

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – April 26, 2004

Date of Decision – October 8, 2004

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Ben Gadd with respect to Approval No. 00188589-00-00 issued under the *Water Act* and Amending Approval Nos. 11767-01-02 and 46972-00-01 issued under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.).

PRELIMINARY MEETING BEFORE:

Dr. Frederick C. Fisher, Q.C., Panel Chair,
Mr. Ron V. Peiluck, Board Member, and
Mr. Al Schulz, Board Member.

APPEARANCES:

Appellant:

Mr. Ben Gadd, represented by Ms. Jennifer Klimek.

Director:

Mr. Larry Williams, Director, Central Region,
Regional Services, Alberta Environment,
represented by Mr. William McDonald and
Mr. Darrin Stepaniuk, Alberta Justice.

Approval Holder:

Cardinal River Coals Ltd., represented by Mr.
Dennis R. Thomas, Q.C. and Mr. Martin
Ignasiak, Fraser Milner Casgrain LLP.

Board Staff:

Ms. Valerie Higgins Myrmo, Registrar of
Appeals, and Ms. Marian Fluker, Senior
Research Officer.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 00188589-00-00 under the *Water Act* and Amending Approval Nos. 11767-01-02 and 46972-00-01 under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. for the construction, operation, and reclamation of a private haul road near Cadomin, Alberta.

The Board received Notices of Appeal from Mr. Ben Gadd appealing the Approval and the Amending Approvals.

The Board determined that Mr. Gadd was directly affected by the private haul road and, therefore, was granted standing. The Board also determined that the private haul road is sufficiently different from the transportation corridor assessed in the joint Alberta Energy and Utilities Board and Canadian Environmental Assessment Agency review, and the Board jurisdiction to hear these appeals is not removed by this joint review process. However, the issues will be limited to the differences in the environmental impacts between what was assessed in the joint Alberta Energy and Utilities Board and Canadian Environmental Assessment Agency review and what now exists as the result of the new design of the haul road. In addition, Mr. Gadd raised a legal issue surrounding the status of the *Environmental Protection and Enhancement Act* approval that was amended.

The issues the Board will hear at the hearing are:

1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended?

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I. INTRODUCTION

[1] These appeals relate to a private haul road (the “Haul Road”) associated with a coal mine development (the “Cheviot Project”).¹ The Cheviot Project was originally designed as a “stand alone project” with both the mine and the coal processing plant being constructed in one location.² Part of the Cheviot Project as originally designed was a transportation corridor, including an upgraded road, upgrading of the existing railway, and a right of way for an electrical power transmission line.³ The Cheviot Project as originally designed was approved in 2000, following a joint review panel (the “Joint Review Panel”) hearing under legislation administered by the Alberta Energy and Utilities Board (the “AEUB”) and the *Canadian Environmental Assessment Act*, S.C. 1997, c. 37 (“CEAA”).⁴ The Cheviot Project was then shelved, according to media reports as a result of low coal prices.

[2] In 2003, the Cheviot Project was revived and a number of authorizations, including the approvals under appeal, were applied for to allow the Cheviot Project to proceed in a modified form. One of the key changes to the design of the Cheviot Project was that an existing coal processing plant, at a nearby existing coal mine development (the “Luscar Project”), would be used instead of constructing a new coal processing plant at the Cheviot Project site. As a result, it was necessary to develop the Haul Road to allow the coal to be transported from the new coal mine at the Cheviot Project site to the existing coal processing plant at the Luscar Project.⁵ The Haul Road is to be located within the McLeod River corridor. According to Cardinal River Coals Ltd. (the “Approval Holder”) the Haul Road project

“...has been developed in anticipation of changing market conditions and improved truck technology. It eliminates the immediate need for construction of considerable infrastructure at the Cheviot mine (such as the coal preparation plant

¹ The Board wishes to stress that these appeals relate only to the private Haul Road component of the Cheviot Mine project and not the mine itself.

² See: AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000), at page 11.

³ See: AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000), at page 11

⁴ See: Letter from the AEUB, dated January 20, 2004. See also: AEUB Decision 97-08, Cardinal River Coals Ltd./TransAlta Utilities Corporation, Cheviot Coal Project (June 1997); AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000); *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 1666 (F.C.T.D.), [1998] F.C.J. No. 821 (F.C.T.D.), [1998] F.C.J. No. 1762 (F.C.A.), [1998] F.C.J. No. 1746 (F.C.A.); and *Alberta Wilderness Assn. v. Cardinal River Coal Ltd.*, [1999] F.C.J. No. 441 (F.C.T.D.)

⁵ See: Letter from the AEUB, dated January 20, 2004.

and handling facilities, a shop and office complex, water supply and tailings dams, and rail access/loadout).”⁶

[3] This decision addresses a challenge to the standing of Mr. Ben Gadd (the “Appellant”) to bring these appeals, a challenge to the jurisdiction of the Board to hear these appeals as a result of the Joint Review Panel, and sets the issues the Board will consider at the hearing of these appeals.

II. BACKGROUND

[4] On December 9, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00188589-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Approval Holder for the construction, operation, and reclamation of the Haul Road near Cadomin, Alberta.

[5] On December 19, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Appellant appealing the Approval.

[6] On December 29, 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 relating to this appeal, and the Parties to provide available dates for a mediation meeting or hearing.

[7] On December 5, 2003, the Director issued Amending Approval Nos. 11767-01-02 and 46972-00-01 (the “Amending Approvals”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12 (“EPEA”) to the Approval Holder for the opening up, construction, operation, and reclamation of the Haul Road. The Amending Approvals⁷ allow for the development of the Haul Road between the Luscar Project site and the Cheviot Project site.

[8] On January 5, 2004, the Board received Notices of Appeal from the Appellant appealing the Amending Approvals.

⁶ See: Director’s Record, Cardinal River Coals Ltd. Private Haul Road Overview (May 2002), at page 3.

⁷ As the Approval and Amending Approvals were issued with respect to the same Haul Road, the Board will refer to the Approval and Amending Approvals collectively as the “Approvals.”

[9] On January 5, 2004, the Board acknowledged receipt of the Notices of Appeal and notified the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records relating to these appeals.

[8] On January 5, 2004, the Board received a letter from the Director suggesting the appeals of the Approval and the Amending Approvals be combined and the records for the appeals (the "Record") be sent at the same time. On January 6, 2004, the Board received a letter from the Approval Holder also asking that the appeals be dealt with by the Board simultaneously and that the Director produce only one set of records relating to both the Approval and the Amending Approvals.⁸ It also requested that instead of scheduling a hearing or mediation meeting, a preliminary meeting should be scheduled first so that the following issues could be addressed:

- “(a) whether Mr. Gadd is ‘directly affected’ by the Approvals under appeal;
- (b) whether Mr. Gadd had the opportunity to participate in a hearing or review administered by the Energy Resources Conservation Board [(AEUB)] at which all of the pertinent matters were adequately dealt with;
- (c) whether the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* at which all of the pertinent matters were adequately dealt with; and
- (d) which matters raised by Mr. Gadd in the Notices of Appeal ought to be addressed during the EAB’s [(the Board’s)] hearing of the appeal, if an appeal proceeds.”

