

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – January 21, 2005

Date of Decision – April 28, 2005

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 Byram Industrial
Services Ltd. with respect to *Environmental Protection and
Enhancement Act* Approval No. 203668-00-00 issued to
Wasteworks Inc. by the Director, Central Region, Regional
Services, Alberta Environment.

Cite as: *Byram Industrial Services Ltd. v. Director, Central Region, Regional Services,
Alberta Environment re: Wasteworks Inc.* (28 April 2005), Appeal No. 04-057-D
(A.E.A.B.).

PRELIMINARY MEETING BEFORE: Dr. M. Anne Naeth, Panel Chair,
Mr. Al Schulz, Board Member, and
Dr. Harrie Vredenburg, Board Member.

APPEARANCES:

Appellant: Byram Industrial Services Ltd., represented by
Ms. Karin Buss, Ackroyd, Piasta, Roth and
Day LLP.

Approval Holder: Wasteworks Inc., represented by Mr. Shawn
Munro, Bennett Jones LLP.

Director: Mr. Tom Slater, Director, Central Region,
Regional Services, Alberta Environment,
represented by Mr. Jeffrey Moore, Alberta
Justice.

WITNESSES:

Appellant: Mr. Patrick Kalita, Byram Industrial Services
Ltd.

Approval Holder: Mr. John Thompson, CEO, HAZCO
Environmental Services, and Mr. Reid
McDougall, Wasteworks.

Director: Mr. Tom Slater, Director, Central Regaion,
Regional Services, Alberta Environment, and
Ms. Celina Duong, Industrial Approvals
Engineer, Alberta Environment.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* to Wasteworks Inc., for the construction, operation and reclamation of a facility consisting of a landfill, near Carrot Creek, Alberta, where more than 10,000 tonnes per year of waste is to be disposed of, and a fixed facility where waste is treated by biological processes, commonly known as the Tower Road Waste Management Facility.

The Environmental Appeals Board received a Notice of Appeal from Byram Industrial Services Ltd. appealing the Approval.

The Board scheduled a Preliminary Meeting to deal with the following preliminary issues:

1. The directly affected status of Byram Industrial Services Ltd;
2. The effect of the Director not accepting the Statement of Concern of Byram Industrial Services Ltd;
3. The issues to be considered at a hearing, should one be held; and
4. Mootness, in relation to some or all of the grounds for appeal.

The Board determined Byram Industrial Services Ltd did not provide sufficient evidence to support its argument that being economically impacted will result in an environmental effect. Therefore, the Board dismissed the appeal, as the appellant was not directly affected.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	DIRECTLY AFFECTED.....	2
A.	Submissions	2
1.	Appellant	2
2.	Approval Holder	4
3.	Director.....	6
B.	Legislation and Previous Cases.....	8
C.	Analysis	15
D.	Summary	19
E.	Additional Comments	20
III.	STATEMENT OF CONCERN.....	20
A.	Submissions	20
1.	Appellant	20
2.	Approval Holder	21
3.	Director.....	22
B.	Discussion	23
IV.	HEARING ISSUES	24
A.	Submissions	24
1.	Appellant	24
2.	Approval Holder	24
3.	Director.....	24
B.	Discussion	25
V.	MOOTNESS.....	25
A.	Submissions	25
1.	Appellant	25
2.	Approval Holder	25
3.	Director.....	26
B.	Legal Framework.....	27
C.	Discussion	28
VI.	DECISION.....	29

VII. COSTS30

I. BACKGROUND

[1] On September 22, 2004, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 203668-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Wasteworks Inc. (the “Approval Holder”) authorizing the construction, operation, and reclamation of a facility consisting of a landfill where more than 10,000 tonnes per year of waste is disposed of and a fixed facility where waste is treated by biological processes, near Carrot Creek, Alberta. This facility is commonly known as the Tower Road Waste Management Facility (the “Facility”).

[2] On October 21, 2004, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Byram Industrial Services Ltd. (the “Appellant”) appealing the Approval. On October 21, 2004, the Board wrote to the Appellant acknowledging receipt of the Notice of Appeal and notified the Approval Holder and the Director of the appeal. The Board requested the Director provide a copy of the records (the “Record”) relating to this appeal,¹ and for the Parties to provide available dates for a mediation meeting or hearing.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[4] On November 16, 2004, the Appellant submitted a request for a Stay of the Approval. On November 24, 2004, the Board notified the Parties that it had reviewed the Appellant’s request for a Stay and had concluded the arguments did not present a *prima facie* case upon which the Board can consider granting a Stay. Therefore, the Board denied the Stay request.²

¹ On November 29, 2004, the Board received a copy of the Record from the Director, and on December 2, 2004, copies were forwarded to the Appellant and the Approval Holder.

² In its November 24, 2004, the Board indicated the Appellant was free to re-apply for a Stay. The Board stated:

“...Finally, the Board can and will only grant a Stay to someone who is directly affected. As

[5] On December 17, 2004, the Board notified the Parties that an oral Preliminary Meeting would be held on January 21, 2005, to hear legal arguments and evidence on the following issues:

1. The directly affected status of the Appellant;
2. The effect of the Director not accepting the Statement of Concern of the Appellant;
3. The issues to be considered at a hearing, should one be held; and
4. Mootness, in relation to some or all of the grounds for appeal.

