ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – February 8, 2007
Date of Decision – May 2, 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 appeals filed by Roxanne Walsh and Linda Abrams with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 1242-01-05 issued to the Town of Turner Valley by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Walsh and Abrams* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (2 May 2007), Appeal Nos. 06-071 and 072-ID1 (A.E.A.B.).

PRELIMINARY MEETING BEFORE: Dr. Steve E. Hrudey, Chair,
Mr. Ron V. Peiluck, Vice Chair, and
Mr. Alex MacWilliam, Board Member.

APPEARANCES:

Appellants: Ms. Roxanne Walsh and Ms. Linda Abrams.

Director: Mr. David Ardell, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Approval Holder: Town of Turner Valley, represented by Mr. Hugh Ham and Ms. Bonnie Anderson, Municipal Counsellors.

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer, Ms. Denise Black, Board Secretary, and Ms. Marian Fluker, Associate Counsel.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to the Town of Turner Valley authorizing the construction, operation, and reclamation of a waterworks system. Specifically, the Amending Approval allows for the construction of a raw water storage reservoir. The raw water storage reservoir will supply the Town's potable water treatment plant, which provides the municipal water supply to the Town's residents.

The Environmental Appeals Board received Notices of Appeal from Ms. Roxanne Walsh and Ms. Linda Abrams. A number of preliminary motions were raised by the participants, the majority of which challenged the standing of Ms. Walsh and Ms Abrams. A Preliminary Meeting was held on February 8, 2007, to address these preliminary motions.

The Board found that Ms. Abrams was not directly affected for the purposes of these appeals because she lives and works in the Town of Black Diamond, and no evidence was provided that water from the reservoir will be distributed to the Town of Black Diamond at the present time. The Board also found there were no special circumstances to extend the time for Ms. Abrams to file a Notice of Appeal or to allow her to appeal without having filed a Statement of Concern. Therefore, her appeal was dismissed.

The Board found Ms. Walsh, a resident of Turner Valley, directly affected because she does use the municipal water supply for Turner Valley, and therefore the Board will hear her appeal.

The Board accepted the Town of Turner Valley's offer to refrain from using water from the raw water storage reservoir until August 15, 2007, or until the Minister releases his decision following a hearing and his decision allows the continued use of the raw water storage reservoir, whichever occurs first. Therefore, the issue of the stay did not have to be considered.

The Board did not have the authority under the legislation to consider the request for security in relation to the Amending Approval.

The Town of Turner Valley argued the Amending Approval was not required for the construction of the raw water storage reservoir, but based on the definitions in the legislation the

Board did not agree. A raw water reservoir is an activity as defined in the legislation and an Amending Approval is required for this project.

The Board also determined the issues to be heard at the hearing of Ms. Walsh's appeal will be:

1. Is the Amending Approval sufficient to protect the Town of Turner Valley's water supply from contamination to ensure a safe water supply?
2. Is using clay from the site as a liner for the raw water storage reservoir the best practicable technology to protect the stored raw water from contamination arising from previous industrial activity?
3. Was the testing, investigation, and remediation of the site prior to and during construction adequate to identify risks from possible contaminants onsite, including the possible contamination of onsite clay used for the construction of the liner?

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I. BACKGROUND

[1] On September 8, 2006, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 1242-01-05 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to the Town of Turner Valley (the "Approval Holder" or the "Town") authorizing the construction, operation, and reclamation of a waterworks system for the Town of Turner Valley, Alberta. Specifically, the Amending Approval allows for the construction of a raw water storage reservoir (the "Reservoir"). The Reservoir will supply the Town's potable water treatment plant, which provides the municipal water supply to the Town's residents.

[2] On October 13 and 17, 2006, the Environmental Appeals Board (the "Board") received Notices of Appeal from Ms. Roxanne Walsh and Ms. Linda Abrams (the "Appellants") appealing the Amending Approval.

[3] On October 13 and 23, 2006, the Board wrote to the Appellants, the Approval Holder and the Director (collectively the "Participants") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the record (the "Record") relating to these appeals, and that the Participants provide available dates for a mediation meeting, preliminary meeting, or hearing.

[4] 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.

[5] On October 18, 2006, Ms. Walsh applied for a Stay of the Amending Approval, and the Board determined there was sufficient information to consider granting a Stay. However, before making its determination, the Board requested the Approval Holder and Director provide written submissions responding to the Stay application. The Director and Approval Holder provided their responses on October 27 and 30, 2006, respectively, and final submissions were received from Ms. Walsh on November 10, 2006.

[6] On October 27, 2006, the Director notified the Board that Ms. Abrams had not filed a Statement of Concern and the issues raised in her Notice of Appeal would more properly apply to a separate application for an approval and that no such application had been filed with Alberta Environment.

[7] On November 10, 2006, the Approval Holder wrote to the Board and raised the question as to whether the Amending Approval was required, rendering the appeals and Stay issue moot. On November 10, 2006, based on the suggestion by the Approval Holder that the Amending Approval was not required, the Board asked the Approval Holder to notify the Board if it intended to make a request to the Director to cancel the Amending Approval.

[8] On November 14, 2006, the Approval Holder requested that the Board hear arguments on the standing of Ms. Walsh to bring a Stay application, the status of the Statement of Concern which should have been filed by Ms. Walsh, and that security be posted by Ms. Walsh to indemnify the Approval Holder against losses attributed to any delay.

[9] On November 17, 2006, the Approval Holder made additional preliminary motions, specifically with respect to the jurisdiction of the Appellants to file the Notices of Appeal.

[10] On November 20, 2006, the Board received a copy of the Record from the Director, and on November 22, 2006, copies were forwarded to the Appellants and the Approval Holder.