The Board granted these various requests.

[10] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the AEUB asking whether this matter had been the subject of a hearing or review under their respective legislation. On January 13, 2004, the NRCB responded in the negative. On January 20, 2004, the Board received a letter from the AEUB advising that:

“...Cardinal River Coals Ltd. (CRC) applied to the Alberta Energy and Utilities Board (Board/[A]EUB) in August 2002, under the *Coal Conservation Act* for approval to develop a private haul road from the Cheviot Mine Site to the Coal Processing Plant located at the Luscar Mine Site. CRC applied to amend Permit

⁸ On February 20, 2004, the Board received a copy of the Record from the Director, and on February 26, 2004, copies were forwarded to the Appellant and the Approval Holder.

2000-37 to extend the Cheviot mine permit area so as to include the private haul road. Permit No. C2000-37 was issued to CRC with respect to the Cheviot mine following two joint [A]EUB/Canadian Environmental Assessment Agency (CEAA) hearings in 1997 and 2000. The CRC also applied for an amendment of Permit No. C2000-2 with respect to those portions of the private haul road that would be located within the Luscar Mine site. Permit No. C2000-2 was issued to CRC for the operating of the Luscar Mine.

A number of objections were received to CRC's application to develop a haul road, including an objection from Mr. Ben Gadd. Following a review of submissions, the Board [(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 Board [(AEUB)] issued Permit No. C2003-4 on April 9, 2003. Permit No. C2003-4 rescinded Permit No. C2000-37 in order for the inclusion of a private haul road to the existing coal processing plant located at the Luscar Mine site."

The AEUB provided a copy of permit No. C2003-4 and AEUB Decisions 97-088 and 2002-59, which were the two decisions of the Joint Review Panel with regard to the Cheviot Project.⁹

[11] On January 22, 2004, the Board informed the Parties that it had decided to schedule a Preliminary Meeting to deal with the preliminary motions raised in the Approval Holder's letter of January 6, 2004.

[12] On April 22, 2004, the Appellant notified the Board and the other Parties that he intended to appear before the Board to provide evidence at the Preliminary Meeting. The Board allowed his request. However, on April 23, 2004, the Approval Holder stated his objection to allowing the Appellant to give oral evidence. The Board notified the Parties that any objections or concerns could be raised at the beginning of the Preliminary Meeting.¹⁰

[13] The Preliminary Meeting was held on April 26, 2004.

⁹ See: AEUB Decision 97-08, Cardinal River Coals Ltd./TransAlta Utilities Corporation, Cheviot Coal Project (June 1997) and AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000).

¹⁰ At the start of the Preliminary Meeting, the Parties were asked if there were any preliminary matters that they wished to raise. The Approval Holder restated its objection to allowing the Appellant to provide oral evidence at the Preliminary Meeting, as the process had been set to provide evidence through written submissions. The Appellant explained his oral evidence would only clarify some of the information, all of the information was essentially included in his affidavit, and no additional factual information would be provided. The Director questioned why oral evidence was required if all of the information was in the affidavit.

The Board held that the Appellant could provide his oral evidence and that if new evidence that was not in the affidavit or material attached to the affidavit was presented, the Approval Holder or the Director could apply for an adjournment. Neither the Approval Holder nor the Director requested an adjournment during the course of the Preliminary Meeting.

[14] The Board notified the Parties on May 26, 2004, that it had decided to grant the Appellant standing in these appeals and that the Board had jurisdiction to hear these appeals. The Board stated:

“The [Approvals relate] specifically to the haul road, and the changes allowed for under the [Approvals] alter the design of the haul road. To the extent these changes in the design of the haul road were not considered in the Alberta Energy and Utilities Board hearings, the Board retains jurisdiction to hear the matter.

The Board is in the process of setting the issues for the hearing. The issues will be narrowly defined and will focus on the difference in the environmental impacts that were originally before the AEUB and what now exists as the result of the [Approvals]. The hearing of these appeals will deal with the Haul Road only and not the project as a whole.” [Emphasis omitted.]

On June 14, 2004, the Parties provided additional submissions on the issues that should be considered at the hearing of these appeals. On July 20, 2004, the Board provided a letter detailing the issues that would be considered at the hearing.

[15] The following are the Board’s reasons for its decisions following the Preliminary Meeting.

III. SUBMISSIONS

A. Appellant

1. Directly Affected

[16] The Appellant stated the original approval was for the Cheviot Project to be a “stand alone project” as the processing facilities would be located at the mine site. The Appellant stated he did participate in the Joint Review Panel hearings that were held to assess the original proposal.

[17] The Appellant explained the Approvals under appeal allow for the development of a “high-speed haul road” to transport coal from the Cheviot Project site to the Luscar Project site over a distance of approximately 22 kilometres.

[18] The Appellant explained he is an interpretative guide who resides in Jasper, Alberta, and earns part of his living by conducting ecotourism and publishing a natural history guide. According to the Appellant both of these pursuits require him to work in wildland areas.¹¹

[19] The Appellant stated he has conducted at least six walks and hikes in the Cardinal Divide area during the past six years, at least seven backpacking trips into Whitehorse Creek and in Wildland Park in the last five years, and he has conducted at least six trips annually, and as many as 12 trips in a year, to Cadomin Cave. The Appellant stated his "...income is obtained one hike at a time, and therefore removing one or two areas from his available destinations will have a significant impact on his income."¹² He explained his clients are looking for a wildland experience, and the development of the Haul Road will affect the suitability of the area for ecotourism and, therefore, his business. The Appellant claimed the Haul Road will affect his ability to access the area, thereby limiting his clients' enjoyment of the area and their willingness to go there, which will affect his business.

[20] The Appellant submitted that he will be affected "...as he often attends in the area as well as earning part of his livelihood from the natural resources of the area."¹³ He stated the "...Haul Road will affect his use of those resources. The effects from the Haul Road have the potential of causing effects on the environment upon which the Appellant uses and relies upon for his livelihood."¹⁴ Therefore, according to the Appellant, he should be granted directly affected status.

2. AEUB Hearing

[21] The Appellant stated he requested that the AEUB hold a hearing into this matter, but the AEUB advised the Appellant "...he was not a directly and adversely affected party..." and "...they would not hold a hearing and rejected his objections."¹⁵ The Appellant stated he

¹¹ See: Appellant's submission, dated April 13, 2004, at paragraph 11.