II. DIRECTLY AFFECTED

A. Submissions

1. Appellant

[6] The Appellant argued EPEA does not describe or limit the manner in which a person may be directly affected. It summarized a number of principles relevant to determining directly affected, including demonstrating a personal or private interest may be directly harmed or impacted and showing on a balance of probabilities that it has the potential to be affected, not that it would be affected. The Appellant stated the personal effect does not have to be unique or different from other Albertans, and a person may be directly affected when a permit or licence may create an injury to a competitive interest. Therefore, according to the Appellant, economic interests are one way in which a person may be affected by the Director's decision.

discussed, the directly affected status of the Appellant has not been determined....

The Board is prepared to entertain a further application for a Stay from the Appellant if it wishes to advance such an application. If the Appellant wishes to advance such an application, it should advise the Board by December 3, 2004. If the Appellant chooses to advance such an argument, the application should respond to the following questions:

- 1) What is the serious concern that the Appellant has that should be heard by the Board?
- 2) Would the Appellant suffer irreparable harm if the Stay is refused?
- 3) Would the Appellant suffer greater harm from the refusal of a Stay pending a decision of the Board on the appeal, than Wasteworks would suffer from the granting of a Stay?
- 4) Would the overall public interest warrant a Stay?" (Emphasis omitted.)

[7] The Appellant explained it provides environmental services by receiving and managing waste in an environmentally responsible manner. It stated the “...proper disposal of industrial waste is an environmental benefit to all Albertans...” and to provide this benefit, it “...must remain viable and have sufficient revenue to cover its costs and earn income.”³ The Appellant stated it is a leader in its industry and has actively been involved in various advisory groups in developing policies and guidelines for environmentally sustainable disposal of oil field and industrial waste.

[8] The Appellant argued its interest in this Approval relates to the policies underlying EPEA, specifically the need for economic growth and prosperity in an environmentally responsible manner, the principle of sustainable development, and the importance of preventing and mitigating the environmental impact of development. It stated the potential adverse effects of the issuance of the Approval include economic and environmental interests. The Appellant stated the Facility is located approximately 36 kilometres across land from its operations and 53 kilometres away when taking the most direct route by road. The Appellant explained it services the same geographic area and the same market as the proposed landfill, and since there is an oversupply of landfill capacity in Alberta, it expects to lose revenue due to the additional landfill. It argued, “Potential adverse economic effects are [a] sufficient pre-requisite to standing.”⁴

[9] The Appellant argued there is a strong correlation between maintaining a healthy market for industrial waste disposal and a healthy environment. It stated sufficient revenues must be generated to enable landfill operators to implement best practices and high standards, and an oversupplied market “...may encourage a race to the bottom – the cheapest prices and the cheapest methods.”⁵ The Appellant stated it has an economic interest in maintaining the viability and profitability of its business, and this concern is tied to environmental issues. It has an interest in ensuring it and other landfill operators operate in an environmentally sustainable manner and that a level playing field exists with environmental standards. The Appellant submitted these interests might be adversely affected by the proposed landfill, as its revenues and

³ Appellant’s submission, dated January 11, 2005, at paragraph 8.

⁴ Appellant’s submission, dated January 11, 2005, at paragraph 13.

⁵ Appellant’s submission, dated January 11, 2005, at paragraph 14.

the environmental and economic sustainability of industrial waste disposal in Alberta may decrease.

2. Approval Holder

[10] The Approval Holder explained the Facility has been constructed and is presently operational pursuant to the Approval. It submitted the appeal should be dismissed because a valid Statement of Concern was not filed and the Notice of Appeal does not establish standing.

[11] The Approval Holder argued that the Appellant's primary concern is "...premiered purely on the regulation of competition in a strict economic sense."⁶ It stated the Appellant's position did not involve a balancing of the economic gain from a given activity with the environmental consequences associated with the activity. It argued the issues raised are not bona fide environmental issues supported by evidence, and there was no evidence any environmental impact related to the Facility would have any impact on the Appellant's operations. The Approval Holder stated it is difficult to imagine how environmental impacts from one landfill would impede the operation of another landfill many kilometres away.

[12] The Approval Holder argued the Appellant cannot establish the necessary proximity between its Facility and the Appellant's operation to show the approved Facility will harm a natural resource used by the Appellant or the Appellant's use of that natural resource. It argued the Appellant did not "...specify how it utilizes natural resources in proximity to the Facility, how those natural resources will be impacted by the Facility, and how that impact would affect Byram's ongoing use, if any, of natural resources in proximity to the Facility."⁷ The Approval Holder stated the Appellant's operation does not involve natural resources in proximity to the Facility, and even if it did, there was no indication how the Facility would impact that use. It argued driving through an area is hardly a use of a natural resource, and even if it was, the proposed facility would not impact the Appellant's ability to drive through the area.

[13] The Approval Holder submitted any alleged economic impact results from alleged business competition, not from environmental impacts, and the evidence regarding economic

⁶ Approval Holder's submission, dated January 11, 2005, at page 6.

⁷ Approval Holder's submission, dated January 11, 2005, at page 8.

impacts is "...speculative, misleading and unsupported by substantial evidence."⁸ The Approval Holder submitted the basis for the Appellant's appeal is patently about business competition. It disagreed with the Appellant's assertions of proliferation and oversupply of landfills and that the facilities serve the same market, but it did state there would be some overlap. The Approval Holder stated it identified a need for a landfill, as a great deal of the waste from the Edson-Hinton region was transported to the West Edmonton Landfill.

