Appeal No. 04-054-D2

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 30, 2007

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

-and-

IN THE MATTER OF an appeal filed by Barbara A. Higgins with respect to Amending Approval No. 46972-00-02 issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Higgins* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.* (30 March 2007), Appeal No. 04-054-D2 (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair.

WRITTEN SUBMISSIONS:

Appellant: Ms. Barbara A. Higgins.

Approval Holder: Cardinal River Coals Ltd., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

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

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval under the *Environmental Protection and Enhancement Act* (EPEA) to Cardinal River Coals Ltd. for the opening up, construction, operation, and reclamation of the Cheviot Creek coal mine, more specifically the development of a particular pit, near Cadomin, Alberta. The Board received a Notice of Appeal from Ms. Barbara Higgins appealing the issuance of the Amending Approval.

Alberta Environment raised a preliminary motion that Ms. Higgins was not directly affected, she had an opportunity to participate in a hearing held by the Alberta Energy and Utilities Board (AEUB) at which all of the issues raised in her Notice of Appeal were adequately dealt with, and the Government of Alberta participated in a hearing under the *Canadian Environmental Assessment Act* (CEAA), and therefore, the appeal should be dismissed.

Under section 95(5)(b)(i) EPEA, the Board must dismiss an appeal if the appellant had the opportunity to participate in an AEUB hearing or review at which all of the issues in the Notice of Appeal were adequately dealt with, or if the Government of Alberta participated in a hearing under CEAA and the matters in the Notice of Appeal were included.

The Board found that Ms. Higgins might be directly affected by the displacement of grizzly bears caused by the open-pit mining operations, but she provided no viable argument that anything in the Amending Approval, as opposed to the original approval of the mine operations, could result in grizzly bear displacement.

The Board found Ms. Higgins also had the opportunity to participate in and did participate in an AEUB hearing. Although the issue of grizzly bear displacement may not have been adequately dealt with by the AEUB, the Government of Alberta participated in the joint review panel under CEAA and the matters included in the Notice of Appeal were heard. Therefore, because the Appellant is not directly affected by the Amending Approval and pursuant to section 95(5)(b)(ii) of EPEA, the Board must dismiss the appeal.

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I. BACKGROUND

[1] On July 29, 2004, the Director, Central Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 46972-00-02 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), to Cardinal River Coals Ltd. (the "Approval Holder" or "CRC") for the opening up, construction, operation, and reclamation of the Cheviot Creek coal mine (the "Cheviot Creek Project"), more specifically the development of the Cheviot Creek pit (the "Cheviot Creek Pit"), near Cadomin, Alberta.

[2] On September 3, 2004, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Ms. Barbara A. Higgins (the "Appellant") appealing the Amending Approval.

[3] On September 8, 2004, the Board wrote to the Appellant, Approval Holder, and Director (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal. The Board also requested the Director provide the Board with a copy of the documents relating to this appeal (the "Record"), and the Participants provide available dates for a mediation meeting, preliminary meeting, or hearing. The portion of the Record relating to Alberta Environment's communication with the Appellant was received on October 19, 2004.

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

[5] The AEUB stated it had not dealt with the specific appeal, but it "…did receive an application for the construction and operation of the Cheviot Coal Mine and Processing Plant (the "Cheviot Project") from Cardinal River Coals Ltd. The [A]EUB along with the Canadian Environmental Assessment Agency [("Joint Review Panel")] held two joint hearings in 1997 and

2000 into the application." The AEUB provided copies of Decision 97-08, Decision 2000-59, and Permit No. C2003-4.

[6] On September 8, 2004, the Board asked the Participants to provide comments on whether the matter was subject to a hearing or review by the AEUB or under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"). On September 13, 2004, the Director raised the additional issues of whether or not the Appellant is directly affected and had properly submitted a Statement of Concern pursuant to section 73 of EPEA.

[7] On September 22, 2004, the Board set a schedule to receive submissions from the Participants to answer whether Ms. Higgins filed a statement of concern with the Director before she filed her Notice of Appeal with the Board. Submissions were received from the Participants between September 30, 2004 and November 15, 2004. On September 1, 2005, the Board notified the Participants of its decision, finding the Appellant had filed a Statement of Concern with the Director.[1]

[8] On September 1, 2005, the Board wrote to the Participants setting the schedule to receive written submissions on the Director's motion of the Appellant's directly affected status. In response to the Director's and Approval Holder's request, the Board asked the Participants to also respond to the questions of whether the matter was subject to an AEUB hearing or review at which the Appellant had the opportunity to participate and all matters in her Notice of Appeal were adequately dealt with, and whether the Government of Alberta participated in a public review of the matter under CEAA. The submissions were received from the Participants between November 15, 2005 and March 3, 2006.

II. SUBMISSIONS

A. Appellant

[9] The Appellant stated she is directly affected because she owns property in Cadomin on the hill on the lower bench of Mt. Leyland above the Cadomin townsite, and the

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[1] See: *Higgins* (2006), 17 C.E.L.R. (3d) 144 (Alta. Env. App. Bd.), (*sub nom. Higgins* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.*) (26 August 2005), Appeal No. 04-

haulroad for the mine operations runs close, above, and west of her place. She stated the Cheviot Project is close to her property and affects her.

[10] The Appellant explained her experiences in the area and how she would retreat to Cadomin, the McLeod River and its tributaries, Mountain Park, and the Cardinal River Divide area. She remarked that as industry faded, the rivers, valleys, and mountains became quiet and more beautiful.

[11] The Appellant commented that it was sad to see these special places degraded by open-pits, haulroads, and other intrusions caused by coal mining. She explained these intrusions included killing creeks, obliterating delicate vegetation, displacing wildlife, restricting access, eliminating recreation, and polluting the atmosphere. The Appellant stated the haulroad corridor was carved through a narrow river valley, widening it and exposing it to greater erosion.

[12] The Appellant stated the mountains and foothills are the reservoirs that feed Alberta's rivers and water tables, and the mining operations interfere with the watercourses and volume. She commented that to "…allow the coal industry to excavate at the water source is folly."[2] She stated the mine uses stream beds for dumping overburden, thereby destroying water quality while depleting volume.

[13] The Appellant argued open-pit operations at high altitudes cause a loss of critical, prime habitat and returning the growth to pre-disturbance levels would be difficult or impossible because of the harsh, cold and variable climate, little, poor quality soil, and few good growing days. The Appellant stated the limitations of altitude and climate were not considered in the Joint Review Panel hearing.

[14] The Appellant stated the people and the Province also lose monetary compensation since coal royalties are low, and she commented that the Cheviot workforce is small.

[15] The Appellant explained the imprint left from strip mining is vastly different from that left from underground mining. She stated strip mining strips the land over a vast area, natural features vanish, and there is total ecological damage. The Appellant stated that, although

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she hated the destruction in Luscar, she accepted it as long as it stayed in the Luscar area. She argued the industrial expansion into the rest of the McLeod River system is unacceptable.

