitted there is nothing in the Appellant's submission that "...points to new evidence that was not reasonably available at the time of the Board's original decision, or that points to a substantial error in law that would have affected the Board's decision."⁸ The Director stated the Appellant did not provide any new evidence or point out anything in the Board's decision or cite any cases that suggest the Board made a substantial error in law in arriving at its decision regarding the application of section 95(5)(b)(i) of EPEA.

[35] The Director submitted the Appellant is merely attempting to reargue the appeal.

III. ANALYSIS

A. Statutory Basis

[36] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[37] The Board has stated in previous decisions that its power to reconsider "...is an extraordinary power to be used in situations where there are exceptional and compelling reasons

⁷ Director's submission, dated September 16, 2004.

⁸ Director's submission, dated September 16, 2004.

to reconsider.”⁹ The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

[38] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.¹⁰ The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.¹¹

[39] A substantial error in law may be a sufficient ground for reconsideration. An example of when a substantial error in law has been made is when a new decision from the courts reveals an error. Generally, a party’s failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. It is important for the parties to realize that to justify a reconsideration, the decision of the courts must demonstrate an error in law that, once corrected, would change the original result. The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility the decision could be altered.¹²

⁹ *Whitefish Lake First Nation Request for Reconsideration: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD (A.E.A.B.); Reconsideration Request: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment* (14 June 2002), Appeal No. 01-074-RD (A.E.A.B.)

¹⁰ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

¹¹ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

¹² *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059 (A.E.A.B.).

[40] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.¹³

B. Discussion

[41] The issue before the Board in its June 28, 2004 Decision, was whether or not the Appellant had the opportunity to participate or did participate in the AEUB process, and whether or not all of the issues identified in the Notice of Appeal were adequately dealt with. Before the Board can proceed with the appeal, it is required to assess whether or not the Appellant participated in or had the opportunity to participate in the AEUB process. Based on this analysis, the Board must determine if it retains jurisdiction to hear the substantive matters of an appeal. Just as the legislation limits who may file an appeal with the Board, the legislation limits the Board's authority to hear matters. It does not matter whether it is an individual or a group that files an appeal, if they had an opportunity to be involved in the AEUB process and all matters in the Notice of Appeal were adequately dealt with, the Board loses jurisdiction to hear the appeal and the appeal *must* be dismissed. The legislation does not give the Board any option.

[42] In its decision dated June 28, 2004, the Board determined that, based on the facts provided by the Parties, the Appellant had the opportunity to participate and did participate in a review before the AEUB and all the issues and matters in the Notice of Appeal were adequately dealt with by the AEUB. The Appellant chose not to continue their participation, but that does not change the fact the Appellant had the opportunity to participate, and did participate to an extent, in the AEUB hearing. Therefore, the Board loses its jurisdiction to hear the appeal.

[43] The Appellant raised the issue of the fairness of the Board's process. A fair process before the Board includes the right to know the case against you and the right to be heard. The Appellant in this case, as in all cases before the Board, received a copy of the

¹³ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

Director's Record and the Board's record. They had all of the information available. The Appellant knew the questions that had to be answered in order for the Board to make its decision. Based on the information provided by the Appellants, and the other Parties, the Board came to the conclusion it did not have jurisdiction to hear the Appeal.

[44] In their submission, the Appellant did not provide any evidence or advance any arguments to demonstrate the Board erred in its analyses of the AEUB issue.

[45] The Appellant argued new evidence will become available in the *Haida* case which is currently before the Supreme Court of Canada. The Board cannot halt its process in anticipation of a decision being made, sometime, by the Supreme Court of Canada. There is no certainty as to when the decision will be made, and there is no certainty the decision would affect the Board's decision in any way. Part of having a fair process is to prevent delays in the decision-making process as much as possible. The process has to be fair to all Parties in an appeal, and waiting for decisions from other tribunals that will be released on an unknown date, would bring uncertainty into the Board's process. Therefore, the Board will not grant a reconsideration on the basis of future unknown decisions.

[46] As part of the Appellant's reconsideration submission, they included a letter from the Minister of Aboriginal Affairs and Northern Development, in which she states Aboriginal Affairs and Northern Development "...has recently approved a \$34,000 Contribution Agreement to provide funding for community sessions with Elders, as well as funding for independent legal council for the WBFN." Although it is uncertain how much of that funding is for legal counsel and if all of the funding has to be used in determining the extent of their potential Aboriginal rights, it does not support the Appellant's argument of being unable to afford legal counsel.