[11] On December 14, 2006, the Board notified the Participants that a Preliminary Meeting would be held on February 8, 2007, to hear oral arguments on the following issues:

> "1. the Stay request filed by Ms. Walsh;
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> 2. Ms. Graham's motion of October 27, 2006, that Ms. Abrams did not file a Statement of Concern;
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> 3. whether Ms. Abrams' appeal was filed late (see the Board's letter of October 23, 2006);
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> 4. Ms. Graham's motion of October 27, 2006, that the issues stated in Ms. Abrams' Notice of Appeal are not related to the current Amending Approval before the Board, that these issues would be the subject of a separate application to the Director for an approval, and that such an application for an approval has not been filed with Alberta Environment;

5. Ms. Anderson's motion of November 9, 2006, that an Amending Approval may not have been required, rendering the appeals and stay issue moot;
6. Ms. Anderson's motions of November 14, 2006, regarding the standing of Ms. Walsh to bring a stay application;
7. Ms. Anderson's motion of November 14, 2006, regarding the status of the Statement of Concern which should have been filed by Ms. Walsh;
8. Ms. Anderson's motion of November 14, 2006, regarding the request that security be posted by Ms. Walsh to indemnify the Town against losses attributed to any delay;
9. Ms. Anderson's motion of November 17, 2006, regarding the jurisdiction of Ms. Walsh to file a Notice of Appeal;
10. Ms. Anderson's motion of November 17, 2006, regarding the jurisdiction of Ms. Abrams to file a Notice of Appeal; and
11. the issues to be heard at a hearing should one be heard."

The letter also set the procedures for the Preliminary Meeting, including the requirement that written submissions be provided to the Board and the other Participants by January 24, 2007. The Board also requested that the Approval Holder provide a further explanation of its motions regarding "the status of the Statement of Concern which should have been filed by Ms. Walsh," and "the jurisdiction of the Appellants to file a Notice of Appeal."

[12] On December 20, 2006, counsel for the Approval Holder stated it would not be able to provide a further explanation of its motions until closer to the January 24, 2007 deadline, and it asked whether the Appellants would provide copies, prior to the Preliminary Meeting, of any new material they would be relying upon. The Board responded on January 12, 2007, explaining that it required a further explanation of the Approval Holder's motions in order to conform to the principles of natural justice by providing the other Participants with sufficient information and time to prepare an adequate response to the motions. The Board also explained the purpose of the written submissions was to have the Participants submit any supporting documents that they intended to rely on at the Preliminary Meeting, as well as to include all of the evidence and arguments they intended to rely on to present their case, and all of the evidence and arguments that could reasonably be anticipated to respond to the submissions of the other Participants. The Approval Holder provided its explanation of its motions to the Board on January 16, 2007. It stated issue 7 no longer had to be addressed. It clarified that issues 9 and 10 were meant to address whether Ms. Walsh and Ms. Abrams meet the Board's directly affected

test and whether the grounds of appeal in their Notices of Appeal relate to the Amending Approval.

[13] Other procedural matters were resolved on December 22, 2006. [1]

[14] In its January 16, 2007 letter, the Approval Holder objected to the potential for persons without standing to participate in the matter and to obtain a Stay without the basis of their request being examined.

[15] On January 22, 2007, the Board provided a response to the Approval Holder's January 16, 2007 letter. It clarified the issues to be heard, taking into account the Approval Holder's explanations. In response to the Approval Holder's concern that a Stay may be granted without Ms. Walsh being subject to cross-examination, the Board revised its Preliminary Meeting procedure to allow for the Appellants to present oral evidence and then be subject to cross-examination by the Approval Holder, and it required the Approval Holder to produce a witness who would be subject to cross-examination by the Appellants. The Director was given the option to produce a witness. The Board also explained that the legislation allows it to permit participants to speak to the issues prior to determining standing of the appellants and that this approach makes the most effective use of time and resources. The Board reassured the Approval Holder that, even though the Board would hear evidence on all of the issues identified, it would only consider the issues that needed to be considered, and therefore, issues such as the Stay application and issues to be heard at a hearing, if one is held, would only be considered if at least one of the Appellants was found to have standing.

[16] On January 23, 2007, the Approval Holder sent the Board suggested changes to the Board's Preliminary Meeting procedure. The Board responded on January 25, 2007, explaining the proposed agenda did not meet with the principles of natural justice and procedural fairness as all Participants at the Preliminary Meeting are entitled to speak to all of the issues. The Board stated its standard practice is to allow each participant to present evidence and then

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[1] On December 22, 2006, the Board notified the Participants that Mr. Ian Clarke with the Historic Sites and Cultural Facilities Branch of Community Development contacted the Chair of the Board to ask whether the Chair would serve on a panel concerning the reclamation and historic issues of the Turner Valley Gas Plant. It was explained that the Chair did not request any details of the panel or the issues and Mr. Clark was told the Chair was unable to participate because there was an active appeal before the Board that may be indirectly connected to the panel review. The Participants were instructed to inform the Board if they had any concerns. No concerns were received by the Board.

allow those adverse in interest to cross-examine them. The Board stated this process is more efficient and results in more complete information being provided to the Board because evidence often overlaps between the issues.

[17] The Board received the written submissions from the Participants on January 26, 2007.

[18] On January 29, 2007, the Approval Holder notified the Board that it intended to provide expert evidence on the issues raised by the Appellants, and the experts, who were identified as authors of the various reports supplied by the Approval Holder during the application process, would be available for cross-examination by the Appellants and the Board. The Approval Holder also expressed concern that Ms. Abrams was scheduled to be a participant for all of the issues considered at the Preliminary Meeting, even though the Approval Holder did not believe she was directly affected or had filed a valid Notice of Appeal. The Approval Holder stated that unless the person is found to have standing as an appellant, they cannot participate in the process beyond arguing the issue of standing.

[19] On January 31, 2007, the Board received a copy of an e-mail sent from Ms. Walsh to the Approval Holder requesting a full copy of the Approval Holder's application and questioning whether Tab 197 of the Record was considered the application. On February 1, 2007, the Approval Holder responded to Ms. Walsh's e-mail, stating it was too late in the process to raise new issues or concerns and the information she was seeking was already in her possession. The Approval Holder stated the Appellant was asking the Approval Holder to answer a legal question when she questioned whether Tab 197 of the Record was the application. According to the Approval Holder, it was only a small portion of the application, and the Appellant had months to raise concerns regarding the sufficiency of the information in the file. The Approval Holder then stated the Appellants were not entitled to cross-examine the Approval Holder outside the hearing process and all future questions were to be directed to counsel.