¹² Appellant's submission, dated April 13, 2004, at paragraph 16.

¹³ Appellant's submission, dated April 13, 2004, at paragraph 25.

¹⁴ Appellant's submission, dated April 13, 2004, at paragraphs 25 to 26.

¹⁵ Appellant's submission, dated April 13, 2004, at paragraph 29.

asked the AEUB to review his objection but they refused to do so, and they dismissed all of the Appellant's objections on the basis he did not have standing.

[22] The Appellant submitted that the AEUB did conduct a review of the matter, determined the Appellant was not directly affected, and dismissed his objections. Therefore, according to the Appellant, he did not participate in a review or hearing as one was not held into the merits, and the issues raised were not addressed or reviewed in a public hearing.

3. CEEA Review

[23] The Appellant stated that the Government of Alberta participated in a CEEA hearing with respect to the original Cheviot Project. However, the Appellant argued that there "...was no CEEA hearing on the Haul Road and resulting changes to the Luscar and Cheviot mines projects as a result of the Haul Road."¹⁶ He stated the issues associated with the Haul Road and the inclusion of 350 hectares of the McLeod River Valley into the Cheviot Project mine permit were not addressed at the Joint Review Panel hearing.

[24] The Appellant stated the Approval Holder was asked during the Joint Review Panel process to address the Haul Road as an alternative. According to the Appellant, the Approval Holder stated the Haul Road was an unacceptable option, and therefore, did not provide any data on it.

[25] The Appellant argued the Haul Road is significantly different than the original access corridor. The Appellant stated Parks Canada and Sustainable Resource Development also considered the Haul Road application as being different from the original access corridor.

[26] The Appellant listed a number of differences he identified, including:

1. the Approval Holder characterized the original Cheviot Project and the Haul Road as two different projects;
2. the cumulative impact of operating the Luscar Project's processing plant was not considered, only the completion and reclamation of the Luscar Project's mine;
3. the Haul Road becomes part of the mine corridor;

¹⁶ Appellant's submission, dated April 13, 2004, at paragraph 40.

4. public access will be closed for six months, starting March 1, 2004, and future access will be limited or closed for traditionally used recreation sites;
5. the Haul Road involves the construction of a new, substantially larger road than the original upgraded public road, and includes a 30 metre top and right of way in addition to the road;
6. the reclamation plan for the Haul Road has not been assessed through a public process, and the original plan exempted the public road from being reclaimed;
7. the Luscar Project's mine, under the original proposal, was to be reclaimed by 2007;
8. traffic on the Haul Road will be significantly different in type and amount from the previously approved access corridor, as trucks will be traversing any given point every 6 to 15 minutes;
9. the disturbed area will be widened as the Haul Road is three times the width of a public road, and the effect the increase in disturbed area will have on wildlife was not addressed; and
10. the Haul Road is adjacent to the McLeod River and crosses streams, and these effects were not assessed.

[27] The Appellant stated the AEUB and Alberta Environment identified several deficiencies in the application for the Haul Road and asked for further information, and had the Haul Road been adequately assessed, those deficiencies would not have been found. The Appellant listed 26 concerns or questions raised by the AEUB and Alberta Environment.¹⁷

[28] According to the Appellant, new information was provided for many of the listed concerns or the Approval Holder asserted the situation would not be different or the incremental effects would be less than the original Cheviot Project. The Appellant submitted this information and these assertions were not assessed at the original Joint Review Panel hearings.

[29] The Appellant referred to studies that were required under the previous approval¹⁸ and argued that without that information, it would be difficult to assess the cumulative impacts of

¹⁷ See: Appellant's submission, dated April 13, 2004, at paragraph 47.

¹⁸ See: Appellant's submission, dated April 13, 2004, at paragraph 53. The studies listed were:

- "a) An evaluation of the levels of metals in receiving waters;
- b) A fisheries compensation program;
- c) A carnivore compensation program;
- d) An assessment of the impacts of increased traffic on wildlife populations along Grave Flats Road;
- e) An assessment of current wildlife movement patterns and dispersal across and throughout the

the Haul Road, as background information was not available. The Appellant argued these studies and plans should have been obtained and reviewed as part of the Haul Road application.

4. Hearing Issues

[30] The Appellant argued it was "...clear that the Haul Road needs its own approval and the construction and operation of it will cause environmental effects."¹⁹ He submitted that the Board must also look at the environmental effects that will be caused by the changes to the Luscar Project and the Cheviot Project.

[31] The Appellant submitted that all matters listed in the Notices of Appeal are relevant and must be considered. He listed these concerns as follows:

- "a) The legal question of whether the previous [EPEA] approval has expired and, as such, can it be amended;
- b) What parts of the application form part of the approval;
- c) The vagueness and uncertainty of many of the conditions in the approval;
- d) The construction criteria for the road;
- e) The impact the construction and operation of the Haul Road will have in its immediate environment including the effect on the ecosystem and the wildland character of the area including the effect:
 - i) On the water quality of the area. In that respect, there should be base line information as to the current quality and any predicted changes as a result of the Haul Road, the continued operation of the Luscar site and any changes within the Cheviot site as a result of the change in the mining;
 - ii) On the air quality including particulate matter;
 - iii) On the river bank stability etc;
 - iv) On the wildlife in the area;
 - v) On the vegetation;
 - vi) [On] the environment as a result of the traffic;
 - vii) Of any spills or accidents that may occur;

mine site;

- f) The impacts on the change to public access and use patterns; and
- g) A program for harlequin ducks."

¹⁹ Appellant's submission, dated April 13, 2004, at paragraph 60.

- viii) Of flooding; and
- ix) [On] recreation users;
- f) An examination of all of the possible mitigation techniques available, the assessment of those measures and whether the ones chosen are the most appropriate ones;
- g) The cumulative effects of the Haul Road together with the other activities including Cheviot and Luscar operations and other operations in the area;
- h) The incompleteness of information obtained. In that regard, the previous approval required certain studies to be completed which were either not done or if completed, not reviewed; and
- i) The current approval requires that additional studies be done. These studies should have been done before the approval was granted. This information should be obtained in order to provide a baseline for the Haul Road and in order to assess the cumulative effects.”²⁰

B. Approval Holder

[32] The Approval Holder explained the Approvals were issued with respect to its Haul Road project, and the application was made jointly to the AEUB and the Director. According to the Approval Holder, the construction of the Haul Road would eliminate the need to construct new infrastructure at the Cheviot Project site. The Approval Holder clarified the project would also involve “...minor alignment modifications to the existing Grave Flats Road, which is a public municipal road, and installation of a 69kV power line.”²¹

[33] The Approval Holder stated the Cheviot Project underwent extensive regulatory review through a joint federal-provincial review pursuant to the *Coal Conservation Act*, S.A. 1980, c. C-14 (now R.S.A. 2000, c. C-17) and the *Canadian Environmental Assessment Act*, S.C. 1997, c. 37. It explained that two public hearings were held by the Joint Review Panel, one in 1997 and the other in 2000. The Approval Holder stated the Joint Review Panel recommended that the Cheviot Project receive regulatory approval and be allowed to proceed, a decision accepted by the Governments of Canada and Alberta.