[14] The Approval Holder stated the Appellant did not raise its economic objection in the letters purporting to be a Statement of Concern. According to the Approval Holder, it is difficult to assert the Director's decision was wrong when the primary concern upon which the appeal was based was never put before the Director.

[15] The Approval Holder stated the Board has considered competition in relation to bottle depots, but the Board requires sufficient evidence that the new depot in fact economically impacted the parties. The Approval Holder distinguished the bottle depot cases from the present case "...as the regulatory mandate of Alberta Environment ... required it to consider the number and location of bottle depots pursuant to a regulated recovery system. Since 1997, it has no longer been the mandate of Alberta Environment to regulate the density of bottle depots."⁹

[16] The Approval Holder submitted there is a minimum standard of evidence required for an appellant to establish it is directly affected, and it was not enough for the Appellant to merely indicate it operates a landfill some distance away and to make unsubstantiated assertions that approving one facility may make it impossible for another facility to sustain itself and meet its environmental obligations. The Approval Holder explained operators of landfills are required to post security to ensure environmental obligations are met. It argued that if the Appellant's "...position is so tenuous that some impact to its market share (which could arise for any number of reasons) would mean that it could no longer meet its environmental obligations with its landfill, then Alberta Environment should investigate the situation."¹⁰

⁸ Approval Holder's submission, dated January 11, 2005, at page 7.

⁹ Approval Holder's submission, dated January 11, 2005, at page 9.

¹⁰ Approval Holder's submission, dated January 11, 2005, at page 10.

[17] The Approval Holder argued the Appellant did not provide sufficient supporting information regarding the economic impacts. The Approval Holder submitted it "...is not within AENV's legislative mandate to regulate the market share of approved landfills, thereby insulating them from fair competition, such that every facility approved by Alberta Environment could be appealed by competitors, purely in a transparent attempt to gain commercial advantage."¹¹

3. Director

[18] The Director submitted the Appellant is not directly affected, and therefore, the appeal should be dismissed.

[19] The Director stated the Appellant argued it would suffer economic loss due to the Approval. However, according to the Director, the Appellant failed to show the Facility would harm a natural resource the Appellant uses or harm the Appellant's use of a natural resource. The Director distinguished the Board's previous decision, *Gadd*,¹² as "...there were direct potential economic consequences arising from environmental effects."¹³

[20] The Director argued the route to harm the Appellant is not within reason nor plausible. He stated there is no connection between the effects on the environment and the economic effects on the Appellant. The Director stated the Appellant is not a neighbour as it is located 50 kilometres away from the approved Facility, and he then argued the Appellant does not use the area directly affected by the approved Facility. Therefore, according to the Director, the Appellant did not assert standing based on geographic proximity.

[21] The Director argued the Appellant asserted an "...economic interest couched in environmental objectives. The Wasteworks' Landfill may harm Byram's markets, which may affect Byram's ability to discharge its environmental obligations...."¹⁴ He argued a "... genuine

¹¹ Approval Holder's submission, dated January 11, 2005, at page 11.

¹² *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 ("*Gadd*"); affirmed at *Cardinal River Coals Ltd. v. Environmental Appeals Board (Alberta)* (4 November 2004), Edmonton 0403 18462 (Alta. Q.B.).

¹³ Director's submission, dated January 11, 2005, at paragraph 12.

¹⁴ Director's submission, dated January 11, 2005, at paragraph 15.

interest is not the same as a direct effect.”¹⁵ He submitted the proliferation of landfills may demonstrate the interest of a citizen but it does not discernibly affect the Appellant.

[22] The Director stated the Appellant’s arguments are purely economic, and both the cause and the discernible effect are financial. He stated the Appellant has a genuine interest in the Facility because of its potential economic consequences, but this does not mean the Appellant is directly affected for the purposes of EPEA.

[23] The Director summarized the Appellant’s argument, stating the premise is that there is an oversupply of landfill capacity, and the proposed Facility will contribute to the overcapacity, which will lead to the depression of revenue, and this may affect the Appellant’s and Approval Holder’s ability to properly operate their landfills. He argued if there was evidence of this, the result of competition from the proposed Facility is an indirect effect, as the potential harm to the Appellant does not arise from any environmental effects.

[24] The Director stated the indirect effects result from consumers buying from the Approval Holder instead of from the Appellant, requiring the Appellant to lower its prices to attract consumers, reducing its revenues, and the reduction in revenues may cause the Appellant to lower its operating standards. He stated these are secondary consequences arising from the consumer’s business decision to patronize the Approval Holder, but “...there is no connection whatsoever between the environmental impacts of Wasteworks’ Landfill [(the Facility)] and the economic effects on Byram.”¹⁶ (Emphasis deleted.)

[25] The Director stated none of the environmental effects of the Approval Holder’s Facility would have any discernible impact on the Appellant, as the Appellant does not use or rely upon any natural resources in the immediate proximity of the Facility.

[26] The Director submitted the appeal process under EPEA was not intended to be a forum for regulating the marketplace or competition, and although certain regulatory schemes have expressly incorporated market considerations, this exceptional treatment does not apply to landfills. He submitted it is left to the proponent to review for market sustainability.