[20] On February 2, 2007, the Board acknowledged the e-mails and the January 29, 2007 letter from the Approval Holder. In response to this correspondence, the Board explained the purpose of the Preliminary Meeting is to determine the issues set out in the Board's letter of January 22, 2007, including whether the appeals of the Appellants are validly before the Board

and the standing of the Appellants. The Board stated the Approval Holder can raise its concerns regarding the participation of the Appellants at the beginning of the Preliminary Meeting. The Board requested the Approval Holder provide the names of its witnesses.

[21] On February 1, 2007, Ms. Abrams notified the Board that she was attempting to receive a copy of the "Joint Water Reservoir Proposal" from the Town of Black Diamond, but she was told in a letter from the Town of Turner Valley's engineers to the Approval Holder that the document could not be released. On February 5, 2007, the Board requested the Town of Black Diamond provide a complete copy of the Joint Water Reservoir Proposal to the Board, including a copy of the letter from the Town of Turner Valley's engineers.

II. PRELIMINARY MATTERS

[22] At the Preliminary Meeting, counsel for the Approval Holder raised a preliminary motion to change the procedure for the Preliminary Meeting. He did not believe the Appellants had a right to present arguments before the Board, other than arguments related to the issue of standing, without the Board first making a ruling on whether the Appellants had valid appeals.

[23] The Board heard comments from the Appellants and the Director. Ms. Walsh stated the Director accepted her Statement of Concern and she had a right to be there because it is a public process open to people with concerns. Ms. Abrams explained her directly affected status would become apparent through her presentation. The Director had no concerns with the procedures set out by the Board.

[24] The Board has a standard practice of allowing all of the participants that have filed appeals to participate fully in a Preliminary Meeting.

[25] Section 95(6) of EPEA provides:

> "Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[26] This section of EPEA provides the Board with broad powers to determine who shall be heard in an appeal, but it also must remain within the constraints determined by the rules of natural justice.

[27] The Board appreciates the concerns of the Approval Holder's counsel, but the Board is very cognizant of its responsibility to deal with the evidence appropriately, and considers only that evidence that is relevant to the decision being made. The Board is fully aware of the sequence of decision-making it must make when it holds a preliminary meeting at which the issue of standing is before it as well as other matters.

[28] The purpose of the preliminary meeting is to hear and determine any preliminary matters that have been raised by the participants. The Board hears all preliminary matters at the same time whenever possible. The Board believes this process is the most effective and efficient way to deal with matters before it.

[29] To state before the evidence is presented by the participants that an appellant does not have the right to provide arguments on issues brought before the Board at the preliminary meeting, would effectively require the Board to pre-judge the matter before the evidence is heard. It would infer that the appellant does not have standing, because the Board does not want their input on the other matters. This goes against the principles of natural justice and administrative procedure. The two cornerstones of administrative law are that a party is able to know the case against it and to have the right to be heard by an unbiased decision-maker. An appellant is allowed to provide evidence to show its appeal is properly before the Board. The Board needs to hear an appellant's evidence, as well as the submissions from the other participants, before the Board makes its decision. To do otherwise would offend administrative law principles.

[30] At the time of the Preliminary Meeting, the Board has made no judgments on the validity of the appeals. The Approval Holder wanted the Board to hear only the arguments on standing, make its decision, and if at least one Appellant is given standing, then reconvene the Preliminary Meeting to hear arguments on the other matters. This would not be an effective manner in which to deal with the preliminary matters. The Board has found through its years of holding preliminary meetings and hearings, that unrepresented appellants often will present evidence related to one issue while presenting evidence on another matter. Evidence can be applicable to more than one issue, so if the preliminary meeting had to be reconvened, there would be increased duplication of evidence presented.

[31] To limit the participation of the Appellants also ignores the public interest element to the Board's proceedings. Because of the public interest element of appeals before the Board, it is better to be more inclusive at the preliminary meeting stage, allow the appellants to present their arguments, and the Board as decision-maker, would first make its decision on standing before considering the other issues. The Board understands that if an appellant does not have standing, the arguments that appellant presented cannot be used as a basis for determining the other matters.

[32] The Board denied the Approval Holder's motion to change the procedures for the Preliminary Meeting.

III. MS. LINDA ABRAMS' APPEAL

A. Statement of Concern

1. Submissions

[33] Ms. Abrams explained she was not aware until after the deadline for filing a Statement of Concern or a Notice of Appeal that the proposed Reservoir was being constructed with the intent of providing water to the Town of Black Diamond as well as the Town of Turner Valley.

[34] Ms. Abrams argued that if the intent of the proposed Reservoir is to provide water to Black Diamond and the entire project is to be approved under one Amending Approval, then residents of Black Diamond should have been included in the public notice.

[35] With respect to the motions raised regarding Ms. Abrams, Ms. Walsh stated the notice of the application should have been open to the residents of Black Diamond to respond to since information in the media stated the Reservoir could also benefit Black Diamond.

[36] The Approval Holder stated that Ms. Abrams did not submit a Statement of Concern and no extenuating circumstances have been shown for not doing so. Therefore, according to the Approval Holder, Ms. Abrams is not entitled to file a Notice of Appeal. The Approval Holder stated Ms. Abrams actively participated in the meetings and site visits related to the Reservior, and her letter to the editor of the Okotoks Western Wheel on September 13,

2006, showed she was aware of the appeal process and the necessity of filing a Statement of Concern.

[37] The Approval Holder argued Ms. Abrams did not present any evidence demonstrating that she was unable to file a Statement of Concern because of special circumstances, and there was no evidence in the Record that she made any attempt to submit a Statement of Concern. The Approval Holder argued the Board does not have jurisdiction to grant Ms. Abrams standing to file an appeal.

[38] The Director stated Ms. Abrams did not file a Statement of Concern in response to the public notice of the application. The Director argued no special circumstances have been provided by the Appellant to indicate extraordinary circumstances existed that prevented her from filing a Statement of Concern. Therefore, according to the Director, the appeal should be dismissed.

2. Discussion

[39] Section 91(1)(a)(i) of EPEA provides that an appeal may be filed by a person "who previously submitted a statement of concern in accordance with section 73" of EPEA.[2] Section 73(1), in turn, authorizes citizens to file "written statement[s] of concern setting out . . . [their] concerns with respect to" a proposed project, before the Director decides whether to approve the project. Section 73 states:

> "(1) Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed

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[2] Section 91(1)(a)(i) provides:

> "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)…."

> amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change.
>
> (2) A statement of concern must be submitted within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice."

[40] The wording of section 91(1)(a)(i) makes it clear that a Statement of Concern is a prerequisite to having a valid appeal. As the Board has stated in previous decisions, the Board must find special circumstances that prevented the appellant from filing a Statement of Concern within the legislated timeframe before it will consider allowing an appeal without a Statement of Concern being filed. In the case of *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (12 March 1999), Appeal No. 98-0250-D (A.E.A.B.), paragraph 14, the Board held:

> "Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even where a statement of concern has not been filed – due to an extremely unusual case (e.g. directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O'Neill, refuses to answer Board questions and provide at least *some* evidence of the requisite statement of concern and its proper filing. His appeal cannot proceed." (Emphasis in the original, footnotes omitted.)

The Board has applied the principles outlined in *O'Neill* in a number of cases, resulting in the dismissal of Notices of Appeal where no Statement of Concern has been filed without special circumstances to explain the failure to comply with the requirements of the legislation.[3]

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[3] See: Preliminary Motions: *Hanson et al.* v. *Director, Southern Region, Regional Services, Alberta Environment*, re*: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Grant and Yule* v. *Director, Bow Region, Natural Resources Services, Alberta Environment,* re: *Village of Standard* (15 May 2001), Appeal Nos. 01-015 and 016-D (A.E.A.B.); *St. Michael Trade and Water Supply Ltd.* v. *Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot Holdings* (17 July 2001), Appeal No. 01-055-D (A.E.A.B.); and *Warner et al.* v. *Director, Central Region, Regional Services, Alberta Environment*, re: *AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.).

[41] Ms. Abrams was aware of the proposed reservoir and the concerns of the other Appellant, Ms. Walsh. According to Ms. Abrams, she assisted Ms. Walsh in preparing the Statement of Concern, but she did not file her own Statement of Concern. Ms. Abrams explained she did not file a Statement of Concern because she assumed the Director would not accept it as valid. Although the Director may not have accepted the Statement of Concern, the Board would have made its own decision whether she was directly affected for the purpose of the appeal regardless of the Director's determination. Filing a Statement of Concern would have preserved her right to file a Notice of Appeal and doing so would have eliminated one obstacle to having a valid appeal.

[42] The purpose of filing a Statement of Concern is twofold; first, it notifies the Director and the approval holder of the concerns of the person filing the Statement of Concern, and second, it reserves the person's right to file a Notice of Appeal. The Director has the obligation to issue the best approval possible, and with the information from Statements of Concern, the Director can take steps to address valid issues raised by concerned persons. In this case, a Statement of Concern was required as a prerequisite to filing a Notice of Appeal since notice of the Amending Approval was provided.

[43] The Board can, if special circumstances are shown, accept a Notice of Appeal without a Statement of Concern having been filed, but appellants must recognize that the Board will use this discretion in only limited circumstances to prevent introducing uncertainty into the process. However, in this case, Ms. Abrams did not provide any special circumstances to explain why she did not file a Statement of Concern

[44] The Approval Holder argued that because Ms. Abrams did not file a Statement of Concern, she is not entitled to file a Notice of Appeal. Although filing a Statement of Concern is a prerequisite for finding an appeal valid in most cases, Ms. Abrams certainly had the right to file a Notice of Appeal and based on the submissions of all the Participants, including the Appellants, the Board makes the final determination on whether the appeal is valid.

[45] However, Ms. Abrams did not file a Statement of Concern as required under section 91(1)(a)(i), and because no special circumstances were shown, the Board dismisses Ms. Abrams' appeal.

B. Late Filed Appeal

1. Submissions

[46] The Approval Holder submitted that the Board does not have jurisdiction to accept Ms. Abrams' appeal as it was filed late. The Approval Holder stated that even though 30 days should have been a reasonable amount of time for Ms. Abrams to file a Notice of Appeal, she filed her appeal nine days late. The Approval Holder argued there is no evidence that shows Ms. Abrams was prevented from filing her appeal on time. It stated Ms. Abrams' September 13, 2006 letter to the editor of the Okotoks Western Wheel clearly demonstrated that Ms. Abrams was aware of the appeal process.

[47] The Approval Holder argued that Ms. Abrams "…had ample opportunity to participate in the application process and was well aware of what was required to file an appeal. She did not make the required effort to ensure her appeal was filed on time…."[4] The Approval Holder submitted that Ms. Abrams did not provide evidence of extenuating or special circumstances required to grant an extension of time, and therefore, the Board does not have jurisdiction to accept Ms. Abrams' appeal.

[48] The Director stated the Amending Approval was issued on September 8, 2006, but the Board did not receive a Notice of Appeal from Ms. Abrams until October 17, 2006. The Director pointed out that Ms. Abrams stated she received notice of the Director's decision on September 13, 2006. The Director argued there were no extenuating circumstances that would overcome the need for certainty in the appeal process and allow for the Board to grant an extension of time for Ms. Abrams to file a Notice of Appeal. The Director stated Ms. Abrams did not provide any reasons why she was unable to file her Notice of Appeal within the three week period after receiving notice of the decision. The Director submitted the Board should exercise its discretion to dismiss Ms. Abrams' appeal.

2. Discussion

[49] Section 91(4) of EPEA provides:

> "A notice of appeal must be submitted to the Board
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> (a) not later than 7 days after receipt of a copy of the enforcement order or the environmental protection order, in a case referred to in subsection (1)(e), (f) or (h),
>
> (b) not later than one year after receipt of a copy of the reclamation certificate, in a case referred to in subsection (1)(i) relating to the issuing of a reclamation certificate, and
>
> (c) not later than 30 days after receipt of notice of the decision appealed from or the last provision of notice of the decision appealed from, as the case may be, in any other case."

Therefore, in this case, the appeal period was 30 days after receipt of the Director's decision to issue the Amending Approval.

[50] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 93 of EPEA states:

> "The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so."

[51] The Board will grant an extension to file a Notice of Appeal only when there are extenuating circumstances warranting the extension.