[34] According to the Approval Holder, the Joint Review Panel considered a transportation corridor. It stated that the corridor was required to provide road and rail access to

²⁰ Appellant’s submission, dated April 13, 2004, at paragraph 63.

²¹ Approval Holder’s submission, dated April 13, 2004, at paragraph 5.

the Cheviot Project, and included construction of an upgraded road, upgrading of the existing railway, and would include a right of way for an electrical power transmission line.

[35] The Approval Holder explained the transportation corridor in the application for the Approvals would follow the same corridor assessed and approved as part of the original Cheviot Project. It stated the rail line would not be upgraded and therefore, the total area of land surface affected would be similar.

1. Directly Affected

[36] The Approval Holder submitted the Appellant is not directly affected by the Approvals and his Notices of Appeal should be dismissed.

[37] The Approval Holder stated that if the Approvals had not been issued, it would still be able to commence operations as contemplated in the original Cheviot Project, and the Approvals "...only facilitate the development of the Cheviot Mine."²² It stated the proposed Haul Road follows the same corridor that was considered and accepted as part of the original Cheviot Project, and it could proceed without the Approvals. Therefore, according to the Approval Holder, "...any effects on Mr. Gadd as a result of the Cheviot Mine Project are irrelevant when determining whether or not he is 'directly affected' by the Approvals...."²³

[38] The Approval Holder submitted that no evidence was provided to indicate the Haul Road would affect the Appellant's interpretive guide business beyond that of the previously approved Cheviot Project, including the proposed transportation corridor. The Approval Holder argued the Appellant choosing that area to conduct guide tours is irrelevant, and although the Appellant may care about the environment in the affected area, he does not own land or reside in the area and is not directly affected by the Haul Road.²⁴ According to the Approval Holder, the Appellant's interests and rights are no different than that of anyone who may occasionally visit the area. The Approval Holder submitted that the Appellant's income he claims is generated from guiding tours in the area is not based on a permit or lease issued by the province or some other authority.

²² Approval Holder's submission, dated April 13, 2004, at paragraph 13.

²³ Approval Holder's submission, dated April 13, 2004, at paragraph 22.

2. AEUB Hearing

[39] The Approval Holder stated the Haul Road "...is not a stand alone project but is instead a modification to the previously assessed Cheviot Mine Project."²⁵ It referred to the letter from the Federal Minister for the Environment where "...he concluded that the private Haul Road project consists of changes which 'are modifications to the previously assessed Cheviot Coal Mine Project.'"²⁶

[40] The Approval Holder stated the AEUB (as part of the Joint Review Panel) held two public hearings regarding the Cheviot Project that included the transportation corridor between the Cheviot Project site and the Luscar Project site. It further stated that the Appellant participated in both hearings. With respect to the issues raised in the Notices of Appeal, the Approval Holder argued the AEUB did not have to deal with the matters at the fully engineered design level. The Approval Holder referenced examples of the issues raised in the Notices of Appeal and the AEUB discussion on the matters, including adequacy of baseline data, mitigation measures, cumulative impacts, prevention of bank instability, and risks of flooding and spills.²⁷ The Approval Holder submitted the issue of access to the Cadomin Caves was also dealt with by the AEUB. According to the Approval Holder, the issues raised by the Appellant in his Notices of Appeal were dealt with by the AEUB.

3. CEAA Review

[41] The Approval Holder stated the Government of Alberta participated in the public hearings held in 1997 and 2000, and the hearings were presided over by a Joint Review Panel consisting of appointees of the Federal Minister of Environment. The Approval Holder argued that "...section 95(5)(b)(ii) only requires that the public review dealt with a given matter at a conceptual level as opposed to in a detailed manner."²⁸ The Approval Holder requested that the

²⁴ Approval Holder's submission, dated April 13, 2004, at paragraph 24.

²⁵ Approval Holder's submission, dated April 13, 2004, at paragraph 30.

²⁶ Approval Holder's submission, dated April 13, 2004, at paragraph 30.

²⁷ Approval Holder's submission, dated April 13, 2004, at paragraph 35.

²⁸ Approval Holder's submission, dated April 13, 2004, at paragraph 40.

appeals be dismissed, as there was a public review under CEAA with respect to the issues raised in the Notices of Appeal.

4. Hearing Issues

[42] The Approval Holder submitted that only those issues in the Notices of Appeal that deal directly to the Approvals may be addressed. It stated the Appellant must establish that the issue only arises as a result of the Haul Road and is not a result of the Cheviot Project as a whole.

[43] The Approval Holder stated the issue of the expiry of the Cheviot Project Approval should not be addressed, as the Approval is valid until September 1, 2008.

[44] The Approval Holder submitted the remaining issues in the Notices of Appeal should not be addressed at a hearing, as they are all in respect of the previously assessed transportation corridor.

C. Director

[45] The Director explained the Approvals authorize the Approval Holder to construct "...a Haul Road so that coal mined at the Cheviot Coal Mine can be transported to the Luscar Coal Mine site to be processed by the existing coal processing facilities and shipment by the existing railway line."²⁹ The Director stated the Haul Road will be constructed across public land, including a portion that is within the Cheviot and Luscar coal mine boundaries.

1. Directly Affected

[46] The Director confirmed the Appellant's Statement of Concern was accepted by him, but the AEUB did not accept the Appellant as being directly affected for the purposes of its legislation. After referencing previous decisions of the Board regarding directly affected, the Director made no representation with respect to the status of the Appellant.

²⁹ Director's submission, dated April 13, 2004, at paragraph 5.

2. AEUB Hearing

[47] The Director stated the Cheviot Project was the subject of hearings held by a Joint Review Panel, and the Appellant was an active participant and made representations at those hearings. The Director stated the Joint Review Panel reviewed the Cheviot Project,

“...including a linear disturbance in the McLeod River Valley to provide for a utility corridor, restoration of the Mountain Park Subdivision rail line to allow for processed coal to be transported from the Cheviot Mine to market and an upgrade to the Grave Flats public road. The effects associated with the presently proposed Haul Road would be the same as or consistent with the effects associated with the linear disturbance included in the original project.”³⁰

[48] The Director submitted that all of the matters set out in the Notices of Appeal were thoroughly dealt with by the Joint Review Panel. The Director stated this included baseline information, impact of transportation and utilities system on water resources, mitigation of transportation and utilities system effects, cumulative effects of transportation and utilities system, the public interest of the project, bank instability, risk of spillage and flooding, and the impact of transportation and utilities system on recreational use.³¹

[49] The Director argued the appeals must be dismissed as the Joint Review Panel considered the issues set out in the Notices of Appeal.