[16] The Appellant stated open-pit, strip mining should not be permitted at higher altitudes because climate rules and conditions do not favour growth and regeneration. The Appellant stated the "…[A]pproval of the Cheviot open-pit mine project was a mistake and that the expansion of CRC's operations Mountain Park were done for big bucks with no consideration for the consequences to the land and its inhabitants."[3]

[17] The Appellant outlined the history of the approval process of the operations. She explained that, in 1996, a Joint Review Panel held a hearing with respect to the Cheviot Project application, and she attended every day. She also explained she appealed the 2004 amendment to the original approval that allowed a haulroad to transport raw coal from the Cheviot open-pits, and she supported the appellant in the Board's proceedings.[4] She stated there was no public scrutiny or environmental impact assessment of the haulroad.

[18] The Appellant stated she has been directly affected by every move of the Approval Holder. She explained residents rallied against the strip mining of Mt. Leyland, but they eventually gave up and protected nothing. The Appellant stated she has spent the better part of the last 15 years opposing open-pit mining in the area. She commented that some people think you cannot fight big business and it will get what it wants anyway, but she "…would like to think that the process works for environmental preservation and conservation and not just to promote industry and economy."[5]

[19] The Appellant stated she knows what it is to be part of a mining community and was always proud to say that she was from a coal mining town. She explained today's mining imprint is "monstrous" in comparison to the past. The Appellant stated it would be sensible to

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2 Appellant's submission, dated November 14, 2005, at page 3.

3 Appellant's submission, dated November 14, 2005, at page 5.

4 *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.*) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.) ("*Gadd*").

5 Appellant's submission, dated November 14, 2005, at page 7.

have a buffer zone between the federal parks and the rest of Alberta, and the coal branch area is the only place that does not have a wildland buffer.

[20] The Appellant questioned where the animals can go if there is no provincial preserve in the McLeod River valley. The Appellant stated she had not seen grizzly bears in Cadomin until 2005, when a grizzly sow with two cubs wandered through the Cadomin hamlet apparently entering the yard of her property. The Appellant stated the bears were pushed out of their habitat on Mt. Leyland by the haulroad.

[21] The Appellant stated her use of her property will not be the same in the future, because open-pit mining activities do not enhance the scenery. She questioned what the value of her property would be. She expressed concern that Cadomin is showing signs of a possible town collapse. The Appellant explained Cadomin was a pleasant and interesting place to experience wilderness, "…but the mine projects divided the residents, turned away the campers and led to the possible demise of the town."[6]

[22] The Appellant requested the Board rescind the Amending Approval and stop further development of open-pits in the McLeod River basin.

[23] In her response submission, the Appellant stated the mining in the area has a direct effect on her, her property in Cadomin, and her family who will take over ownership and responsibility of her Cadomin property. The Appellant explained she owns property in Cadomin jointly with her son.

[24] The Appellant stated she had stakeholder status for the A8 pit hearing in the early 1990s, and she presented her objections at a one-day hearing. She stated letters sent from the Approval Holder addressed her as "stakeholder," and she had stakeholder status for the 1997 Joint Review Panel hearing. She questioned when and how her stakeholder status disappeared.

[25] The Appellant stated she has concerns about the personal and ecological impact of the Cheviot Project, and when "…environment and ecology are taken out of the mix in the

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[6] Appellant's submission, dated November 14, 2005, at page 8.

'directly affected' issue, you miss the reality and reason for having property there in the first place."[7]

[26] The Appellant explained the reason she owns the Cadomin property is to have the opportunity to enjoy the natural beauty, peace, and tranquility of the setting. She stated her property is among those closest to the site of the A8 pit, where the haulroad has been built that crosses the corner of Cadomin and turns northwest toward the Luscar mine. She explained noise from the machines and dust from the haulroad and work are evident at her property. She stated there was dust at her property before the haulroad, but now it is worse.

[27] The Appellant stated the whole region, including the valleys of the McLeod River drainage system from Mountain Park through to Cadomin and Luscar, have not had adequate environmental protection. The Appellant argued the area has become an environmental throw-away zone, even though an earlier report had marked the Cadomin corridor as the primary space for ecotourism in an area of 8,700 square kilometres.

[28] The Appellant stated the negative effects of the Cheviot Project were identified and supposedly mitigated by the Joint Review Panel hearings and decisions of 1996-97 and 2000. The Appellant explained the original project that was the subject of the hearings included rebuilding the railway and constructing a processing plant at Cheviot Creek, but what has taken place is very different. The Appellant stated the existing project, although it was very different, was amended and "…quickly and quietly approved by orders-in-council"[8] and was not assessed by an environmental impact assessment process. The Appellant explained the footprint into Cadomin and the McLeod River system became larger and more intrusive with the amendments. She stated the construction of a mountain road for haul trucks, a power corridor, and a public road is damaging to the land and river system, and the constant activity has fractured habitat for many animals, disrupted riparian integrity along mountain streams, and eliminated creeks with the dumping of overburden into them.

[29] The Appellant also questioned where the rock residue was being dumped since the Approval Holder stated in the 1997 Joint Review Panel hearing that there was no room left at

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7 Appellant's submission, dated February 27, 2006, at page 3.

8 Appellant's submission, dated February 27, 2006, at page 4.

the site. The Appellant stated the Approval Holder had explained in the Joint Review Panel hearing that the Luscar processing plant was obsolete and questioned why it was now being used.

[30] The Appellant questioned why the mine operations started before the environmental concerns previously identified had been mitigated, and why no public hearing was held for the Cheviot Creek Project. She stated the Gadd hearing[9] on the haulroad was too restrictive since the revised mine operation plan has devastating effects on the environment.

[31] The Appellant questioned why she cannot get the latest report on the census study of grizzly bear DNA and habitat in the foothills area, including Cadomin and Luscar. She stated the information is relevant to the intrusion of mining into bear habitat, and therefore it affects her. The Appellant stated the bears wandering into Cadomin illustrate animal displacement due to fractured habitat.

[32] The Appellant stated the Cheviot Project has chased the deer away from the area. She argued the Approval Holder has been displacing animals and destroying habitat for 30 years. The Appellant explained the haulroad extends into the public lands to the north and south ends of the Cadomin valley, and the steady traffic and size of the roadway impede the animals that traditionally use the valley crossings. The Appellant argued the animal mortality rate will continue to rise as their habitat is destroyed.

[33] The Appellant raised concerns regarding light pollution and how the mine lights are intruding on her night sky view.

[34] The Appellant explained she was a member of the original group that formed the Canadian Environmental Protection Association ("CEPA"), and its mandate was to keep open-pit mining out of the McLeod River valley. According to the Appellant, CEPA did not hold to its original intention, and she began her own opposition to the open-pit mine in 1991.

[35] The Appellant argued the "…proposed changes of April 2004 were vastly different and more intrusive than the project that was heard and approved in [the] 1997/2000

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[9] See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.*) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

processes."[10] She stated the Cheviot Creek Project should not have been approved without a public review. The Appellant explained the effects on her and her property are greater now than they were in the 1990s, and the haulroad affects her directly. The Appellant argued open-pit mining in her area is not for the public good, and even though it may provide a few jobs and benefit the corporation, there is no benefit to the environment. She argued, "Preserving the planet is more important than owner profit." [11] The Appellant stated it is not practical to allow open-pit mining in a critical, prime habitat environment, and an effective environmental department would be preserving the land.