[52] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. The application process provides for a technical and scientific review of the application and a public notice process, which seeks out concerns (Statements of Concern) of anyone who may be directly affected by the proposed approval. Once a decision is made to issue, or for that matter not to issue, the approval or amending approval, then there is an appeal period in which the applicant for the amending approval or approval or anyone who is directly affected (and who filed a Statement of Concern) can file an appeal. The time limit in which an appeal must be filed is stipulated so that all participants, the applicant, the people who are directly affected, and the regulator, know when the process is complete.

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[4] Approval Holder's submission, received January 26, 2007, at paragraph 49.

[53] Once this process is complete, the amending approval can be acted upon and all of the participants can move forward on that basis. The approval holder can carry on with its proposed project, making decisions based on the known terms and conditions of the amending approval. If no time limits were placed on the appeal period, the applicant for an approval or amending approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the approval.

[54] The time lines included in the legislation, and the certainty that they create, balance the interests of all the participants. That is why the Board is reluctant to extend appeal periods unless it can be shown there are circumstances that prevented the appellant from filing in time.

[55] The Amending Approval was issued on September 8, 2006, but Ms. Abrams did not file her Notice of Appeal until October 17, 2006.

[56] Ms. Abrams stated she had not filed her Notice of Appeal within the legislated time lines because she wanted to ensure she had all of the information and understood the issues before filing an appeal. The Board recognizes the timeline can be short to sort through the information and prepare a succinct Notice of Appeal, and the Board appreciates that Ms. Abrams did not want to file an appeal until she decided the proposed project would affect her. However, this does not provide sufficient reason to extend the appeal period. Nothing prevented Ms. Abrams from filing her appeal and then withdrawing it if she found she had no concerns with the Reservoir. The Board appreciates that she wanted to ensure she understood the issues before filing an appeal, but Ms. Abrams presented no case as to why she could not have achieved an adequate understanding within the allowable time. The legislated timeframes are there to provide fairness to all the participants.

[57] Ms. Abrams has not presented sufficient reasons to justify allowing the appeal to be accepted past the legislated time limit, and therefore, her appeal must be dismissed.

C. Directly Affected Status

1. Submissions

[58] Ms. Abrams explained she owns a business in Black Diamond and relies on the Town of Black Diamond's water supply. She argued she will be directly affected if the Town of Black Diamond's water supply is connected to the Town of Turner Valley's water supply.

[59] Ms. Walsh stated that Ms. Abrams regularly eats in the restaurants in Turner Valley. Ms. Walsh referenced reports that there may be a possible regional water system and Turner Valley and Black Diamond are discussing amalgamation, so there is a good possibility Ms. Abrams, a café owner in Black Diamond, could be using the water directly.

[60] The Approval Holder stated Ms. Abrams did not demonstrate that she is directly affected by the decision of the Director to issue the Amending Approval. The Approval Holder argued Ms. Abrams did not demonstrate that her interest was unique or beyond that of a generally concerned member of the public. The Approval Holder emphasized that Ms. Abrams is not a resident of Turner Valley but is a resident of Black Diamond, and she is not connected to the Town of Turner Valley's current waterworks system or the Reservoir. The Approval Holder stated that Ms. Abrams only made "…a bare assertion that she *may in the future* be drinking water from a regional waterworks system shared with the Town of Black Diamond."[5] (Emphasis in original.) The Approval Holder referred to the Director's Record where it shows that discussions have taken place regarding the possibility of a regional waterworks system, but no decision has been made, and Ms. Abrams was advised that the Amending Approval was for the Town of Turner Valley only, no amalgamation has been finalized, and a regional waterworks system would require further consideration by the Director. The Approval Holder argued a regional waterworks system is speculative and therefore, too remote. The Approval Holder argued Ms. Abrams' generalized interest is not enough, and if it were, standing could be granted to anyone who may use the Turner Valley water or who may move to Turner Valley in the

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[5] Approval Holder's submission, received January 26, 2007, at paragraph 34.

future. The Approval Holder stated the Board should not grant Ms. Abrams standing and to do so would be a jurisdictional error of law.

[61] The Approval Holder stated the required notice was published in the Okotoks Western Wheel, which serves 10 communities including the Town of Black Diamond.

[62] The Director reiterated that Ms. Abrams did not file a Statement of Concern and there is little or no information before the Board, except that she is a resident of the neighbouring municipality of Black Diamond and she may be impacted in the future if the two municipalities amalgamate. The Director submitted this information does not show how the Amending Approval would directly affect Ms. Abrams.

2. Discussion

[63] The Board has discussed the issue of directly affected in numerous decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

[64] In the *Court* decision, Justice McIntyre summarized the following principles regarding 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. 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 '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."[6]

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[6] *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-

[65] 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…."[7]

[66] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer 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.[8]

[67] The Court of Queen's Bench in *Court*[9] stated an appellant only needs to show there is a potential for an effect on that person's interests. This potential effect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[68] The effect does not have to be unique in kind or magnitude.[10] 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 which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in

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230-D (A.E.A.B.) ("*Bildson*"); *Mizera et al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection,* re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch* v. *Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[7] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

[8] See: *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.).

[9] *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.).

[10] 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.).

protecting the environment.[11] Under EPEA, the Legislature chose to 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. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision, it intended it be something narrower.

[69] To be found directly affected by the Director's decision to issue the Amending Approval, the Appellant must be able to demonstrate a direct effect on a personal interest or right. The more remote the connection, the less likely the Appellant will be found to be directly affected.

[70] Ms. Abrams lives in Black Diamond, a town about 4 kilometers from the Town of Turner Valley. Ms. Abrams, although she frequently visits Turner Valley, does not live there and does not rely on the water drawn from the Reservoir for her water supply either at her residence or at her business. The Board notes there are discussions underway regarding the possible amalgamation of Turner Valley and Black Diamond, but at this point of time, it is unclear when this might happen, if ever.