3. CEAA Review

[50] The Director argued section 95(5)(b)(ii) of EPEA does not require the Board to consider whether the matters included in the Notices of Appeal “were adequately dealt with” under the CEAA review.

[51] The Director submitted “...the Joint Panel review that was conducted in accordance with the *Canadian Environmental Assessment Act*, and the consideration of the matters by the Joint Panel prohibits the EAB from hearing these appeals.”³²

[52] The Director submitted that the real concern of the Appellant was the Cheviot Coal Project itself and not the Director’s decisions under appeal. He argued that the Joint

³⁰ Director’s submission, dated April 13, 2004, at paragraphs 30 and 31.

³¹ Director’s submission, dated April 13, 2004, at paragraph 32.

Review Panel determined the project was in the public interest and could proceed, and "...this appeal is simply a further attempt to undermine the decision of the Joint Panel..."³³

4. Hearing Issues

[53] The Director was of the opinion that all of the issues raised in the Notices of Appeal had been addressed in the public review held by the Joint Review Panel.

[54] The Director accepted the Appellant's view that one of the issues that might be heard if the appeals proceed to a hearing, is "...the status of the EPEA approval for the Cheviot Coal Project at the time the amendment was issued."³⁴

[55] A second issue raised by the Director was "...whether certain reports should be approval conditions or should have been information provided as part of the application."³⁵

[56] The Director stated that if the Board determines certain matters were not adequately dealt with, then the applicable terms of the Approvals should be reviewed to determine if they were reasonable.³⁶

IV. ANALYSIS

A. Directly Affected

1. Statutory Basis

[57] Before the Board can accept a notice of appeal as being valid, the person filing the notice of appeal must show that he is directly affected. Under section 115 of the *Water Act* and section 95(1) of EPEA, a person who is directly affected by the decision of the Director – here the issuance of the Approval and the Amending Approvals - has the right to file a notice of appeal with the Board.³⁷ The Board has examined the term "directly affected" in numerous

³² Director's submission, dated April 13, 2004, at paragraph 37.

³³ Director's submission, dated April 13, 2004, at paragraph 42.

³⁴ Director's submission, dated April 13, 2004, at paragraph 45.

³⁵ Director's submission, dated April 13, 2004, at paragraph 46.

³⁶ Director's submission, dated April 13, 2004, at paragraph 47.

³⁷ Section 115(1) of the *Water Act* provides:

previous appeals, providing a framework to determine if appellants should be given standing to appear before this Board. The test is the same whether the appeal is filed under the *Water Act* (for an approval, preliminary certificate, or a licence) or EPEA (for an approval or amending approval). Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.³⁸

[58] The requisite test for determining a person's directly affected status has two elements: the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,³⁹ the Board stated "...the word 'directly' requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Approval in question."⁴⁰

[59] The principle test for determining directly affected was stated in *Kostuch*:

"A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances: ... (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108...."

Section 95(1) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
 - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3).

³⁸ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

³⁹ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*").

⁴⁰ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

“Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person’s interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”⁴¹

[60] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person “...must have a substantial interest in the outcome of the approval that surpasses the common interest of all residents who are affected by the approval.”⁴² In *Kostuch*, the Board considered its previous decision in *Ross*,⁴³ saying directly affected “...depends upon the chain of causality between the specific activity approved...and the environmental effect upon the person who seeks to appeal the decision.”⁴⁴

[61] Further, in *Kostuch* the Board stated that the determination of directly affected is a “...multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel

⁴¹ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

⁴² *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) (“*Ross*”).

⁴³ *Ross v. Director, Environmental Protection* (May 24, 1994), Appeal No. 94-003 (A.E.A.B.).

⁴⁴ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

confident that the interest affected is consistent with the underlying policies of the Act.”⁴⁵

The Board further stated that:

“If the person meets the first test, they must then go to show that the action by the Director will cause a direct effect on that interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified.”⁴⁶

[62] A similar view was expressed in *Paron* where the Board held that the

“...Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”⁴⁷

[63] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the Appellants. In *Paron*, the Board held that:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”⁴⁸

⁴⁵ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

⁴⁶ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

⁴⁷ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) (“*Paron*”).

⁴⁸ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

The Board's Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.⁴⁹ The onus or burden of proof issue, in a slightly different context, was upheld in by the Court of Queen's Bench.⁵⁰

[64] In the *Court*⁵¹ decision, Justice McIntyre reversed a standing decision based on the Board's previous cases and provided the following summary on the principles of standing before the Board:

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B.D. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a

⁴⁹ Section 29 of the Board's Rules of Practice provide:

“Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

⁵⁰ See: *Imperial Oil Ltd. v. Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

⁵¹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area’s wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson’s factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”⁵²

[65] Justice McIntyre concluded by stating:

⁵² *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”⁵³

2. Discussion

[66] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer that these two elements are connected (their proximity), the more likely the person is directly affected. The onus is on the Appellant to present a *prima facie* case that he is directly affected.⁵⁴

[67] The Court of Queen’s Bench in *Court*⁵⁵ stated an appellant only needs to show that there is a potential for an effect on their interests. This potential effect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[68] The effect does not have to be unique in kind or magnitude.⁵⁶ However, the affect the Board is looking for needs to be more than an affect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being effected must be something more than the generalized interest that all Albertans have in protecting the environment.⁵⁷ Under the *Water Act* and EPEA, the Legislature chose to restrict

⁵³ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁵⁴ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁵⁵ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁵⁶ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

⁵⁷ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017

the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class.

[69] The Board has always held that a person must show how a personal interest will be affected by the approval, and it is of assistance to the Board if the type of interest which the appellant claims to be affected is supported by the statutes, such as being included in the purpose sections of the acts (EPEA and the *Water Act*). The interests included in the acts include, among other interests, the integrity of the environment, human health, economic growth, sustainable development, and management of water resources.⁵⁸

(A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

⁵⁸

Section 2 of EPEA provides:

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

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act."

Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;

[70] The Appellant in this case argued he would suffer economic losses when the Haul Road is built, as it will limit access to certain areas he currently uses and will diminish the intrinsic wilderness of the area, a feature that is vitally important to his business. The Appellant explained how he uses the area around the Luscar Project and Cheviot Project to conduct wilderness tours. It is only logical that someone going on a “wilderness tour” would prefer the area to be as pristine as possible, or at least with only minimal disturbance. There is also no doubt the mines in the area are not causing a “minimal disturbance,” but the Appellant has found areas surrounding the mine sites suitable for his tours. The Appellant stated his clients expressed concern when going past the mines that the tour would not be a wilderness experience as they had anticipated. The Board accepts this evidence.

[71] The Appellant explained to the Board that he takes groups and individuals on tours in the area around the mines at least six times annually. While the Appellant did not indicate to the Board what percentage of his income is derived from these tours, it is clear that he relies on the tours for at least a portion of his income, and as identified in the *Court*⁵⁹ decision, the magnitude of the impact in question is not relevant. What is relevant is that economic factors are identified under the purposes of EPEA. Economic factors were also accepted by the Court in *Kostuch* as being one way in which a person can be directly affected.⁶⁰ Therefore, there is a sufficiently direct link between the effect of the approvals under appeal and the personal interests, supported by the statute that will likely be impacted, to conclude the Appellant is directly affected.

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- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
 - (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
 - (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
 - (f) the important role of comprehensive and responsive action in administering this Act.”

⁵⁹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁶⁰ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[72] It is also clear that the Appellant's use of this area is different from that of other Albertans – he obtains a portion of his income from operating wilderness tours in the area. This is a personal impact that is beyond that of a generalized interest in protecting the environment. His particular use of the area requires the wilderness aspect of the area be maintained as much as possible. It is irrelevant that he does not require federal or provincial permits to conduct his business in the area or that he does not own property or live in the area. While these types of property interests may be of assistance in making a determination that someone is directly effected, it is not a prerequisite. Other Albertans may use the area for recreational purposes and to enjoy the natural setting, and although their enjoyment of the area may be generally affected by the Haul Road, their livelihood, in most cases, is not dependent on the protection of the wilderness around the mine sites.

[73] The Approval Holder has argued that because a transportation corridor was authorized by the previous approvals, the impact of the Haul Road on the Appellant will not be different, and therefore he cannot be directly affected.⁶¹ The Board rejects this argument. First, as the Board will discuss shortly, the Board does not accept that the specific impacts of the previous design of the transportation corridor will be the same as the new design of the transportation corridor, in particular the Haul Road. This notion is not consistent with sound science. While it may be at the end of the day that the net effects are similar, or even the same, this is a substantive matter to address at the hearing and not something that should be addressed in a preliminary decision on the matter of standing.

[74] Second, the affect of accepting the Approval Holder's argument on this point would mean that the Board would not be able to hear appeals on the amendment or renewal of approvals. This is not consistent with the purpose of EPEA or the *Water Act*.

[75] The Director argued the Appellant was using the issue of the Haul Road for ulterior motives, specifically to oppose the operation of the mine. While the Appellant quite clearly opposes the mine, the Board does not see anywhere in his submissions he has made for the purpose of these appeals that he suggests the mine should stop operations. As the Board has indicated, and as it will discuss further in setting the issues to be considered in these appeals, the

⁶¹ See: Approval Holder's submission, dated April 13, 2004, at paragraph 22.

appeals currently before the Board relate to the changes to the Haul Road only and the Board will not hear issues related to the mine itself. The fact the Appellant opposed the Cheviot mine before does not prevent him from appealing the Haul Road Approvals.

[76] The Board concludes that the Appellant has provided enough evidence to indicate his economic livelihood could be affected by the construction and operation of the Haul Road. This means that the Appellant is directly affected, and the Board therefore grants the Appellant standing for the purpose of these appeals.

B. Alberta Energy and Utilities Board Hearing

1. Statutory Basis

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

[78] Further, under section 95(2)(a) of EPEA, the Board has the authority to limit the issues that it will hear with respect to an appeal taking into account whether a matter was addressed by the AEUB. Section 95(2)(a) 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: (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review....”

2. Discussion

[79] There are two basic conditions that have to be met in order to have the Board lose jurisdiction in these appeals. These steps are to determine whether: (1) the Appellant received notice of, participated in, or had the opportunity to participate in an AEUB review of the project at issue; and (2) the AEUB adequately dealt with the matters raised by the Appellant in these appeals.

[80] The AEUB clearly stated that no public hearing was held regarding the Haul Road application.⁶² The AEUB, in response to the Appellant's submission outlining his objection to the Haul Road, stated that his

“...interest in the proposed application reflects a general interest in environmental protection and is not sufficiently direct to afford standing. The Board has reviewed and assessed the Haul Road application and determined that it meets the public interest. Accordingly, the Board will not convene a public hearing and will issue an approval for the Haul Road to CRC shortly.”⁶³

The AEUB denied the Appellant's request for a review and variance of the original decision.⁶⁴

[81] The Board must determine whether the Haul Road is essentially the same as the transportation corridor previously assessed by the AEUB (in the Joint Review Panel process) as part of the original mine application.

[82] All of the Parties agreed a Joint Review Panel hearing was held to review the applications for the original Cheviot Project, and that the Appellant participated in these hearings. What the Board must decide in these appeals is whether the issue of the Haul Road had been heard at the AEUB (Joint Review Panel) hearing, and whether the issue of the Haul Road had been adequately dealt with by the AEUB.

[83] The Approval Holder and Director argued the matters under appeal had been heard by a joint AEUB and CEAA review in 1997 and 2000, and the Haul Road, with its

⁶² See: Letter from the AEUB, dated January 20, 2004.

⁶³ Letter from AEUB to Appellant, dated March 28, 2003. See: Appellant's submission, dated April 13, 2004, at Tab 3, Exhibit B. See also: Letter from AEUB to Environmental Appeals Board, dated January 20, 2004.

⁶⁴ See: Appellant's submission, dated April 13, 2004, at Tab 3, Exhibit D. Letter from AEUB to Appellant, dated July 2, 2003.

environmental effects, is analogous to the environmental effects assessed with the access corridor under the original mine application.

[84] The Appellant, however, listed a number of differences between the original application and the Haul Road applications. The Board accepts some of the differences identified.

[85] The Haul Road will have a width of 15 to 30 metres and will allow gravel trucks to travel between the mines at a speed from 25 to 70 kilometres per hour.⁶⁵ From the Board's estimation, trucks will be passing a point on the road approximately every 10 minutes. In addition, there will be a berm, approximately 1 metre high, constructed along portions of the Haul Road which was not included in the original access corridor.

[86] The original access corridor consisted of three separate linear disturbances – an upgrading of the existing Grave Flats Road; a transmission line right of way; and an upgraded rail line.