¹⁵ Director’s submission, dated January 11, 2005, at paragraph 16.

¹⁶ Director’s submission, dated January 11, 2005, at paragraph 24,

[27] The Director argued the Appellant may be affected by the proposed Facility, but it is not directly affected and in a manner that is the proper basis for an appeal.

B. Legislation and Previous Cases

[28] Before the Board can accept a notice of appeal as being valid, the person filing the notice of appeal must show that it is directly affected. Under section 95(1)(a) of EPEA, a person who is directly affected by the decision of the Director, here the issuance of the Approval, has the right to file a notice of appeal with the Board.¹⁷ The Board has examined the term “directly affected” in numerous previous appeals, providing a framework to determine if appellants 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.¹⁸

[29] 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*,¹⁹ the Board stated “...the word ‘directly’ requires the Appellant to establish,

¹⁷ 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).

¹⁸ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

¹⁹ *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*”).

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.”²⁰

[30] The principle 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.

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.”²¹

[31] 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.”²² In *Kostuch*, the Board considered its previous decision in *Ross*,²³ 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.”²⁴

²⁰ *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.)).

²¹ *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.).

²² *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) (“*Ross*”).

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

²⁴ *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.)).

[32] Further, in *Kostuch* the Board stated 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.”²⁵

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.”²⁶

[33] A similar view was expressed in *Paron* where the Board held 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.”²⁷

[34] *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

²⁵ *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.)).

²⁶ *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.)).

²⁷ *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*”).

affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”²⁸

The Board’s Rules of Practice also make it clear the onus is on the Appellants to prove they are directly affected.²⁹ The onus or burden of proof issue, in a slightly different context, was upheld by the Court of Queen’s Bench.³⁰

[35] In the *Court*³¹ 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

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 24 (A.E.A.B.).

²⁹ 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.”

³⁰ 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.).

³¹ *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.).

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 ‘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.”³²

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.). 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 e. 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*

[36] 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....”³³

[37] When assessing the directly affected status of an appellant, the Board determines 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 assesses 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 these 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 it is directly affected.³⁴

[38] The Court of Queen’s Bench in *Court*³⁵ 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.

[39] The effect does not have to be unique in kind or magnitude.³⁶ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest that the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.³⁷ Under the *Water Act*, R.S.A. 2000, c. W-3, and EPEA, the Legislature chose to

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.)).

³³ *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.).

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. (4d) 71 (Alta. Q.B.).

³⁵ *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.).

³⁶ 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.).

³⁷ 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 (A.E.A.B.)). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals*

restrict 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.

[40] 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 the appellant claims to be affected is supported by the statutes, such as being included in the purpose section of EPEA. The interests identified in the Act include the protection of the integrity of the environment, human health, economic growth, and sustainable development.³⁸

Division, Environmental Protection (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

³⁸

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."

C. Analysis

[41] The Appellant's basis for its appeal is that competition resulting from the Approval Holder's Facility would reduce revenue for the Appellant, and if revenues declined, then the Appellant could, at best, only maintain the minimum levels of environmental protection required under its approval. Essentially, the Appellant argued there would be an indirect environmental effect as a result of a direct effect on its revenue.

[42] The Appellant distinguished the present case from a recent Board decision, *Gadd*,³⁹ in which the appellant was granted standing based on economic impacts. The Appellant explained that, in *Gadd*, the appellant argued the construction of a coal haul road would have detrimental effects on the environment, and as the appellant was a nature guide in the area, his business would be negatively impacted by the effect of the haul road on the wilderness experience in the area. Essentially, in *Gadd*, it was argued the haul road would have a direct effect on the environment that would, indirectly, affect his economic interest in the area. The Appellant compared that case to the present situation, explaining the Facility would have a direct effect on the economic interests of the Appellant that would, conceivably, indirectly affect the environment, as the Appellant would reduce its environmental standards to the minimum required as profits decreased.

[43] The Appellant operates a landfill approximately 50 kilometres from the Approval Holder's Facility. The Appellant stated 60 to 80 percent of its business is a Class II⁴⁰ landfill, and the remainder is Class I.⁴¹ The Approval Holder's operation is a Class II landfill and

³⁹ *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 ("*Gadd*"); affirmed at *Cardinal River Coals Ltd. v. Environmental Appeals Board (Alberta)* (4 November 2004), Edmonton 0403 18462 (Alta. Q.B.).

⁴⁰ A Class II landfill is defined in the *Waste Control Regulation*, Alta. Reg. 192/1966, (the "Regulation") as "...a landfill for the disposal of waste, not including hazardous waste."

⁴¹ A Class I landfill accepts hazardous waste and is defined in the Regulation as including Class I(a) landfill and Class I(b) landfills:

"Class I(a) landfill means a landfill for the disposal of waste and that has

- (i) two liners of which at least one is a synthetic liner,
- (ii) a leachate collection and removal system,
- (iii) a leak detection system between the two liners, and
- (iv) a groundwater monitoring system;

Class I(b) landfill means a landfill for the disposal of waste and that has

includes a fixed facility for biologically treating waste. Therefore, the portion of the Appellant's operations that could be affected from the Approval Holder's Facility is the Class II landfill. The Class I landfill portion of the Appellant's operation should not be economically affected by the Approval Holder's Facility, as its client base would not be the same.