[71] What is at issue in these appeals is the Amending Approval. To determine if the Appellants are directly affected, the Board must look at how the issuance of the Amending Approval will affect the Appellants. In this case, the Amending Approval allows for the construction and operation of a raw water storage reservoir. The actual water treatment facility is not being changed. The Amending Approval does not refer to Black Diamond as being a potential recipient of the treated water, so at this point of time, there is no link between Ms. Abrams place of residence or business that would make her directly affected by the Reservoir. Although she may use the water when she is in the Town of Turner Valley, this interest is not different from any other person who visits that town. If the Town of Black Diamond and the

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

Town of Turner Valley amalgamate water services in the future, there may be stronger links to consider in determining whether Ms. Abrams is directly affected. The Director stated that should the water services be joined, an amending approval may be required. At that time, the Appellants, including Ms. Abrams, may, if they want, file a Statement of Concern and Notice of Appeal if they have concerns with the planned joint services. The Director is now aware of the concerns in the area and is well aware water quality is a public concern, and the Board hopes the Director will exercise his discretion to receive public input if there is an amalgamation of the waterworks and the Approval Holder applies for an amending approval.

[72] For the purpose of this appeal, the Board finds Ms. Abrams is not directly affected by the issuance of the Amending Approval.

IV. DIRECTLY AFFECTED STATUS OF MS. ROXANNE WALSH

A. Submissions

[73] Ms. Abrams argued that Ms. Walsh is directly affected because she is a resident in the Town of Turner Valley and she relies on the Town's water supply.

[74] Ms. Walsh stated she lives in Turner Valley and personally uses the water on a daily basis and for watering vegetables in her garden in the summer. She acknowledged that she does not currently drink the water from the Town of Turner Valley's water supply.

[75] Ms. Walsh stated her Notice of Appeal only contained the information she was able to gather up until the time she filed her appeal. Ms. Walsh stated she responded to the application notice as a concerned resident of Turner Valley.

[76] The Approval Holder argued Ms. Walsh's appeal should be dismissed as she has not demonstrated that she is directly affected, her appeal is without merit, and the issues raised do not apply to the Amending Approval.

[77] The Approval Holder argued Ms. Walsh did not show that, on the balance of probabilities, the completion of the proposed project would injure her use of the water. The Approval Holder stated its current waterworks system has provided safe drinking water to the

Town of Turner Valley for a number of years, and the Reservoir was added to provide a safe water supply during periods of drought and to accommodate future growth of the community.

[78] The Approval Holder argued Ms. Walsh did not provide evidence that the quality of the potable water for the Town of Turner Valley has been or will be compromised by the Reservoir, and her concerns are unfounded. The Approval Holder referred to documents in the Director's Record that indicated the Reservoir meets the *Standard and Guidelines for Municipal Waterworks and Storm Drainage Systems* and the *Water Act*, R.S.A. 2000, c. W-3, and that Alberta Environment and the Calgary Health Region had no concerns.

[79] The Approval Holder argued Ms. Walsh did not provide any evidence that the Town of Turner Valley's drinking water will be affected by the addition of the Reservoir, providing the terms and conditions of the Amending Approval are met, since the Amending Approval imposes a number of construction, operation, monitoring, and reporting requirements. The Approval Holder stated Ms. Walsh did not demonstrate that she will be directly affected if the Approval Holder operates under the additional requirements, and it has a statutory obligation to adhere to the terms and conditions of the Amending Approval, to report any failure to do so, and the Director can take action under EPEA if the terms and conditions of the Amending Approval are not followed.

[80] The Approval Holder argued Ms. Walsh's interest is not different than that of innumerable other concerned members of the public that have inquiries about the quality of drinking water in Alberta. It argued this generalized interest is not enough, and the concerns raised by Ms. Walsh are unfounded and no evidence was presented that her use of water would be impacted by the Amending Approval.

[81] The Approval Holder argued Ms. Walsh's appeal should be dismissed because it is without merit, the Director has sufficiently addressed Ms. Walsh's issues, and the grounds of the appeal do not relate to the Amending Approval. According to the Approval Holder, Ms. Walsh feels that responses to her inquiries are inadequate. The Approval Holder continued:

> "…Ms. Walsh may never 'feel assured' about the information provided to her as it is difficult for a member of the general public to appreciate all of the aspects of the Reservoir Project – technical and otherwise. The due diligence conducted by experts ought to be given due weight by both the Board and Ms. Walsh when

> assessing whether the [Amending] Approval should have been issued and what issues, if any, remain to be determined at a hearing."[12]

[82] The Approval Holder stated Ms. Walsh attended the open house and site meeting regarding the Reservoir. The Approval Holder explained Ms. Walsh raised further questions on numerous occasions, and the Approval Holder's consultants, the Approval Holder, or the Director provided responses. The Approval Holder noted that the Director had attempted to have Ms. Walsh included in the drafting of the Amending Approval, but she failed to provide written comments on the draft. The Approval Holder stated it was unfortunate the Director was unable to address all of Ms. Walsh's questions prior to issuing the Amending Approval and that all site circumstances could not be predicted in advance, but the Director felt sufficient due diligence had been conducted by the experts and the Amending Approval was issued.

[83] The Approval Holder argued that every attempt was made to include Ms. Walsh in the process and to address her concerns. The Approval Holder stated Ms. Walsh's concerns in her Statement of Concern and in her series of questions provided later were considered by the Director. The Approval Holder stated the Director took proactive steps to protect the interests of Ms. Walsh, and additional conditions were included in the Amending Approval to make it stronger than what would have been required under the legislation. The Approval Holder claimed the Director was aware of the sensitivity of the area and the prior oil and gas activities. The Approval Holder thought "…Ms. Walsh should appreciate the efforts of the Director to involve her in the process and his efforts to minimize any potential risks."[13] The Approval Holder argued Ms. Walsh did not present any evidence to show she will be directly affected by the change in operations, as long as the terms and conditions of the Amending Approval are met.

[84] The Director stated Ms. Walsh filed a Statement of Concern and was found to be directly affected. He explained Ms. Walsh, a resident of Turner Valley, had concerns related to the potential for contamination in the source for potable water due to previous industrial activity in the area.

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[12] Approval Holder's submission, received January 26, 2007, at paragraph 65.

[13] Approval Holder's submission, received January 26, 2007, at paragraph 75.