[87] The Board does not agree with the Approval Holder's and the Director's interpretation that a linear disturbance is a linear disturbance. Depending on the width and the manner it is constructed, one linear disturbance can create significantly different environmental affects from another linear disturbance. The Board is of the view that the argument that the environmental "...effects associated with the presently proposed haul road would be the same as or consistent with the effects associated with the linear disturbance included in the original proposal..."⁶⁶ is not sound science. While the Board is prepared to accept that at the end of the day the net effects may be the same, it is unlikely that the specific effects will be the same, and as a result, there may be different mitigations that may be appropriate. In the Board's view, this is the heart of the matter – the different effects - that needs to be examined at the substantive hearing.

[88] The Board examined a similar issue and heard similar arguments in the *Dzurny*⁶⁷ case. In the *Dzurny* case, the appellants appealed an amendment to an EPEA approval to a

⁶⁵ See: Director's Record, CRC Private Haul Road Project at 1-8 to 1-9.

⁶⁶ Director's submission, dated April 13, 2004, at paragraphs 30 and 31.

⁶⁷ *Dzurny et al. v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Shell Chemicals Canada* (15 June 2004), Appeal Nos. 0-106 and 108-D (A.E.A.B.).

chemical plant. The purpose of the amendment was to authorize ethylene spikes that were occurring at start up. The Board looked at the decision of the AEUB and determined that while ethylene spikes at start up were not expressly addressed at the AEUB hearing, ethylene spikes during upset conditions were expressly contemplated. The Board dismissed the appellants' appeals in that case because the issue raised in their notices of appeal was adequately dealt with.

[89] In the *Dzurny* case, the environmental effect under consideration was ethylene spikes. While the timing of the spikes was different, the spikes were effectively the same. The Board does not have sufficient evidence before it to suggest that this type of similarity exists in the case currently before it. If the proposed Haul Road was the same width or less and traversed the same route as the previously assessed corridor, the Board may be more willing to accept the Approval Holder's and the Director's arguments. However, in this case, the road is wider than the previously planned disturbances, the disturbance comes closer to the McLeod River in places, and the disturbance includes a berm along portions of the road. All of these differences have the potential to affect the environment in ways not previously considered by the AEUB and makes the type of analysis in the *Dzurny* case inapplicable. Also, there is the issue of the number of trucks traveling on the road and the associated speed that may be a factor to consider.

[90] If the proponent of a project decides to make fundamental changes to the project after it has been reviewed, it should not complain if a new hearing is held to consider the effect of those changes on the environment. It would lead to absurd results if such changes could not be questioned on the basis that the overall project had previously received approval without consideration of the elements of the project that have been changed.

[91] The Board notes particularly, in the Environmental Impact Assessment (the "EIA") completed for the original Joint Review Panel, that the Approval Holder stated:

"The high speed truck haulage option was abandoned because of technical, environmental and social reasons. Physically, there is not enough room within certain segments of the McLeod River Corridor to accommodate a private haulage road with a minimum width of 30 metres and the necessity for run-away lanes, a power right-of-way, and the existing Grave Flats public road. Because, for safety reasons, the public would not be permitted to travel on the private haulage road, two road systems would have to be maintained within the corridor right-of-way.

The animal mortality and significant surface disturbance associated with high speed truck haulage has environmental implications....”⁶⁸

[92] Based on this information, it appears the Approval Holder initially rejected the Haul Road option and, therefore, little other information was provided in the EIA regarding the Haul Road. This interpretation is supported by the evidence of the Appellant. Without further analysis of the Haul Road as currently authorized and its effect on the environment, it cannot be claimed that the Joint Review Panel, and therefore the AEUB, considered the matter of the Haul Road adequately.

[93] The Approval Holder has now decided that the benefits of the Haul Road outweigh the concerns that it previously expressed in the EIA. However, altering the route chosen in the original application is a considerable change to the existing approvals. The concerns identified in the EIA need to be addressed, and the mitigation measures chosen need to be reviewed.

[94] The Board concludes that the Haul Road, as now conceived, was not adequately addressed by the Joint Review Panel and the Board retains jurisdiction to hear these appeals. However, the Board accepts that the issues that need to be considered at the hearing of these appeals need to be limited. Therefore, pursuant to section 95(2)(a),⁶⁹ and as stated in the Board’s letter of May 26, 2004: “The issues will be narrowly defined and will focus on the difference in the environmental impacts that were originally before the AEUB and what now exists as the result of the [Approvals]. The hearing of these appeals will deal with the Haul Road only and not the project as a whole.”

⁶⁸ Cheviot Mine Project Application, Vol. 1 (1996) at I-27. See: Appellant’s submission, dated April 13, 2004, at Tab 3, Exhibit E.

⁶⁹ Section 95(2)(a) of EPEA provides:

“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: (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review....”

C. Canadian Environmental Assessment Act Review

1. Statutory Basis

[95] Under section 95(5)(b)(ii) of EPEA, the Board must dismiss an appeal if the Government of Alberta has participated in a public review under CEAA. Section 95(5)(b)(ii) provides:

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

2. Discussion

[96] All of the Parties agreed a joint CEAA and AEUB review was completed on the original Cheviot Project, including an access corridor. There is also no doubt the Government of Alberta participated in the review and public hearing.

[97] However, the Parties disagreed on whether a hearing had been held regarding the Haul Road. According to the Approval Holder and the Director, the CEAA review previously held regarding the original Cheviot Project sufficiently dealt with the matters included in the current Approvals.

[98] At the Preliminary Meeting, the Board specifically asked the Director if the application for the Haul Road had been sent to a CEAA panel for its approval. The Director explained the application was sent only to the AEUB as the matter of the Haul Road was solely within the jurisdiction of Alberta, and other federal agencies, such as Fisheries and Oceans, did not consider other approvals would be required.

[99] The Federal Minister of Environment responded to the Appellant’s request to have a panel appointed to review the application, stating:

“With respect to your request that the project be assessed under section 48, I have the discretionary authority to refer a project to a review panel or mediator when a project may cause significant adverse environmental effects on federal lands, including national parks. However, I may only take this action in situations when no power, duty or function referred to in section 5 of the [*Canadian*

Environmental Assessment Act], or conferred by or under any other Act of Parliament, is to be exercised by a federal authority in relation to the project.

Having reviewed your petition and the proponent's project information, the Agency, in consultation with federal authorities, has concluded that the proposed changes to the project do not constitute a stand-alone project under the [*Canadian Environmental Assessment Act*]. Rather, the changes are modifications to the previously assessed Cheviot Coal Mine Project. As the *Fisheries Act* authorizations required for the Cheviot Coal Mine Project have already triggered an assessment under the [*Canadian Environmental Assessment Act*] by a joint Canada-Alberta Review panel, I have no authority to refer the project to a review panel or mediator under section 48 of the *Canadian Environmental Assessment Act*.⁷⁰

[100] The Federal Minister of Environment did not authorize a panel review of the Haul Road project, and therefore, no public hearing was held regarding the Haul Road. Although he did not consider the Haul Road a stand-alone project, his assessment of the project is not binding on this Board. Only if the Federal Minister had determined a panel review was it warranted and was held to discuss the matters under appeal would the Board be bound by his decision.

