

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 the Wood Buffalo First Nation with respect to *Environmental Protection and Enhancement Act* Approval No. 137467-00-00 issued to OPTI Canada Inc./Nexen Canada Ltd. 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: OPTI Canada Inc./Nexen Canada Ltd.* (17 November 2004), Appeal No. 03-148-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, Alberta Justice.

Approval Holder:

OPTI Canada Inc./Nexen Canada Ltd., represented by Mr. Shawn Denstedt, Bennett Jones LLP.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 137467-00-00 to OPTI Canada Inc./Nexen Canada Ltd. for the construction, operation and reclamation of the Long Lake 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 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, did participate in, and withdrew from 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 requested the Board reconsider its decision. After reviewing the submissions, the Board found the Appellant did not provide any compelling evidence or arguments for a reconsideration of the Board's decision, and therefore, the request for reconsideration was denied.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUBMISSIONS	4
	A. Appellant.....	4
	B. Approval Holder	4
	C. Director	5
III.	ANALYSIS.....	5
	A. Statutory Basis	5
	B. Discussion	7
IV.	CONCLUSION.....	11

I. BACKGROUND

[1] On November 10, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 137467-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to OPTI Canada Inc./Nexen Canada Ltd. (the “Approval Holder”) for the construction, operation, and reclamation of the Long Lake 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 (“NRCB”) and the Alberta Energy and Utilities Board (“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 January 2, 2004, the Director informed the Board that there were preliminary issues associated with the appeal, including:

- “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 determinations about assertions of aboriginal and treaty rights.”

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

“... the Alberta Energy and Utilities Board (EUB) did receive an application from OPTI Canada Inc./Nexen Canada Ltd. for the Long Lake commercial oil sands scheme. The application was approved on August 20, 2003 without a public hearing being held.”

[7] 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 Appellant, including the letters and documents from the AEUB in relation to the dismissal of the objections.

[8] On January 13, 2004, the Board received a letter from the Approval Holder, stating:

“...we respectfully submit that the two motions raised in our letter of December 24, 2003 can be dealt with expeditiously and without the filing of detailed records or evidence. Those two motions are:

1. Whether Mr. Malcolm/Wood Buffalo First Nation had an opportunity to participate in an Energy and Utilities Board hearing or review process (section 95(5)(b)(i)); and
2. Whether Mr. Malcolm/Wood Buffalo First Nation’s Notice of Appeal is without merit (section 95(5)(a)(i).”

[9] On January 15, 2004, the Board wrote to the Parties acknowledging the letter from the Approval Holder and asking the Parties to provide their comments regarding its motions.

[10] On January 19, 2004, the Director advised that he supported the approach outlined by the Approval Holder.

[11] On January 22, 2004, the Board wrote to the Parties, advising that a response due January 19, 2004, from the Appellant had not been received, and stated that:

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

[12] On February 6, 2004, the Board received a copy of an abbreviated Record from the Director, and copies were forwarded to the Appellant and the Approval Holder.

[13] On April 22, 2004, the Board wrote to the Parties to advise that the Board had decided to conduct the Preliminary Meeting via written submissions, as it was unable to find a common suitable date between the Parties and the Board to hold an oral Preliminary Meeting. In the same letter the schedule for providing written submissions was set.

[14] The Appellant submitted letters to the Board on April 30 and May 3, 2004, requesting an extension for filing their submission.

[15] The Approval Holder, in its May 5, 2004, stated its opposition to granting an extension of time, but submitted a reasonable length of time would be acceptable.

[16] On May 7, 2004, the Board wrote to the Parties, stating:

“The Board has reviewed the letters from Mr. Malcolm that were received by the Board on April 29 and May 3, 2004, and Mr. Denstedt’s and Mr. Block’s letter of May 5 and 6, 2004. The Board is of the view that the issue for the Preliminary Meeting can be dealt with in writing. Specifically the issue for the Preliminary meeting is whether the Wood Buffalo First Nation received notice of or participated in or had the opportunity to participate in one or more hearings or reviews 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*.

Although there was a delay in getting the Board’s April 22, 2004 letter containing the schedule for written submissions to Mr. Malcolm, it is the Board’s view that Mr. Malcolm has been aware of the issue for the Preliminary Meeting since the Board’s letter of January 22, 2004 was forwarded to his former lawyer, Mr. Szakacs, on January 22, 2004, and therefore has had sufficient time to prepare.

Given the above, the Board confirms its decision to conduct this Preliminary Meeting via written submissions. The Board notes Mr. Denstedt’s request for a compressed deadline and Mr. Block’s suggested submission schedule. The Board has also taken into consideration Mr. Malcolm’s request for an extension to file his written submissions with the Board.”

The Board’s letter goes on to set a revised schedule for providing submissions.

[17] Submissions were received from the Parties between May 20, 2004, and June 3, 2004.

[18] 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.

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

[20] 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

[21] 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

B. Approval Holder

[22] The Approval Holder submitted the Appellant did not respond to the question before the Board and has not provided any new information or argument that would cast material doubt on the validity of the Board's decision.

[23] The Approval Holder asked the Board to dismiss the request for reconsideration.

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

C. Director

[24] The Director submitted that the Appellant has failed to meet the onus on him 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.

[25] The Director explained the Board's decision considered the question of whether the Appellant had received notice of or participated in a hearing 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 "...the Board dismissed Mr. Malcolm's appeals as required by section 95(5)(b)(i) of the EPEA."²

[26] 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."³ 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.

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

III. ANALYSIS

A. Statutory Basis

[28] 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."

[29] 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

² Director's submission, dated September 16, 2004.

³ Director's submission, dated September 16, 2004.

to reconsider.”⁴ 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.

[30] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.⁵ 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.⁶

[31] 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.⁷

⁴ *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.)

⁵ 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.).

⁶ 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.).

⁷ *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.).

[32] 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.⁸

B. Discussion

[33] 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.

[34] 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 to not 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.

[35] 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

⁸ 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 Appellant, and the other Parties, the Board came to the conclusion it did not have jurisdiction to hear the Appeal.

[36] 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.

[37] 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.

[38] 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.

[39] 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.

[40] 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.

[41] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if, in the Board's 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....”

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

[43] The Appellant's submission did not provide any new information that would change the Board's decision regarding its participation in the AEUB process. Instead, the Appellant provided information regarding its argument that they should be recognized as a First Nations group. The Appellant continued to argue their 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.

[44] 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.

[45] 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.

[46] 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.

[47] The Appellant must also be aware 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.

[48] 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.

[49] 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.

[50] Therefore, the reconsideration request is denied.

IV. CONCLUSION

[51] 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