[36] The Appellant stated she is a lifetime user and steward of the area where the McLeod River drains the highlands of the eastern slopes; she does not holiday anywhere else and she always lived in sight of the Rocky Mountains until her health forced her to relocate to Edmonton.

[37] The Appellant stated that, as the mine spreads, the peaceful wilderness experience will be gone as well as the grizzlies, ungulates, small mammals, birds, and fish. The Appellant questioned why flora and fauna have to give way to an industry that is exploiting a non-renewable resource and altering everything in its path. The Appellant stated Luscar Creek, a tributary to the McLeod River, is now a moonscape after 37 years of the Approval Holder open-pit mining the area.

[38] The Appellant expressed concern about the McLeod River and its tributaries as the water quality and quantity have already been compromised. She stated the mountain rivers must be protected to water a dry province, and allowing open-pit mining in the eastern slopes does not protect or conserve the watershed.

[39] The Appellant raised the issue of selenium in relation to coal mining.

[40] The Appellant stated she can hear traffic above her place, as her place is close to the mine operations. She stated her property is six kilometres closer to the Cheviot mine site than the processing plant and mine office at Luscar, and she is 54 kilometres closer to the Cheviot mine site than the workers who live in Hinton.

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[10] Appellant's submission, dated February 27, 2006, at page 9.

[41] The Appellant stated her family has used the Whitehorse Wildland for recreation for over 75 years, but now the access to the area and natural beauty of the entrance have been impaired by the unsightly haulroad crossing of Whitehorse Creek. She explained that instead of a bridge, the river crossing is now a huge, metal culvert topped by the elevated haulroad, and access into the Whitehorse Wildland recreational area is a one-car-width tunnel. She stated wildlife crossing there would have to fight for space in the tunnel or dodge the monster trucks on the haulroad.

[42] The Appellant argued the "…quiet nature of the area has been impinged upon and the topography altered."[12]

[43] The Appellant submitted the Director and the Approval Holder continue to rely on the 1996-97 and 2000 hearings and decisions, and they "…refuse to acknowledge that the project approved in July 2004 was a completely different operation, affecting the environment, animals, people, water courses and topography more severely."[13]

[44] The Appellant submitted the present working mine and all its elements were not subject to an environmental assessment. She stated the mitigating factors laid down in the Board's decision regarding the haulroad[14] have not been followed, and the Joint Review Panel hearings and AEUB decisions of 1996-2000 did not include a haulroad to Luscar or the use of the old processing plant.

[45] The Appellant stated she attended the 1997 Joint Review Panel hearing. She explained she was unable to attend the 2000 Joint Review Panel hearing due to health reasons. The Appellant stressed her real home is Cadomin and the mountains, and she asked the Board to save them.

B. Approval Holder

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[11] Appellant's submission, dated February 27, 2006, at page 9.

[12] Appellant's submission, dated February 27, 2006, at page 13.

[13] Appellant's submission, dated February 27, 2006, at page 13.

[14] See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd*.) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

[46] The Approval Holder explained the Amending Approval allows for the development of the Cheviot Creek Pit within the existing mine permit boundary of the Cheviot Project by providing for a number of additional requirements, specifically it:

> "1. establishes additional obligations in respect of Workplans;
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> 2. establishes requirements for a Selenium Monitoring and Management Program;
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> 3. establishes that CRC must salvage sufficient surface soil and regolith to meet reclamation objectives and establishes other requirements in respect of reclamation;
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> 4. poses restrictions on the discharge of mine waste water;
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> 5. establishes requirements in respect of record keeping as it pertains to the use of flocculants;
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> 6. establishes that CRC must implement the Benthic Invertebrate Biomonitoring Program;
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> 7. establishes that CRC shall submit other reports to the Director, such as a Benthic Algae Monitoring Program, Substrate Monitoring Report and Ground Water Monitoring Program Proposal;
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> 8. establishes conditions that CRC must meet with respect to Land Reclamation;
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> 9. establishes requirements that CRC must meet in respect of materials placement, backfilling and contouring;
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> 10. establishes that CRC must evaluate opportunities for incorporating native species into the final landscape;
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> 11. establishes that CRC must revegetate disturbed lands;
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> 12. establishes that CRC must prepare an Annual Report; and
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> 13. establishes that CRC must prepare an estimate of the cost of decommissioning and reclamation for the entire mine as of December 31 of each year."[15]

[47] The Approval Holder argued the Appellant failed to demonstrate how the Amending Approval directly affects her or her recreational property at Cadomin. It stated the Appellant's concerns are more general environmental concerns, such as global warming and the impact of open-pit mining on natural landscapes, concerns with the royalty structure established by the Province, and positions taken by the CEPA. The Approval Holder argued the Appellant's concerns regarding the haulroad and the A8 pit are not relevant to the Amending Approval.

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[15] Approval Holder's submission, dated November 29, 2005, at pages 2 and 3.

[48] The Approval Holder submitted that the Appellant is not directly affected, and therefore, her appeal should be dismissed.

[49] The Approval Holder stated the Joint Review Panel conducted two public hearings in connection with the Cheviot Project, and two decisions were issued as a result of the hearings. The Approval Holder pointed out that the Appellant acknowledged that she was at the first Joint Review Panel hearing every day, and the Appellant did not provide any evidence that she did not receive notice of the second public hearing. The Approval Holder submitted that given the profile of the second Joint Review Panel hearing and the notice requirements in respect of the hearing, on the balance of probabilities, the Appellant had notice of the second hearing.

[50] The Approval Holder stated the AEUB dealt with the more general environmental concerns related to open-pit mining when it made its public interest decision regarding the Cheviot Project, in which the Cheviot Creek Pit was a component. The Approval Holder argued the Appellant did not raise any matters in her Notice of Appeal that were not dealt with by the Joint Review Panel and that are relevant to the Amending Approval.

[51] The Approval Holder submitted the three steps required in section 95(5)(b)(i)[16] of EPEA have been satisfied and the appeal must be dismissed.

[52] The Approval Holder explained the Joint Review Panel hearings held in 1997 and 2000 were convened jointly by the AEUB and under CEAA. The Approval Holder submitted that the appeal be dismissed on the basis there was a public review under CEAA in respect of the issues raised, and the Government of Alberta participated in the review.

C. Director

[53] The Director submitted the Appellant failed to demonstrate that she is personally affected by his decision, and all of the issues raised in her Notice of Appeal were adequately addressed by the Joint Review Panel that found the Cheviot Project was in the public interest.

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[16] Section 95(5)(b)(i) states:
"The Board … shall dismiss a notice of appeal if in the Board's opinion (i) 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 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…."