[44] The Board's role is to determine if a proposed project will have an environmental effect, and whether the appellant has provided sufficient evidence to demonstrate it will be directly affected or its use of the environment will be affected by the proposed project.

[45] Even though the courts have determined the Board should allow an appellant to be heard if there is a potential effect, the Board cannot grant directly affected status on speculation. In this case, the Appellant is speculating its customer base will be affected, but it has not provided any concrete evidence this will happen. The Appellant anticipated a 20 to 50 percent decline in its business as a result of the Approval Holder opening its Facility 50 kilometres away. However, the Appellant could not produce evidence of this decline in business, only speculation based on uncollaborated information.⁴² The Appellant stated there has

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- (i) a synthetic or clay liner,
 - (ii) a leachate collection and removal system, and
 - (iii) a groundwater monitoring system."

⁴² Preliminary Meeting tape, January 21, 2005. At the Preliminary Meeting, the Appellant provided the following answers to questions of the Board:

“Mr. Schulz: So what is your sense in terms of market share that you might, just roughly, this might be proprietary, what is the sense you might lose?”

Mr. Kalita: The indications that we're getting from our sales representatives at this point, sir, are that we are potentially, stand to potentially lose, if we don't reduce, substantially reduce our tipping fees, 20 to 50 percent of our Class II disposal market.”...

“Dr. Naeth: When you were answering Mr. Schulz's questions, you said, I believe, that you could lose 20 to 50 percent of your Class II disposal market. Can you just tell me; first, are those the correct numbers that you used?”

Mr. Kalita: Those are the correct numbers that we used, Madam Chair. That is anecdotal speculation.

Dr. Naeth: Okay. Because I was just going to ask you where you got that information.

Mr. Kalita: From our sales representatives who are working the market place and who are currently being approached by numerous long standing customers that we have had in the area and being pressured to say, ‘Well, there's this new facility. It's a bit closer. How much can you drop your rate to be competitive? How much can you reduce and match your disposal costs to pick up the differential in the trucking?’

We've got numerous calls from some of our better customers in the area that are, pardon the expression, trying to grind for better pricing, as a result of an

been a decline in its business since the Approval Holder's Facility began operating, but no data were provided to support this position. The Board recognizes the facility has only been operational for approximately two months, but any hard data would have supplemented the Appellant's position; even studies related to other operations would have been helpful. The Board acknowledges it is possible some customers will go to the new Facility, but it does not mean the Appellant will suffer economic hardship as a result. Competition in the market will determine how many operations can succeed. The Board's role is not to ascertain the saturation point of a specific market.

[46] The Appellant argued economic factors would result in the operations lowering their environmental protection efforts. Regardless of how many operations are in existence, all of them must operate according to the terms and conditions of their approvals and licences. They are required to meet the standards indicated in their approvals: non-compliance is not an option.

[47] The Appellant used a very simplistic model when he explained the economic effect on the environment. There are other factors that will come into play in the economic market. What a company does with its industrial solid waste is governed by economics. As described by the Approval Holder at the Preliminary Meeting, some companies have determined the most economical way to handle the waste is to leave it where it is. As tipping fees decline, there may be an increase in the customer base. However, customers that determined it was not economical to remove the industrial waste and transport it to a landfill might reassess their practices. This would be beneficial to the environment as less waste is left onsite and more is removed and contained in a landfill.

[48] Although the Appellant may be required to reduce its tipping fees, thereby reducing the profit margin for an individual transaction, if more customers start using the facility that would not have previously done so, then the total profit would still be the same, just spread over a larger customer base.

already discounted market rate that we are offering. Just in way of perspective, we are currently offering disposal rates to these companies in general at roughly 20 percent off our list rate, and we are being pressured to reduce another 40 percent of that discounted rate, pardon me, 25 percent of the discounted rate to match and remain competitive. And the threat is, quite frankly, well either drop

[49] The Appellant expressed concern that the level of environmental protection will decline as revenues decrease from lowered tipping fees. However, as stated, any landfill operating under an approval must abide by the conditions included in that approval. That would be the minimum operating level allowed for the facility, and if the facility cannot meet the conditions in the approval, then Alberta Environment can take the necessary steps to ensure the environment is protected. The Board commends the efforts taken by the Appellant to exceed the minimum environmental standards and hopes the Appellant will continue its efforts to take a proactive approach in protecting the environment. The Board agrees with the Appellant that alternatives to landfills must still be sought and encouraged. However, there are other options available to Alberta Environment to achieve this goal, rather than allowing operators to use the Director and the Board to attempt to regulate competition.

[50] Another factor that was not considered in the Appellant's economic analysis is the role of Alberta Environment. If the environmental standards start to decline at landfills in the Province, Alberta Environment could increase the minimum standards that must be maintained. This is an added check and balance system to ensure environmental protection is maintained.

[51] The Director stated he does not have the expertise to review the economics of a proposed project. It might be more accurate to state the Director has no guidance in how to review the economic aspect of an application. He asks for information regarding the need of the project, but it appears this information is not used in his assessment of whether the approval should be issued. It appears the Director does not consider whether the project is a good choice for Albertans; he simply checks to ensure the criteria are met and does not consider the bigger picture.

[52] Environmental effects as a result of economics are a valid concern. One of the purposes of EPEA, as stated in section 2(b) is "...to support and promote the protection, enhancement and wise use of the environment while recognizing ... 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...."