B. Discussion

[85] Ms. Walsh lives in the Town of Turner Valley and is a ratepayer of that Town. At the Preliminary Meeting, she stated she would like to be able to use the Town of Turner Valley water for all of her needs, but at the present time she uses bottled water for drinking purposes. This is a choice she is entitled to make, but she uses tap water for other uses, including watering her garden and cooking. As to whether or not these uses could be affected by the Reservoir water would depend on whether Ms. Walsh's concerns are valid and contaminants are present, the type of contaminants that might enter the water, and how those contaminants interact with plants or other uses. However, the determination of the presence of contaminants, which contaminants, if any, and the levels of contamination if present, is the issue that would be determined at a substantive hearing. Ms. Walsh is concerned about contaminants entering the water supply and the safety of the water supply, which are serious concerns.

[86] The Approval Holder agreed the site is complex with a history of oil and gas operations. It is because of this history that Ms. Walsh has a concern about the safety of her water supply. There is a direct connection between what is allowed under the Amending Approval, to construct and operate the Reservoir, and Ms. Walsh's concerns. If there is an issue with contaminants entering the water in the Reservoir, as a user of that water, Ms. Walsh could be affected.

[87] The Approval Holder argued Ms. Walsh, in her Notice of Appeal, did not provide any remedy that can be granted by the Board. As stated in *Castle-Crown Wilderness Coalition* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *Castle Mountain Resort Inc.* (8 August 2006), Appeal No. 03-144-D1 (A.E.A.B.), the validity of an appeal does not rest on the remedies provided in a Notice of Appeal. Although the information is helpful, it is not an essential term of the Notice of Appeal:

> "The Board will not usually dismiss an appeal on the sole grounds of the remedy not being feasible or moot, providing there is some indication within the Notice of Appeal of what the appellant is actually seeking. It must also be noted that the Board will not hold an appellant to the remedy specified, because time and knowledge may change the appellant's perspective. Also, many appellants only list "reject the approval" as the remedy they will accept, ignoring the ability to amend approvals to mitigate concerns. In the Board's decision process, its options are not limited to those specified in the relief sought section of the Notice

> of Appeal. The Board realizes not all appeal filers, particularly those who are not represented by counsel, would be able to provide all of the alternatives available.
>
> Each question in the Notice of Appeal was included for a specific reason. It is important for appellants to consider the information they are including in the Notice of Appeal, realizing it is the document that reserves their right to be heard by the Board. The Board wants an appellant to consider exactly what it is they are appealing and why they are appealing. When the Board asks for the remedy being sought, they want the appellant to consider exactly what they are asking for, but also to get the appellant to start thinking of alternatives that may mitigate or alleviate their concerns. When a remedy is narrowly worded, as it was in this Notice of Appeal, the appellant is limiting the scope of the issues that can be considered as well as the recommendations the Board may consider."[14]

[88] Based on the decision of the Court of Queen's Bench in *Court*, the Board must determine whether there is a potential for Ms. Walsh to be affected by the proposed project. At the preliminary stage, the Board is not to determine if there is an actual effect, since that can only be determined after the Board hears all of the evidence at the substantive hearing. The Approval Holder argued that a whole list of errors has to occur before Ms. Walsh could be affected, including failure to test the water properly, the consultants being wrong, etc. It also raised the problem that occurred at Walkerton, Ontario,[15] when it was assumed the process was being followed and it was not. The Approval Holder explained there were a few unexpected findings at the site, such as pipelines that were not mapped. Although the Board assumes proper steps were taken to determine the entire infrastructure on site, even the consultants did not find everything pre-construction. The Board is not inferring that the Approval Holder has or will compromise the health and safety of its residents, but experience does demonstrate that not all systems are infallible. Therefore, it is important to take every step possible to minimize potential risks. If contaminants are able to reach the water, Ms. Walsh, as a user of the water, can be affected. The Board discussed the site of a project and how it could affect other persons in *Joe Zink* v. *Acting Director of Air and Water Approvals Division, Alberta Environmental Protection* (28 October 1996), Appeal No. 96-011 (A.E.A.B.) at page 21:

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[14] *Castle-Crown Wilderness Coalition* v. *Director, Southern Region, Regional Services, Alberta Environment,* re: *Castle Mountain Resort Inc.* (8 August 2006), Appeal No. 03-144-D1 (A.E.A.B.) at paragraphs 91 and 92.

[15] The Board notes that the Approval Holder's reference to "…malicious intent (as happened in Walkerton, Ontario)" is without foundation in either the findings of the Walkerton Inquiry of Justice Dennis O'Connor or the subsequent criminal proceedings against the Koebel brothers that concluded with guilty pleas and sentencing in December 2004.

> "Mr. Fleming's analogy of this appeal to Westridge Water Supply acting as an insurer against future negligence by Colpitts Ranches is not valid because the circumstances can arise without any negligence, illegal or improper actions on the part of Colpitts Ranches. Rather, the actions which make this scenario likely are entirely the result of Westridge Water Supply selecting an inherently vulnerable site to locate their water intake while failing to provide any measures to protect it from normal and foreseeable risks of contamination at the site chosen."

[89] The Approval Holder raised concern that Ms. Walsh did not file her Notice of Appeal until the last day and that this should be taken into consideration by the Board. There is no problem with an appellant filing on the last day – the appeal period in this case was 30 days, which does not mean the appeal period actually ends one or two days before that. Thirty days is 30 days. In many cases, the appellant needs 30 days in which to prepare a Notice of Appeal that clearly states all of the issues and concerns and why the Board should consider their appeal.

[90] As there is a direct link between the water in the Reservoir and Ms. Walsh's use of the water, the Board finds Ms. Walsh directly affected for the purposes of this appeal.

V. REQUIREMENT OF AMENDING APPROVAL

A. Submissions

[91] The Appellants did not provide any comments regarding whether the Amending Approval is required.

[92] The Approval Holder argued that the Amending Approval was not necessary in these circumstances, thereby rendering the Stay request and appeals moot. The Approval Holder stated EPEA defines a waterworks system as any system providing potable water to a town and includes on-stream and off-stream water storage facilities. The Approval Holder referred to section 67 of EPEA and the definition of substance in section 1(mmm) of EPEA.[16] The

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[16] Section 67 states:

> "(1) No person shall, with respect to an activity that is the subject of an approval, make any change to
>
> (a) the activity,
>
> (b) the manner in which the activity is carried on, or

Approval Holder argued that the exceptions set out in section 67(3) are meant to apply to more than just any release of any substance into the environment, or else the section would be rendered meaningless as no change would prove to be an exception. The Approval Holder argued that the emphasis must be on the word "increase" and the general purpose of EPEA, which is not to require an amendment for every single change to an activity.