[54] The Director explained the Joint Review Panel held hearings in January, February, and April of 1997, and the Joint Review Panel released a decision, AEUB Decision 97-08, approving the Cheviot Project as being in the public interest, and after considering the Joint Review Panel decision, the Director issued Approval No. 46972-00-00 on September 29, 1998. A judicial review application was undertaken to the Federal Court, challenging Decision 97-08, and the Appellant appeared on her own behalf.[17] As a result of the judicial review, the Joint Review Panel reconvened in March 2000, held further hearings, and issued a supplemental decision, AEUB Decision 2000-59. The Approval Holder submitted an application to amend Approval No. 46972-00-00, and on December 5, 2003, Approval 46972-00-01 was issued, including authorization to open, construct, operate, and reclaim the Cheviot haulroad connecting the mine pits of the Cheviot Creek Project with the coal processing facilities at the Luscar mine site. An appeal was filed regarding Approval No. 46972-00-01, and the Appellant appeared as an intervenor at the Board's hearing held in January 2005. The Minister upheld the Director's decision with variations.[18] A further amendment of Approval No. 46972-00-01 was issued on July 29, 2004, authorizing the construction and operation of the Cheviot Creek Pit coal mine.

[55] In response to the question of whether the Appellant is directly affected, the Director stated the Appellant's primary residence is in Edmonton, even though she owns property in Cadomin. The Director stated the Appellant's submission related to the haulroad and the impact of open-pit mining at high elevations. He explained the A8 pit, located immediately above Cadomin, is part of the Luscar mine and not part of the Cheviot Creek Pit.

[56] The Director argued there was nothing in the Appellant's submission that deals with how the Appellant is personally affected by the Amending Approval under appeal. According to the Director, the comments and arguments submitted by the Appellant relate to the overall Cheviot Creek Project. The Director submitted the Appellant has not met the Board's test relating to whether a person is directly affected, and therefore, the appeal must be dismissed.

[57] The Director explained the Joint Review Panel held hearings into the Cheviot Project application, and the AEUB Decision 97-08 clearly shows the Appellant was a participant.

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[17] See: *Alberta Wilderness Association et al.* v. *Cardinal River Coals Ltd.* [1999] 3 F.C. 425.

[18] See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta*

The Director stated he issued Approval No. 46972-00-00 after considering Decision Report 97-08, and issued Approval No. 46972-00-01 and 46972-00-02 only after being advised that the AEUB Approval C2003-4 was issued.

[58] The Director referred to the Appellant's submission where she stated she attended the Joint Review Panel hearing every day, and she did not point to any new facts that were not before the Joint Review Panel. The Director stated the Appellant had the opportunity to and did participate in the Joint Review Panel hearings, thereby meeting one of the conditions of section 95(5)(b)(i) of EPEA.

[59] The Director explained approval decisions are not considered during the Joint Review Panel proceeding because he has not made up his mind at that time. He stated he does not make his decision until he has considered the Joint Review Panel decision. The Director submitted that all of the concerns in the Appellant's Notice of Appeal were explicitly considered by the Joint Review Panel or could have been raised before the Joint Review Panel. The Director argued the Appellant cannot raise issues for the first time in order to create an issue for the Board to consider. The Director stated the issues of the haulroad, the Luscar plant site, the mining imprint on the land, the economic benefits of the Cheviot Project, low coal royalties, small work forces, and regenerative growth potential were all issues addressed in the Joint Review Panel reports. The Director submitted that all of the matters raised in the Appellant's Notice of Appeal were addressed in the Joint Review Panel reports, and therefore the Board does not have jurisdiction and must dismiss the appeal.

[60] The Director explained the Joint Review Panel was constituted jointly under the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, and CEAA. The Director pointed out the list of participants for both hearings included the AEUB and the Government of Alberta. The Director argued it was clear the Government of Alberta participated in a review undertaken under CEAA, at which all of the issues raised in the Notice of Appeal were addressed, and therefore, the Board must dismiss the appeal.

[61] The Director stated the Appellant has strong views on maintaining the landscape in the area of the Cheviot Project and she expresses these views at every opportunity. The

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Director argued the concerns presented by the Appellant are no greater than those of an ordinary member of the public who opposes development in mountain terrain.

[62] The Director stated that none of the concerns expressed by the Appellant are new and the concerns were presented before the Joint Review Panel, at which the Joint Review Panel found the project to be in the public interest. The Director submitted the Board cannot undertake a review that duplicates those issues originally addressed before the public interest decision-maker, the AEUB.

[63] The Director submitted the Board does not have jurisdiction to hear the appeal as EPEA prohibits duplication of hearings.

III. DIRECTLY AFFECTED

A. Legislation

[64] Section 91(1) of EPEA stipulates who may file a Notice of Appeal:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
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> (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)…."

[65] Therefore, under section 91, a Notice of Appeal can only be accepted if the person previously filed a Statement of Concern and is directly affected. The Board in its previous decision found the Appellant filed a valid Statement of Concern.[19] One of the issues in this

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[19] See: *Higgins* (2006), 17 C.E.L.R. (3d) 144 (Alta. Env. App. Bd.), (*sub nom. Higgins* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.*) (26 August 2005), Appeal No. 04-054-D (A.E.A.B.).

decision is whether the Appellant is directly affected by the Director's decision to issue the Amending Approval.

[66] Before the Board can accept a Notice of Appeal as being valid, the person filing the Notice of Appeal must show that he or she is directly affected. Under section 91 of EPEA, a person who is directly affected by the decision of the Director – here the issuance of the Amending Approval – has the right to file a Notice of Appeal with the Board. The Board has examined the term "directly affected" in numerous previous appeals, thereby providing a framework to determine if an appellant should be given standing to appear before this Board. 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.[20]

[67] 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*, the Board stated "…that 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."[21]

[68] The principal test for determining directly affected was stated in *Kostuch*:

> "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.

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

[21] *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*").

> 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."[22]

[69] 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."[23] In *Kostuch*, the Board considered its previous decision in *Ross*,[24] 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."[25]

[70] 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 confident that the interest affected is consistent with the underlying policies of the Act."[26]

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

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[22] *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.).

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

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

[25] *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.).

[26] *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.).

> imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified."[27]

[71] 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."[28]

[72] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show she is directly affected, is on the Appellant. 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."[29]

The Board's Rules of Practice also make it clear that the onus is on the Appellant to prove that she is directly affected.[30] The onus or burden of proof issue, in a slightly different context, was recently upheld in by the Court of Queen's Bench.[31]

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[27] *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.).

[28] *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"*).

[29] *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.).

[30] Section 29 of the Board's Rules of Practice provides:

> "Burden of Proof
>
> Any party offering 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."

[31] 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.).

[73] In the judicial review decision of *Court,*[32] Justice McIntyre reversed the Board's standing decision based on the Board's previous cases, and the Court 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 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

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[32] *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.).

> '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."[33]

[74] Justice McIntyre concluded by stating:

> "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…."[34]

B. Discussion

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[33] *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. (4th) 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 No. 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 No. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[34] *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. (4th) 71 (Alta. Q.B.).

[75] The Board recognizes the value the Appellant places on the area surrounding Cadomin. It appears she has acted as a champion for the protection of the area for a number of years. The Board recognizes the aesthetic value of the area around the mine site and what it means to the Appellant. The Appellant's concerns for the environment in this region are deeply held and genuine. This is an area enjoyed by many Albertans, those who live in the area as well as those who visit the area for recreational purposes. However, as the Board has stated in previous decisions, to find an appellant directly affected the interest affected must be more than a general interest in the environment of an ordinary Albertan, no matter how genuine the concerns may be.