This suggests to the Board an obligation on the Director's part to assess economics when reviewing an application.

[53] The Board has in previous decisions determined a person is directly affected based on direct environmental impacts and direct economic impacts as a result of environmental impacts, but the Board also sees there is the possibility of a direct economic impact with an indirect environmental impact being the basis of standing. Indirect environmental effects can be just as significant as direct environmental impacts.

[54] Therefore, it is important for the Director to at least consider the economics of a proposal, since there is a possibility economic effects may ultimately impact the environment. If an environmental impact assessment had been required, the economics of the proposal, as well as alternatives, would have been analyzed, and Alberta Environment would have had to review the analysis for accuracy and credibility. This indicates there are people available to the Director that have the skills necessary to review the economic analysis of an application. This does not mean the Director, must have a complete economic analysis as part of every application, but he should at least have a cursory analysis completed to determine if there is a possibility economic effects might have environmental consequences.

D. Summary

[55] The Appellant in this case presented a unique, and potentially viable argument regarding indirect effects on the environment. The Appellant argued that economics could affect the amount of resources used to protect the environment; if profits decline, a company would be less willing to go beyond the minimum to protect the environment. Although the Board can see some merit to this argument, based on the evidence presented before it, the Board rejects the argument. To convince the Board that such an argument is viable, the Appellant would have to provide better evidence of this potential effect. Anecdotal evidence is not sufficient to convince the Board this might occur. The Appellant referred to cases in the United States that demonstrate the economic effect on the environment, but the cases were not cited or provided to the Board. The Board needs this type of documentation and evidence to enable it to make the best decision possible. Without this information, the Board only has speculation and hypothetical scenarios to

rely on, and cannot thus consider granting standing. Therefore, considering the witnesses and the testimony, the Board finds the Appellant is not directly affected for the purposes of this appeal.

E. Additional Comments

[56] The Board notes the Parties' use of the terms biodegradation and bioremediation. Throughout the Preliminary Meeting, the Parties used these two terms interchangeably. These words have distinct and different meanings. According to *Merriam Webster Dictionary*, bioremediation means "the treatment of pollutants or waste (as in an oil spill, contaminated groundwater, or industrial process) by the use of microorganisms (as bacteria) that break down the undesirable substances," whereas biodegradation is the breaking down "...especially into innocuous products by the action of living things (as microorganisms)." The Approval has "biodegradation area" defined as "...that portion of the waste management facility that aerobically biodegrades non-hazardous and non-dangerous hydrocarbon contaminated material in a contained and controlled environment." The terms must be used correctly to ensure the intent is clear to all, including the public.

III. STATEMENT OF CONCERN

A. Submissions

1. Appellant

[57] The Appellant explained it filed a Statement of Concern within the statutory time limit, but the Director decided it was not directly affected. The Appellant stated the statute does not require any action or decision on the part of the Director to enable the Appellant to have standing before the Board. It submitted an administrative board cannot fetter its decision by a statutory delegate whose decision is under review.

[58] The Appellant stated "...the Board is bound by judicial precedent, not the Director's decisions."⁴³ It further stated the Board's decision determines standing to bring an appeal rather than promoting participation in administrative decision-making. It stated the Board may have more evidence available to it than the Director had at the time he made his decision, and the Board has the benefit of testing the evidence in an adversarial proceeding and of receiving legal arguments from all parties to the appeal.

2. Approval Holder

[59] The Approval Holder submitted the two letters filed by the Appellant to the Director failed to establish that the Appellant was directly affected by the application, and therefore, the Director was correct in dismissing the letters for not meeting the requirements of a Statement of Concern. The Appellant had two opportunities to provide adequate information to constitute a Statement of Concern, but it failed to provide the detail requested.

[60] The Approval Holder submitted that when the Board assesses whether the Director was correct in finding the information failed to constitute a Statement of Concern, it should consider the information contained in the two letters rather than the information subsequently provided. The letters provided by the Appellant lacked the information necessary to establish a reasonable prospect that it used natural resources in proximity to the facility and those natural resources or their use would be directly and adversely impacted by the environmental effects associated with the construction and operation of the facility.

[61] According to the Approval Holder, section 95(2)(d) of EPEA allows the Board to consider new evidence not available to the Director at the time of his decision. The Approval Holder argued further information would not be new information and would have existed at the time the second letter was submitted. It submitted that if the Board accepts this information at this stage, it would be extending the 30-day deadline for submitting Statements of Concern. It stated this would result in allowing parties "...to submit limited information in a statement of

⁴³ Appellant's submission, dated January 11, 2005, at paragraph 21.

concern, secure in the knowledge that even if the Director dismissed the statement of concern, the process could be revived by filing further information in a notice of appeal.”⁴⁴

[62] The Approval Holder argued that even though the legislation empowers the Board to consider new evidence not before the Director, this is a discretionary power, and there is clearly an opportunity for an abuse of the *de novo* appeal process when a party fails to put forward evidence readily available at the time to support a Statement of Concern but seeks to present the evidence before the Board. It argued that even if the Board finds the additional information presented establishes standing, unless that evidence could not have been presented when the Appellant submitted the two letters, then the decision of the Director to reject the submissions as a Statement of Concern must be upheld. It stated that if no valid Statement of Concern was filed, then one of the two criteria in section 91(1)(a)(i) has not been met.