[101] As stated previously, the Board is concerned with the effects of the Haul Road, and if it was not discussed in the previous Joint Review Panel, the Government could not have participated in any public hearing regarding the environmental effects of the Haul Road. If the Haul Road is to be kept separate from the previous projects for the determination of directly affected and the issues, surely it must also be kept separate when analyzing the Government's participation in a CEAA review. In the Board's view, the matter of the modifications to the Haul Road, the only matter being considered in these appeals, has not been subject to a CEAA review and the Board retains its jurisdiction to hear the matter.

D. Hearing Issues

1. Statutory Basis

[102] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing. Section 95 provides:

⁷⁰ Letter from Federal Minister of Environment to the Appellant, dated December 10, 2003, Approval Holder's submission, dated April 13, 2004, at Tab 1.

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....
- (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.”

2. Discussion

[103] In determining the issues for the hearing, the Board refers back to the comments regarding the Haul Road that were made by the Approval Holder with respect to the original Cheviot Project application:

“The high speed truck haulage option was abandoned because of technical, environmental and social reasons. Physically, there is not enough room within certain segments of the McLeod River Corridor to accommodate a private haulage road with a minimum width of 30 metres and the necessity for run-away lanes, a power right-of-way, and the existing Grave Flats public road. Because, for safety reasons, the public would not be permitted to travel on the private haulage road, two road systems would have to be maintained within the corridor right-of-way. The animal mortality and significant surface disturbance associated with high speed truck haulage has environmental implications....”⁷¹

[104] Based on the Approval Holder’s own assessment, there were concerns regarding the effects on wildlife with the construction of the Haul Road. As this alternative was not studied in depth, the AEUB did not receive detailed information regarding the possible effects of the Haul Road on wildlife, nor the appropriate mitigative measures to address these effects. Therefore, the impact of the Haul Road on wildlife is an appropriate issue to be considered at the hearing of these appeals.

[105] The Approval Holder also raised concerns with the public access, and the public would not be permitted on the Haul Road. In the Board’s view, this issue was not adequately dealt with by the Joint Review Panel and is therefore a valid issue in these appeals.

[106] The third concern expressed by the Approval Holder regarding the Haul Road was the limited area available within the McLeod River Corridor for the construction of the Haul Road. The Approval Holder’s concern discussed in the EIA, which is also the Appellant’s

⁷¹ Cheviot Mine Project Application, Vol. 1 (1996) at I-27. See: Appellant’s submission, dated April 13, 2004, at Tab 3, Exhibit E.

concern in his notices of appeal, is that the effects of the Haul Road on the watershed need to be assessed. The Haul Road, even though it is a linear disturbance, is different from what was previously assessed by the Joint Review Panel. The disturbance caused by the construction of the Haul Road is closer to the McLeod River, increasing the potential for affecting the waterway. The linear disturbance initially approved included the use of a rail line to move coal off site. The Haul Road relies on trucks, traveling by approximately every 10 minutes, to transport coal to the processing facility. This is a change to the use within the disturbance which has the potential to cause different impacts to the watershed (i.e. sedimentation) than what was original assess. As a result, the impact to the watershed is an appropriate issue to be considered.

[107] Fourth, the Board is of the view that given the change in the design to the Haul Road, and the use by many large trucks on a regular basis that were not previously contemplated, the issue of noise and dust is also a valid issue.

[108] Finally, the Appellant also raised a legal issue that is appropriate for the Board to address: What is the legal status of the EPEA approval given that “pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended?” This is certainly not an issue that was raised before the Joint Review Panel and is a question that is within the jurisdiction of the Board.

[109] Although the Appellants argued the environmental effects that may be caused by the changes to the Luscar Project site and Cheviot Project site should be looked at, the Board cannot re-hear matters already heard by the Joint Review Panel or that are not part of the Approvals under appeal. The Approvals relate to the Haul Road only, and it is only that Haul Road that Board can consider and hear arguments about.

[110] The Board stresses to the Parties that it will not accept arguments related to the original mine project approvals. The Approvals under appeal were issued for the Haul Road, and therefore, the only issues that will be considered by this Board are the effects of the Haul Road on the environment.

[111] That being said, the Board has narrowed the issues listed by the Appellant to the following:

1. What effect will the new design of the Haul Road have on the movement

and migration of wildlife in the area?

2. What effect will the new design of the Haul Road have on public access to the wilderness areas and tourist sites on either side of the Haul Road?
3. What effect will the new design of the Haul Road have on the local watershed?
4. What effect will the new design of the Haul Road have on the noise and dust coming from the Haul Road?
5. What is the legal status of the EPEA approval given that “pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended?”

[112] Pursuant to section 95(4) of EPEA, the Parties will be allowed to make representations on these five issues only.⁷² If any of the Parties attempt to argue matters beyond these defined issues, the Board will not consider the arguments in its deliberations.

V. CONCLUSION

[113] The Board finds that the Appellant, Mr. Ben Gadd, is directly affected by the Approvals. Therefore, the Board grants Mr. Gadd standing to present arguments to the Board.

[114] The Board finds the issue of the Haul Road was not previously assessed in the AEUB/CEAA Joint Review Panel hearings that were held with respect to the original Cheviot Project. Although the Joint Review Panel considered the effects of an access corridor, the Haul Road currently under appeal will be constructed differently, resulting in potentially different environmental effects. Notably, in the EIA that was before the Joint Review Panel, the Approval Holder expressly rejected the Haul Road as a viable option. Therefore, the Board retains jurisdiction to hear the appeals.

[115] The issues that will be heard by the Board are:

1. What effect will the new design of the Haul Road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the Haul Road have on public access to the wilderness areas and tourist sites on either side of the Haul Road?

⁷² Section 95(4) of EPEA provides:

“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.”

3. What effect will the new design of the Haul Road have on the local watershed?
4. What effect will the new design of the Haul Road have on the noise and dust coming from the Haul Road?
5. What is the legal status of the EPEA approval given that pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended?

[116] The Board will not hear arguments regarding the original Cheviot Project application or the operations of the Cheviot and Luscar mines.

Dated on October 8, 2004, at Edmonton, Alberta.

“original signed by”

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

“original signed by”

Mr. Ron V. Peiluck
Board Member

“original signed by”

Mr. Al Schulz
Board Member