[76] In order for the Appellant to be found directly affected as required by EPEA, she must be able to demonstrate to the Board that as a result of the Director's decision to issue the Amending Approval, she has an interest that will be affected in some way by that specific decision. It is the terms and conditions of the Amending Approval and the resulting actions resulting from these terms and conditions that can be considered. The Board can only consider the project named in the Amending Approval itself when assessing the directly affected status of an appellant. As stated in the Board's decision of *Court*,

> "…to be considered directly affected, an appellant must be directly affected by the approval that is under appeal in and of itself. There must be a nexus between the approval being appealed and the impacts that the appellant is using as the foundation for standing."[35]

The Board cannot look to the original approval issued to the Approval Holder to find the Appellant is directly affected. The direct affect must be found in something caused by the Amending Approval itself.

[77] Most of the terms and conditions in the Amending Approval relate to reporting and monitoring of specific site parameters, including the Cheviot Mine Environmental Workplans, selenium monitoring and management, mine wastewater, benthic algae monitoring, land reclamation and conservation, groundwater monitoring, materials placement, revegetation, annual reporting, and financial securities. Before the Board can consider the issues raised in the Notice of Appeal as a basis for finding the Appellant directly affected, the issues need to relate to

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[35] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc*. (22 April 2002), Appeal No. 01-096 (A.E.A.B.) at paragraph 37.

the terms and conditions in the Amending Approval in some manner. Issues that do not relate to these terms and conditions cannot be raised before the Board as grounds to find the Appellant directly affected or to argue the issue was not raised before the Joint Review Panel in its hearing process.

[78] The Appellant stated she is directly affected by the Director's decision to issue the Amending Approval because her peaceful enjoyment of her property in Cadomin would be negatively affected by the project. She referred to atmospheric pollution including noise levels from the mine and dust from the haulroad and the haulroad itself, wildlife displacement, effects of water in the area, revegetation of the site, loss of recreational areas and access, loss of property values, and selenium.

[79] The Appellant raised the issues of dust and noise emanating from the mine site. The Appellant did not provide information on how dust and noise will affect her personally, beyond that her peaceful enjoyment of the area will be affected. She did not indicate, and did not provide any data, to suggest she will be affected in any other way, such as having a direct effect on her health. The Board needs more than general statements of concern in order to find the Appellant directly affected.

[80] The issue of the haulroad including dust and noise from the use of the haulroad was considered in the Board's previous decision, *Gadd*.[36] The Appellant participated in the hearing as an intervenor. Based on the principles of issue estoppel,[37] the issue of the haulroad

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[36] See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd*.) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

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

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

As stated by the Board in Villeneuve Sand & Gravel Alberta Ltd. (2001), 36 C.E.L.R. (N.S.) 119 (Alta. Env. App. Bd.), (sub nom. Villeneuve Sand and Gravel Alberta Ltd. v. Director, Northeast Boreal Region, Alberta Environment re: Inland Aggregates Limited) (10 November 2000), Appeal No. 00-015-D (A.E.A.B.).at paragraph [44]:

cannot be reheard by this Board as the matter and the participants are the same as that heard in *Gadd*. Therefore, the issue of the haulroad cannot be considered in determining the directly affected status of the Appellant. Further, the fact that the Amending Approval does not include the haulroad is why the Board cannot consider it in this case.

[81] The Board accepts there will be an effect on the vegetation on the area while the mine is in operation. The question is how the change in vegetation will directly affect the Appellant. The Appellant stated the aesthetics of the area will be altered as a result of the mine, but this affect is the same for all Albertans who have an interest in this region. The Appellant did not indicate if the mine is visible from her property or if it is only visible from public access areas. Without some indication of how the removal of vegetation would affect the Appellant, the Board cannot use this as a basis to find the Appellant directly affected.

[82] The Appellant expressed concern regarding the loss of recreational areas and access to recreational areas as a result of the mining operations. These issues are the same for the Appellant as they are for anyone else who lives in the area or visits the area. Although the Appellant may have used the recreational sites more frequently when she lived in the area, it does not appear she currently uses the recreational sites around the mining area. The Appellant has not shown she will be directly affected due to limited access to recreational sites in the area. The Board notes the issue of recreational sites and access to these sites was previously raised in the *Gadd* decision, and therefore, the Board cannot use these issues to find the Appellant directly

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> "Issue estoppel is intended to protect the public interest by bringing about the end of the dispute and providing finality and conclusiveness to legal proceedings. In simple terms, it means that the same issue should not be decided twice. Often the concept is expressed in criminal law as double jeopardy. It is a fundamental tenant of our legal system."

In *Wavel Ventures Corp.* v. *Constantini* (1996) 46 Alta. L.R. (3d) 292 at page 306, the Alberta Court of Appeal stated:

> "The doctrine of *res judicata* [issue estoppel is one form of *res judicata*] is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed by the same cause. The rule which I deduce from the authorities is that a judgement between the same parties is final and conclusive not only as to the matters dealt with, but also as to questions which the parties had the opportunity of raising. The authorities also showed that principles of issue estoppel are applicable to the decision of administrative tribunals, as stated in *Rasanen* v. *Rosemount Instruments* (1994) 112 D.L.R. (4th) 683 at 687 (Ont.C.A.)"

affected. Because the issue was dealt with in *Gadd*, the Board cannot revisit in relation to the Amending Approval.

[83] The Appellant raised the issue of how the mining operations are affecting the water quality and quantity in the watershed. However, she did not explain how this will affect her directly, other than her general concerns for the environment in the area and the potential effect on the aesthetic value of the area. There is insufficient information to find the Appellant directly affected as a result of the project potentially affecting water resources in the area.

[84] The Appellant also referred to the low royalties given to the Province by the Approval Holder and the size of the workforce hired by the Approval Holder. These issues are not within the Board's jurisdiction to consider so they are irrelevant in the determination of the directly affected status of the Appellant.

[85] The Appellant argued the value of her property will be affected by the continual expansion of mining in the area. Although the Board appreciates these concerns, there is no remedy that the Board can provide with respect to land values even if the Board found the Appellant's concerns valid.[38] A decrease in property value is not within the Board's jurisdiction and cannot be used as a basis for determining whether the Appellant is directly affected.

[86] The Appellant stated in her submission that she does not like anything about the decisions that approve open-pit mining in the area and that open-pit mining should not be permitted at higher altitudes in the first range of the Rocky Mountains. This is a generalized concern and does not provide any indication on how the specific project allowed under the Amending Approval will have a direct effect on her. The Board needs more than generalized statements of issues that are of concern to an appellant. The Board needs some indication tying the specific details of the approved project back to the Appellant and demonstrating there will be an adverse effect on the Appellant.

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[38] See: *Mizeras et al.* v. *Director, Northeast Boreal and Parkland Regions #2, Alberta Enviornmental Protection* re: *Beaver Regional Waste Management Services Commission* (13 July 1999) Appeal Nos. 98-231-233-R; *Nault and Mitchell* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Canmore* (17 August 2004) Appeal Nos. 04-019 and 04-020-R (A.E.A.B.); and *Covey* (2005), 12 C.E.L.R. (3d) 36 (Alta. Env. App. Bd.), (*sub nom. Covey et al.* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Hal Willis*) (20 January 2005), Appeal Nos. 03-014-019, 021-027, 029-038, and 03-082-ID1 (A.E.A.B.).