[47] The Appellant argued they require professional legal help to assist them through the process. The Board has set its process to allow parties to participate without requiring legal counsel. The Board focuses on the substance of the submissions, not the legal prowess in which it is presented. Therefore, it is irrelevant in assessing the reconsideration request as to whether or not the party has access to legal counsel.

[48] The Appellant in this case did an adequate job in providing their arguments to the Board. However, it does not change the fact they participated in the AEUB hearing process, and they did not identify any issue that had not been adequately dealt with by the AEUB.

[49] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if, in our opinion, it has been heard and adequately dealt with by the AEUB and the person had the opportunity to participate in the hearing. Section 95(5)(b)(i) states:

“The Board shall dismiss a notice of appeal if in the Board’s opinion the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with....”

[50] The Board based its decision on the facts presented by the Parties and other documentation provided by the AEUB. In their reconsideration submission, the Appellants did not dispute the fact the Appellant had the opportunity to participate in the AEUB hearing, and they did not argue the AEUB did not cover all of the matters in the Notice of Appeal. It was undisputed by the Appellant they were paid to review the Approval Holder’s application to the AEUB. The Appellant did not dispute they filed a letter with the AEUB and then withdrew from the process.

[51] The Appellant’s submission did not provide any new information that would change the Board’s decision regarding their participation in the AEUB process. Instead, the Appellant provided information regarding their argument that they should be recognized as a First Nations group. The Appellant continued to argue the WBFN’s hunting and fishing rights would be disrupted by the project. These are arguments that should have been presented to the AEUB in its hearing process, when the Appellant had the opportunity. In fact, the Appellant’s submission appears to have been prepared for the AEUB, not this Board, and the AEUB is the proper place to request a reconsideration. It was the AEUB that made the original decision to proceed with the project, and it is the AEUB where the reconsideration request should be heard. As no new evidence was provided, the Board does not find any basis to reconsider its previous decision.

[52] Before the Board can determine the directly affected status of an appellant, it must have jurisdiction to hear the matter. The Board's decision did not consider whether the Appellant was directly affected or whether they would be recognized as a group that had standing to appear. The Board made and makes no determination on the standing of the Appellant. The Board does not have the ability to hear a matter that has been determined by the AEUB and the person appealing had the opportunity to participate in that hearing. Therefore, the Board did not assess the directly affected status of the Appellant or if they had an interest that would be affected by the Director's decision.

[53] Aboriginal and Treaty rights was not an issue in the Board's decision. The Board cannot determine issues such as the infringement of rights or the duty to consult until it seizes jurisdiction to hear the matter according to the legislation. It is irrelevant as section 95(5)(b)(i) applies to all who file a Notice of Appeal, and the assessment of whether or not the Board retains jurisdiction is the same for all appellants.

[54] Based on the decision of the Supreme Court of Canada in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, the Board can consider aboriginal rights in the course of carrying out its valid legislated mandate. Therefore, before the Board can consider aboriginal rights, it must have a valid appeal before it. In this case, and as stated above, there is no valid appeal before the Board since the Board had no alternative but to dismiss the appeal pursuant to section 95(5)(b)(i) of EPEA.

[55] The Appellant must also be aware that the Board cannot assess whether or not another board, such as the AEUB, did or did not fulfill any duty it may have to consult with First Nations groups.

[56] On reviewing the submissions for the original decision and the submissions provided for the reconsideration, the Board is still of the opinion the Appellant had the opportunity to participate and did participate in the AEUB hearing into this matter, and all matters included in the Notice of Appeal were adequately dealt with by the AEUB.

[57] The Appellant asked the Board to reconsider its decision of June 28, 2004. The Appellant did not provide any new evidence and there are no exceptional or compelling reasons for a reconsideration of the decision. There was not a substantial error in law, and the public

interest would not be served by a reconsideration. The Appellant did not provide any new evidence or any evidence that was not available at the time of the original decision.

[58] Therefore, the reconsideration request is denied.

IV. CONCLUSION

[59] The Board finds the Appellant did not provide any compelling evidence or arguments for a reconsideration of the Board's decision, and therefore, their request for reconsideration is denied.

Dated on November 17, 2004, at Edmonton, Alberta.

“original signed by”

Dr. Frederick C. Fisher, Q.C.
Chair