3. Director

[63] The Director stated he advised the Appellant that he was rejecting its written submission as a Statement of Concern on the basis the Appellant was not directly affected by the proposed landfill. He stated the person filing a Notice of Appeal must demonstrate it is directly affected, and even though the person has gone through a similar process with the Director, the Director’s decision has no effect on the Board’s position. He stated the Director’s decision does not bind the Board, and the Board has the jurisdiction to review the Director’s decision, decide whether the Statement of Concern filer is directly affected, and determine whether the Statement of Concern is sufficient.

[64] The Director stated the Board has unfettered discretion to decide if the Appellant is directly affected for the purposes of the appeal, and therefore, the Board is not bound by the Director’s decision. He submitted the Board must consider his reasons, because they are relevant, but the Board is free to accept or reject them.

[65] The Director distinguished his decision-making function from the appellate function of the Board. He explained he is engaged in a non-adversarial information gathering process, and public input in the decision-making process is encouraged. The Director stated the

⁴⁴ Approval Holder’s submission, dated January 11, 2005, at page 14.

Board adjudicates an appeal in an adversarial setting. Therefore, according to the Director, different considerations apply to each level, and the Board is not and should not be obligated to make the same finding as that of the Director.

B. Discussion

[66] As the Board has found the Appellant is not directly affected, the issue of whether the letters filed with the Director constituted a valid Statement of Concern does not have to be considered by the Board. However, two matters raised about the handling of the Statement of Concern letters should be dealt with.

[67] At the Preliminary Meeting, the Director explained he rejected the letters provided by the Appellant as a valid Statement of Concern. He based his decision on the proximity of the Appellant's facility to the proposed Facility. The Director stated that although he did not accept the letters as a Statement of Concern, he did review the information provided. He explained the letters contained technical information, so he forwarded the letters to staff in Alberta Environment with the technical expertise to review the information. The Board hopes this is the standard procedure for the handling of Statements of Concern that are not deemed valid. Regardless of whether an individual is directly affected for the Director's purposes, the person filing the Statement of Concern can have valuable information included in their submission. The Director's role is to make the best approval possible, and if the information is relevant, it should be considered.

[68] The Board understands the Approval Holder was willing to respond to the Appellant's concerns and had drafted a response letter, but as soon as it was told the Director was not accepting it as a valid Statement of Concern, the Approval Holder abandoned the letter. The Board is concerned, as this approach is not the way to promote good business relationships and public relations. Whether a competitor or an interested person expressed the concerns should not matter, the Approval Holder should have responded to their concerns. Lack of communication is often what results in appeals being filed. Even though the Appellant may still have filed its appeal, the Parties would have benefited from a discussion of the identified concerns. The Board does not expect the Approval Holder to reveal proprietary information, but the concerns could have been addressed.

[69] As discussed in previous decisions, the Board is not bound by the decision of the Director to accept a Statement of Concern or whether a person is directly affected.⁴⁵ The Board agrees with the Director's analysis that it has unfettered discretion to decide if an appellant is directly affected for the purposes of an appeal.

IV. HEARING ISSUES

A. Submissions

1. Appellant

[70] The Appellant did not provide any submissions regarding the issues to be heard at the hearing, should one be held.

2. Approval Holder

[71] The Approval Holder submitted that only issues that relate to impacts of a natural resource used by the Appellant or the Appellant's use of that natural resource should be considered at a hearing. It stated economic impacts resulting from fair competition should not be considered.

3. Director

[72] The Director submitted that, if a hearing should be held, the issues considered should be concerned with those effects on the environment that will potentially harm the Appellant.

⁴⁵ See: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D, and *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment re: St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.).

B. Discussion

[73] The Board will not make any determination of the issues, as the Board has determined the Appellant is not directly affected and the appeal is not properly before the Board. Therefore, no hearing will be held.

V. MOOTNESS

A. Submissions

1. Appellant

[74] The Appellant submitted there is no valid issue regarding mootness, including those related to siting, design, and construction of the Facility. It stated the Board addressed the issue in its November 24, 2004 letter.⁴⁶

2. Approval Holder

[75] The Approval Holder submitted the argument of mootness is applicable where relief is sought to forestall environmental effects that have already occurred due to construction at the Facility. It stated the Facility has already been constructed and the environmental impacts of construction have already occurred. According to the Approval Holder, the grounds relating to the ongoing operation and monitoring of the Facility are not moot, but those grounds pertaining to the construction of the Facility are moot.

[76] The Approval Holder argued that, "...given that the Appellant has failed to provide any compelling evidence that the construction or operation of the Facility adversely affects a natural resource used by the Appellant, or its use of that resource, then the relief sought cannot possibly have any 'real effect' on that use."⁴⁷ It submitted a decision of the Board to

⁴⁶ The Appellant referred to the following sentence in the Board's November 24, 2004 letter:

"It is up to the approval holder if they wish to proceed with construction of the landfill and take the risk that they will be required to redesign or even dismantle the landfill if the appeal is successful."

⁴⁷ Approval Holder's submission, dated January 11, 2005, at page 17.

address environmental impacts can have no real effect on a party that does not use that natural resource.