[87] For all of the foregoing concerns raised by the Appellant, she has not made a case of how she is directly affected nor has she shown how any of these concerns arise from anything in the Amending Approval.

[88] The issue of grizzly bears being displaced by the mining operations and now coming into Cadomin could conceivably directly affect the Appellant in terms of the safe use of her property. Such displacement could also affect the grizzly bears, because if the bears recurrently come into contact with humans, some incident could occur that would force action to be taken against the grizzly bear, including relocation or killing the bear. This issue was only mentioned in the Appellant's submission without any explanation of how she believed that she would be directly affected. Furthermore, it is necessary to determine if there is anything in the Amending Approval that might lead to an increase in grizzly bear displacement.

[89] The Amending Approval deals with a number of definitions and reporting requirements, none of which provide a substantive change to how the mine will be sited or operated that would conceivably provoke actions that might raise concerns with grizzly bear displacement. The only clause of the Amending Approval that opens the possibility is clause 2.4.13, which provides:

> "The approval holder shall holder [*sic*] shall [*sic*] implement the revised workplans as described in Cheviot Creek Pit application document entitled 'Cheviot Mine, Environmental Workplan Update' updated June 25, 2004, unless otherwise authorized in writing by the Director."

[90] In Section 3.3.5 of the application document referred to in clause 2.4.13, Actions Remaining (Terrestrial), it states:

> "Grizzly Bear
>
> Continued assessment of grizzly bears in the Cheviot area should address three questions
>
> 1. Are bears still using the area adjacent to the mining development?
> 2. Has human caused mortality increased?
> 3. Are there specific wildlife travel corridors that need protection or consideration?
>
> To address these items, the following is suggested: …
>
> - Information on grizzly bear occurrence and movement at the existing Luscar and Gregg River mines needs to be summarized and incorporated

> with bear data from the Cheviot mine into the pre-development stage of pit and reclamation planning."

[91] This provision, adopted as an action by reference in the Amending Approval, refers to actions involving more study of grizzly bear issues, including their movements. Although there is some plausibility of the Appellant being directly affected as her use and enjoyment of her property could be impaired by increased grizzly bear displacement, the Board does not find a basis to proceed on this narrow issue, even if it has jurisdiction to hear the appeal, because the issue of grizzly bear displacement does not follow from any of the issues raised by the Amending Approval. There is nothing in the Amending Approval that suggests actions that would conceivably increase the displacement of grizzly bears leading to an increased risk of grizzly bears appearing in Cadomin. Whatever risks there may be of such grizzly bear displacements, they are associated with the approval of the Cheviot Project, not the Amending Approval.

IV. AEUB HEARING

A. Legislation

[92] Under section 95(5)(b)(i) of EPEA, the Board is required to dismiss an appeal, if, in its opinion, the issues raised in the appeal have been adequately dealt with by the AEUB and the appellant had the opportunity to participate in the AEUB hearing process. Section 95(5)(b)(i) of EPEA provides:

> "The Board … shall dismiss a notice of appeal if in the Board's opinion (i) 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 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…."

[93] Three basic conditions have to be met for the Board to lose jurisdiction in this appeal. First, did the Appellant receive notice of the AEUB hearing or review; second, did the Appellant participate in or have the opportunity to participate in the AEUB hearing or review of the project at issue; and third, did the AEUB adequately deal with all the matters raised by the Appellant in the Notice of Appeal.

[94] In a previous decision, *Carter Group* v. *Director of Air and Water Approvals, Alberta Environment Protection,*[39] the Board noted the intent of what is now section 95(5)(b)(i) is to avoid duplication in the hearing process. The Board stated:

> "The jurisdiction of this Board to become involved in a 'review' of [Energy Resources Conservation Board ("ERCB") (now AEUB)] decisions that led to approvals which are eventually appealed here is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence."[40]

The Board stated: "The Board interprets section 87(5)(b)(i) [(now section 95(5)(b)(i))] of the *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually."[41] The Board concluded that: "...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB [(now AEUB)]."[42]

[95] The matter of how adequately the AEUB considered the issues was further discussed in the Board's decision, *Smulski et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074-082-D (A.E.A.B.), where the Board explained:

> "As the Board stated when considering section 95(5)(b)(i) in the *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection,*[43] the Board is mindful of the judgment of the Alberta Court of Queen's Bench in *Slauenwhite* v. *Alberta Environmental Appeal Board*.[44] In *Slauenwhite,*[45] Justice Wilkins emphasized that subsection 6(1) of the *Approvals*

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[39] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) (the "*Carter Group*").

[40] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 6.

[41] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 7.

[42] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.) at page 10.

[43] *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.) ("*Graham*").

[44] *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.), ("*Slauenwhite*").

[45] *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

> *Procedure Regulation*[46] imposed a duty on the Director in his approval decision to consider the environmental impacts of the entire project in question. Justice Wilkins stated that it would be patently unreasonable for the Board to conclude that it was precluded from determining whether the environmental impacts of the whole project had been weighed in accordance with EPEA and the regulations.
>
> As in *Graham*,[47] the Board believes that it was correct in its interpretation of what is now section 95(5)(b)(i) in the *Carter Group*[48] decision and, notwithstanding the substantive result in *Slauenwhite*, this approach is consistent with that case on the basis of a full reading of Mr. Justice Wilkins' decision. In *Slauenwhite*,[49] the Court concluded that the environmental impacts of a significant part of the natural gas processing facility in question had not been considered by either the ERCB or the Director. Unlike *Slauenwhite*,[50] there is no similar question here of failure of the NRCB or the Director to assess environmental impacts of a significant physical component of the Approval Holder's expansion."[51]

[96] The Board cannot judge or assess the merits of the AEUB decision to see if the Board agrees with the decision; it only reviews the decision to see if the issues raised were discussed or reviewed. Even if the Board does not agree with a decision of the AEUB, it cannot gain jurisdiction if all the matters in the Notice of Appeal were adequately dealt with and the Appellant was given the opportunity to participate. The legislators included section 95(5)(b)(i) of EPEA to prevent opponents of projects from trying to use different tribunals to have multiple hearings.

B. Discussion

[97] There are three steps to determine whether the conditions required in section 95(5)(b)(i) have been met. These steps require that a hearing or review was held by the AEUB, the Appellant received notice of the hearing or participated in or had the opportunity to

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46 *Approvals Procedure Regulation*, Alta. Reg. 113/93.

47 *Ed Graham et al* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (28 June 1996), Appeal No. 95-025 (A.E.A.B.).

48 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (8 December 1994), Appeal No. 94-012 (A.E.A.B.).

49 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

50 *Slauenwhite et al.* v. *Alberta Environmental Appeal Board et al.* (1995), 175 A.R. 42 (Alta. Q.B.).

51 *Smulski et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Agrium Products Inc.* (29 April 2005), Appeal Nos. 04-074-082-D (A.E.A.B.) at paragraphs 41 and 42.

participate in the AEUB hearing process, and the final step is a determination of whether all of the issues identified in the Notice of Appeal were adequately dealt with by the AEUB.

[98] All of the Participants agree that the AEUB held hearings in 1997 and 2000 (the Joint Review Panel) regarding the Cheviot Project. Therefore, the first condition has been met.

[99] The Appellant admitted she attended the 1997 hearing almost every day, but was unable to attend in 2000 for personal reasons. She did not argue that she was unaware of the 2000 hearing, and if she had concerns that she wanted raised, she could have appointed a representative to speak on her behalf. Thus, the second condition has also been met.

[100] The final step is to determine whether all of the issues raised in the Notice of Appeal were adequately dealt with by the AEUB. The issues raised by the Appellant included the effect of the haulroad, the effect on water bodies and vegetation, the displacement of wildlife, restriction of access, elimination of recreation, and polluting the atmosphere. The Appellant also made reference to the low royalties received by the Province and the workforce to be hired.

[101] The Appellant argued the project approved by the Joint Review Panel was very different from the project approved in 2004. Along with the submissions provided by the Participants, the Board reviewed the AEUB decisions released in response to the Joint Review Panel hearings.

1. Vegetation

[102] During the Joint Review Panel hearing, the panel heard concerns regarding the vegetation in the area and the Approval Holder's plans for reclamation. The Joint Review Panel found there would be no significant cumulative adverse effects to the vegetation, and the reclaimed site would eventually contain late successional species of vegetation. The Joint Review Panel accepted that various plant communities would change, and although the loss of certain plant communities may disadvantage some wildlife species, others will benefit. (See: AEUB Decision 97-08, section 4.1.3 and AEUB Decision 2000-59, section 7.3.4).

2. Loss of Recreation and Restriction of Access

[103] The Joint Review Panel discussed the feasibility of allowing continued access in and around the mine site and the effects on recreational use of the area. The Joint Review Panel found recreational use of the area would be affected and raised the matter of the effect of the project on the two areas being protected for their ecological resources. It is clear the Joint Review Panel considered the effects of the project on recreational areas and access to the area and adequately dealt with the matters. The Joint Review Panel encouraged the Approval Holder to mitigate negative effects from human access into the area. (See: AEUB Decision 97-08, section 6.4.3, AEUB Decision 2000-59, section 8.4).

3. Displacement of Wildlife

[104] During the Joint Review Panel hearings in 1997 and 2000, there was substantial evidence on the effect of the project on wildlife, including grizzly bears, ungulates, and harlequin ducks. This included evidence on the effect of human activity on the wildlife population from the mining project as well as from the forestry and oil and gas industries.

[105] The Joint Review Panel accepted the Approval Holder's focus on grizzly bears and gray wolves as indicator species of the quality of the habitat in the area. The focus of the Joint Review Panel was the effect the mine site would have on wildlife in the area, including mortality due to collisions, increased hunting and trapping, habitat alteration and alienation, and movement corridors and habitat fragmentation. The Joint Review Panel required the Approval Holder monitor the impacts of the mine on the movement and mortality of wildlife. The Joint Review Panel believed strategies implemented for the area would provide regional mitigation of the cumulative effects on grizzly bears.[52] (See: AEUB Decision 97-08, sections 4.3.3, 4.4.3, 4.5.3, 4.6.3, and AEUB Decision 2000-59, section 7.3.4).

[106] The Board notes the Joint Review Panel did not discuss explicitly the possibility that grizzly bear displacement might be a threat to the residents of Cadomin, nor was there a discussion on the effects on the grizzly bear population as a result of increased human contact

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[52] The AEUB referred to the regional mitigation strategy described in the document prepared by the Northern East Slopes Environmental Resources Committee, "Grizzly Bear Conservation in the Alberta Yellowhead Ecosystem: A Strategic Framework."

caused by the displacement of grizzly bears to Cadomin and the increased possibility of injury to humans. The Board believes the Appellant's concern that the Cheviot Project covered by the original approval has resulted in the movement of grizzly bears from the mining area into Cadomin is plausible. Under section 95(5)(b)(i) of EPEA, the AEUB must have adequately dealt with the matters in the Notice of Appeal before the Board loses jurisdiction. As the effect of the displacement of wildlife beyond the mine site was not discussed in detail at the Joint Review Panel hearing, this could be a valid issue that the Board could address if it retains jurisdiction.

[107] However, the Board finds no elements of the Amending Approval, as opposed to the original approval for the mine development, could conceivably lead to a change in grizzly bear displacement.

4. Water Bodies

[108] Under section 3 of the AEUB Decision 97-08 and section 7.1 of the AEUB Decision 2000-59, it is evident the Joint Review Panel heard discussions on the effect of the project on surface water bodies as well as groundwater sources. The Joint Review Panel determined there would not be any significant effect and accepted that the Approval Holder would replace groundwater supplies in Cadomin should the existing supplies be damaged. The Joint Review Panel required the Approval Holder to continue monitoring of groundwater quantity and added a requirement to determine winter flow rates.

[109] The issue of water quality was also presented at the Joint Review Panel hearing. The Joint Review Panel recognized the potential effect of the mine operations on water quality, but determined the effects would be either localized to groundwater in the mine permit area or would join flows beyond the mine disturbance.

[110] During the Joint Review Panel hearing, evidence was presented on the potential loss of fish habitat, and the Joint Review Panel determined any short-term impacts can be adequately mitigated by the Approval Holder (See: Section 3.3.3 of AEUB Decision 97-08).

5. Selenium

[111] The issue of selenium was raised during the Joint Review Panel hearing as an issue and the Approval Holder was cross examined on the matter as noted in the AEUB Decision 97-08[53] and AEUB Decision 2000-59.[54] The Joint Review Panel found that it did not expect that the selenium levels would have an adverse impact on regional water quality, but it felt ongoing monitoring and research were warranted. Selenium was also discussed in the Board's Report and Recommendations regarding the haulroad.[55] (See: AEUB Decision 97-08 at page 39; AEUB Decision 2000-59, section 7.2).

6. Other Issues

[112] The Appellant raised issues including atmospheric pollution, the haulroad, low royalty payments to the Government, the work force to be hired for the project, and strip mining in the area.

[113] The Joint Review Panel heard evidence regarding the potential effect of noise on the Cadomin residents, and the Approval Holder was told that should the mining activities result in noise levels unacceptable to Cadomin residents, the Approval Holder would be required to take appropriate steps to reduce the noise levels. (See: AEUB Decision 97-08, section 5.1.3).

[114] With respect to emissions, the Joint Review Panel did not find evidence that the ambient air quality or public health would be impacted by emissions from the project. The Joint Review Panel recommended the Grave Flats Road be paved to reduce dust within Cadomin. (See: AEUB Decision 97-08, section 5.2.3).

[115] The issue of the haulroad was not adequately dealt with by the Joint Review Panel. This was the Board's determination in its decision, *Gadd-ID1*.[56] The Board held a hearing in January 2005 on the effects of the haulroad on the movement and migration of

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53 See: AEUB Decision No. 97-08 at page 39.