[77] The Approval Holder stated Alberta Environment does not have a mandate to regulate competition and to protect existing landfills from new facilities. It submitted the more appropriate forum to address the concerns of alleged oversupply and proliferation is the local government charged with regulating land use designations and issuing development permits, which in this case is the Municipal District of Yellowhead.

[78] The Approval Holder explained the Municipal District of Yellowhead held a public hearing relating to the land use re-designation. It stated there was considerable interest and numerous submissions, but no submission was made by the Appellant's representative. The Approval Holder stated the Appellant did not provide an objection when a notice calling for concerns was advertised. It argued the "...appeal represents an inappropriate collateral attack upon the local government approvals, which could have addressed and considered those issues, in a more appropriate forum, had they been raised."⁴⁸ It stated the Appellant elected not to raise concerns before a more appropriate body and as those approval processes are now complete, the economic issue is now moot unless the Board sees fit to regulate competition and the resulting commercial considerations such regulation entails.

3. Director

[79] The Director argued the mere construction of an approved project does not render the Appellant's issues moot. He submitted that section 100 of EPEA provides that the Minister can reverse an approval and in "...order to give that power any effect or meaning, it must include the power to reverse the effect of an approval. Otherwise, the appeal system would be undermined."⁴⁹

⁴⁸ Approval Holder's submission, dated January 11, 2005, at page 17.

⁴⁹ Director's submission, dated January 11, 2005, at paragraph 38.

B. Legal Framework

[80] The Courts have analyzed the issue of mootness. In the leading case, *Borowski v. Canada (Attorney General)* (No. 2),⁵⁰ the Court stated that “...if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.”⁵¹ It stated a court may decline to decide a case which raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, the Alberta Court of Appeal stated, “...an appellate court cannot order a remedy which could have no effect.”⁵²

[81] The Supreme Court of Canada has identified a two-step process in assessing if a moot issue should be heard. The first is to determine whether the tangible and concrete dispute has disappeared and the issue is now legally or factually moot, thus making the issue academic. If the answer is yes, then it is necessary to determine if the court should exercise its discretion to hear the case. The Court stated that a case is moot when it fails to meet the “live controversy” test. The court in *Borowski* stated the matter was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.⁵³

[82] In *Borowski*, the court set out a process to determine when, even though the issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. Whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. Whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical effect on the rights of the parties?) (judicial economy); and
3. Whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

⁵⁰ [1989] 1 S.C.R. 342 (“*Borowski*”).

⁵¹ *Borowski v. Canada (Attorney General)* (No. 2), [1989] 1 S.C.R. 342 at paragraph 15.

⁵² *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

⁵³ *Borowski* was asking the court to declare section 251 of the Criminal Code invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

[83] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. For the second part of the test, judicial economy, the court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate. The third step is for the decision-maker to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

C. Discussion

[84] Section 95(5)(a) of EPEA states:

“The Board

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

[85] The Board has considered when an issue is moot in previous decisions. For example, in the *Butte Action Committee*,⁵⁴ the Board stated:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”⁵⁵

[86] The moot issue was also discussed in *Kadutski*,⁵⁶ where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect.”⁵⁷

⁵⁴ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

⁵⁵ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

⁵⁶ *Kadutski v. Director, Northeast Boreal Region, Natural resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

⁵⁷ *Kadutski v. Director, Northeast Boreal Region, Natural resources Service, Alberta Environment re: Ranger*

[87] Pursuant to section 100 of EPEA, the Minister could accept the Approval as issued, accept the Approval with changes in the conditions, or reject the Approval in its entirety. In this case, the Approval Holder chose to build the Facility before the Minister made his final decision. If the Minister decided to change the conditions of the Approval, the Approval Holder would be required to make modifications to the Facility to ensure it complied with the Approval as amended. This would add costs to the Facility that the Approval Holder would have to bear. If the Approval was revoked, which it is not in this case, the Approval Holder would have incurred the costs of building the Facility and, thus, would not have the benefit of using it for the purpose intended. That was the risk the Approval Holder was willing to take in this case.

[88] The issues of the site of the Facility and the design are not moot, even though the Facility has been built. If the Minister determined there were environmental effects caused by the location or design of the Facility, he could require the site be moved or redesigned to minimize environmental impacts. If this should occur, the conditions in the Approval relating to the construction of the Facility would still be applicable and subject to revision by the Minister. Therefore, the Approval Holder's arguments that some of the issues are moot are not supported by the circumstances of this case.

[89] That being said, the Board has determined the Appellant is not directly affected and the appeal is not properly before the Board, so no further discussion is required on the matter of mootness.

VI. DECISION

[90] Pursuant to section 95 of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal of Byram Industries Services Ltd., as it is not directly affected by the decision of the Director to issue Approval No. 203668-00-00 to Wasteworks Inc.

VII. COSTS

[91] The Approval Holder advised in their written submission for the Preliminary Meeting that they may wish to make an application for costs. The Board requests that should the Approval Holder wish to proceed with their application, they are to provide their application for costs to the Board within two weeks of the date of this Decision. The Board will then provide the Parties with an opportunity to respond to the application before making its decision on costs.

Dated on April 28, 2005 at Edmonton, Alberta.

“original signed by”

Dr. M. Anne Naeth
Panel Chair

“original signed by”

Mr. Al Schulz
Board Member

“original signed by”

Dr. Harrie Vredenburg
Board Member