54 See: AEUB Decision No. 2000-59 at pages 66 to 69.

55 See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.*) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

56 See: *Gadd* (2006), 19 C.E.L.R. (3d) 1 (Alta. Env. App. Bd.), (*sub nom.* Costs Decision: *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.* (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.) ("*Gadd-ID1*").

wildlife in the area, public access to wilderness areas and tourist sites, the watershed, and noise and dust from the haulroad. The Appellant participated at the hearing as an intervenor.[57] It was at this time that all of her concerns regarding the haulroad should have been raised. As stated before, based on the principles of estoppel, the Board cannot rehear arguments on the same issues that were previously determined.[58]

[116] The issue of royalty payments is not a matter this Board has jurisdiction over. It is a matter for the Government of Alberta to determine, and neither the Director nor this Board has the jurisdiction to dictate to the Government of Alberta how to calculate royalty payments.

[117] The work force employed by the Approval Holder for the project is not a matter this Board can deal with. It is up to the employer to determine how many people it requires to operate the facility effectively and efficiently. The Board does note that the Joint Review Panel did consider employment opportunities as part of the economic assessment of the Cheviot

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[57] See: *Gadd* v. *Alberta (Director, Central Region, Regional Services, Alberta Environment)* (2005), 13 C.E.L.R. (3d) 203 (Alta. Env. App. Bd.), (sub nom. *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd*.) (24 February 2005), Appeal Nos. 03-150, 151 and 152-R (A.E.A.B.).

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

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

As stated by the Board in *Villeneuve Sand & Gravel Alberta Ltd*. (2001), 36 C.E.L.R. (N.S.) 119 (Alta. Env. App. Bd.), (sub nom. Villeneuve Sand and Gravel Alberta Ltd. v. Director, Northeast Boreal Region, Alberta Environment re: Inland Aggregates Limited) (10 November 2000), Appeal No. 00-015-D (A.E.A.B.) at paragraph [44]:

> "Issue estoppel is intended to protect the public interest by bringing about the end of the dispute and providing finality and conclusiveness to legal proceedings. In simple terms, it means that the same issue should not be decided twice. Often the concept is expressed in criminal law as double jeopardy. It is a fundamental tenant of our legal system."

In *Wavel Ventures Corp.* v. *Constantini* (1996) 46 Alta. L.R. (3d) 292 at page 306, the Alberta Court of Appeal stated:

> "The doctrine of *res judicata* [issue estoppel is one form of *res judicata*] is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed by the same cause. The rule which I deduce from the authorities is that a judgement between the same parties is final and conclusive not only as to the matters dealt with, but also as to questions which the parties had the opportunity of raising. The authorities also showed that principles of issue estoppel are applicable to the decision of administrative tribunals, as stated in *Rasanen* v. *Rosemount Instruments* (1994) 112 D.L.R. (4th) 683 at 687 (Ont.C.A.)"

Project. (See: Section 7.2 of AEUB Decision 97-08 and section 10.1 of AEUB Decision 2000-59).

[118] The Appellant argued strip mining should not proceed in the first range of the Rocky Mountains. The Joint Review Panel also looked at whether underground mining was a viable alternative, but it concluded that it was not a viable alternative with current technology. (See: AEUB Decision 2000-59, section 4.4).

7. Summary

[119] Except for the concern raised by the Appellant about the possible displacement of grizzly bears into Cadomin, all of the issues raised in the Appellant's Notice of Appeal were adequately dealt with by the Joint Review Panel, and in most cases, the Joint Review Panel made recommendations to minimize potential impacts. No case was made by the Appellant that anything in the Amending Approval would lead to the displacement of grizzly bears. Therefore, pursuant to section 95(5)(b)(i) of EPEA, the Board must dismiss the appeal.

V. CEAA REVIEW

A. Legislation

[120] Section 95(5)(b)(ii) of EPEA 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."

B. Discussion

[121] The Joint Review Panel that conducted hearings in 1997 and 2000 was convened jointly by the AEUB and under CEAA. The Appellant did not argue to the contrary. The Government of Alberta was a participant in these hearings as Alberta Environmental Protection

and Alberta Community Development were listed in the AEUB Decision 97-08 as attending the hearings and providing witnesses.

[122] There is a lower standard that needs to be reached under section 95(5)(b)(ii) than in section 95(5)(b)(i) of EPEA, in that the Government had to participate and all the matters in the Notice of Appeal were dealt with. The matters in the Notice of Appeal did not have to be "adequately" dealt with as required under section 95(5)(b)(i). The Appellant's participation is irrelevant under section 95(5)(b)(ii).

[123] As stated above, all of the issues identified by the Appellant in her Notice of Appeal were dealt with by the Joint Review Panel, except the matter of displacement of wildlife, which the Appellant clarified in her arguments as a concern about movement of grizzly bears into populated areas.

[124] The test included in section 95(5)(b)(ii) is less stringent than that required in section 95(5)(b)(i). The CEAA test requires only that the matter was heard. It appears from the Joint Review Panel decisions that the issue of grizzly bears and the effect of the mining operations on the grizzly bear populations was discussed and considered by the Joint Review Panel. As a result, the Approval Holder is required to participate in the regional grizzly bear study that tracks the movement of bears in and around the mining area.[59] As the grizzly bear study is for the whole region, not just specifically the mine site, tracking the movement of grizzly bears into Cadomin should be included. Mortality of grizzly bears is also monitored, and any bears killed as a result of becoming a nuisance in populated areas should be recorded and if there is an increasing concern, the Approval Holder would have to notify the Director.

[125] The Joint Review Panel dealt with all of the issues identified by the Appellant in her Notice of Appeal, and the Government was a participant. Since the matter only has to have been considered by a CEAA panel, the Board must dismiss the appeal pursuant to section 95(5)(b)(ii) of EPEA.

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[59] See: "Grizzly Bear Conservation in the Alberta Yellowhead Ecosystem: A Strategic Framework," prepared by the Northern East Slopes Environmental Resources Committee.

VI. DECISION

[126] The Board acknowledges the Appellant's genuine concern with many aspects of the development as approved by the AEUB and CEAA with their public interest decision about mine development and the Director's original approval of the mine development. The Board, however, only has jurisdiction in dealing with this appeal to consider the Amending Approval.

[127] The Board finds the Appellant is not directly affected by the Director's decision to issue the Amending Approval. While the Appellant raised a plausible concern about grizzly bear displacement, she did not provide any explanation of how any element of the Amending Approval would lead to any change in grizzly bear displacement. The Appellant is opposed to the project covered by the original approval for many reasons, and she may have been able to make a case that the original approval resulted in her being directly affected by grizzly bear displacement caused by the project. However, the Board finds that no case has been made that the Amending Approval would directly affect the Appellant.

[128] The only issues raised in the Notice of Appeal that were not adequately dealt with by the Joint Review Panel were the issues of the grizzly bears affecting the Appellant as they come nearer to her property in Cadomin and the effect displacement of bears into populated areas will have on the grizzly bears themselves. There was a CEAA review in respect of all the matters included in the Notice of Appeal, including the movement of wildlife, and at which the Government of Alberta participated. Therefore, pursuant to section 95(5)(b)(ii) of EPEA, the Board must dismiss the appeal.

Dated on March 30, 2007, at Edmonton, Alberta.

"*original signed by*"

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Dr. Steve E. Hrudey, FRSC, PEng
Chair