[93] The Approval Holder explained the Director can amend terms and conditions on his own initiative under section 70(3) of EPEA, if an amending approval is not required,[17] and the public consultation process is not compromised because this type of change is still subject to public notification, Statement of Concern filers, and the appeal process.

> (c) any machinery, equipment or process that is related to the carrying on of the activity
>
> unless an approval or an amendment to an approval authorizing the change is issued by the Director.
>
> (2) A person who wishes to make a change under subsection (1) shall apply to the Director in accordance with the regulations.
>
> (3) This section does not apply to
>
> (a) adjustments, repairs, replacements or maintenance made in the normal course of operations,
>
> (b) *changes that do not result in an increase in the release of a substance into the environment*,
>
> (c) short-term testing or temporary modifications to machinery, equipment or processes that do not cause an adverse effect,
>
> (d) changes in the type of equipment used in the conservation or reclamation of specified land, or
>
> (e) minor changes to conservation and reclamation plans that do not contravene the purpose or intent of the approval." [Emphasis added.]

Section 1(mmm) of EPEA provides:

> "'substance' means
>
> (i) any matter that
>
> (A) is capable of becoming dispersed in the environment, or
>
> (B) is capable of becoming transformed in the environment into matter referred to in paragraph (A),
>
> (ii) any sound, vibration, heat, radiation or other form of energy, and
>
> (iii) any combination of things referred to in subclauses (i) and (ii)"

[17] Section 70(3) provides:

> "If the Director considers it appropriate to do so, the Director may on the Director's own initiative in accordance with the regulations"

[94] The Approval Holder stated it is uncertain why an Amending Approval was required in this case and who made the decision. The Approval Holder explained its consultant contacted Alberta Environment advising of the proposed changes to the waterworks system and that there would be no changes to the wells, water treatment method, or capacity of existing water treatment facilities. According to the Approval Holder, there was some uncertainty as to whether public notice was required, but the Director advised the Approval Holder that it would be necessary to advertise the application in the local newspaper. The Approval Holder referred to the June 8, 2006 letter from Alberta Environment to the Approval Holder's consultant in which Alberta Environment stated:

> "I [Mr. Frank Lotz] discussed this situation with the Director and we agreed that because of public interest in water issues in the Turner Valley area that it likely would be best to publicly advertise the fact that the Town of Turner Valley has applied to the department for an amendment to its approval which will allow it to construct and operate a raw water storage reservoir."[18]

[95] The Approval Holder also referred to the June 14, 2006 letter from Alberta Environment to the Approval Holder's consultant in which it stated:

> "I [Frank Lotz] spoke to the Director and our reaction based on the interest in the community in water issues, is to suggest that we continue on with the public advertising of the proposed approval amendment. If we were to give notice of decision and a concern does come up this means the Town and the department wind up before the appeal board as there is no chance of discussing the issue with the people who have the concern."[19]

[96] The Approval Holder argued the proposed project "…does not result in an increase in the release of substances to the environment and therefore it should not have been subject to the amendment approval process as the terms and conditions of the prior approval could have been amended to account for any concerns the Director had."[20] The Approval Holder argued the Director's decision to require the Amending Approval appears to have been motivated by concerns as to public perception, but public perception is not listed or implied by section 67.

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[18] Approval Holder's submission, received January 26, 2007, at paragraph 121.

[19] Approval Holder's submission, received January 26, 2007, at paragraph 122.

[20] Approval Holder's submission, received January 26, 2007, at paragraph 123.

[97] The Director stated the Amending Approval was required given the nature of the activity and the manner in which it is carried on was proposed to change. The Director referred to section 5(1) of the *Activities Designation Regulation*, Alta. Reg. 276/2003, where it states the construction, operation, and reclamation of a waterworks system requires an approval.[21] The Director also referred to section 2(4)(i) of the same regulation[22] where it sets out what can be considered components of the activity that is a waterworks system. The Director explained that prior to the Amending Approval, water wells were the direct source of water that was then treated, but with the Amending Approval, water can be diverted from the wells to the Reservoir and then treated as required. The Director stated the Reservoir is not for treated water storage, and therefore, the "Note" at the end of Division 1, Schedule 5 of the *Activities Designation Regulation* does not apply. The Director submitted that the change in the fundamental components to the waterworks system "…comprises a change in the nature of the activity, the

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[21] Section 5(1) of the *Activities Designation Regulation* states:

> "The activities listed in Schedule 1 are designated as activities in respect of which an approval is required."

[22] Section 2(4)(i) *Activities Designation Regulation* provides:

> "The following definitions apply for the purposes of Division 5 of Schedule 1:
>
> (i) "waterworks system" means any system providing potable water to a city, town, specialized municipality, village, summer village, hamlet, settlement area as defined in the *Metis Settlements Act*, municipal development, industrial development, privately owned development or private utility, and includes any or all of the following components:
>
> (i) water wells connected to water supply lines, surface water intakes or infiltration galleries that constitute the water supply;
>
> (ii) water supply lines;
>
> (iii) on-stream and off-stream water storage facilities;
>
> (iv) water pumphouses;
>
> (v) water treatment plants;
>
> (vi) potable water transmission mains;
>
> (vii) potable water storage facilities;
>
> (viii) potable water pumping facilities;
>
> (ix) water distribution systems;
>
> (x) watering points."

manner in which it is carried out and the equipment used in the activity, such to trigger the need for an amendment pursuant to s. 67(1)…"[23] of EPEA.

B. Discussion

[98] The Approval Holder argued that the Amending Approval is not required for the construction and operation of the Reservoir. It argued the Director made his decision based on public perception and not the requirements of the legislation. The letters referenced by the Approval Holder discussing the need to advertise the Amending Approval application relate to how notice should be given. The Director can direct how public notice of an application should be given; it can vary from multiple publications in local newspapers to posting a notice in the municipal office, to a combination of different methods. In the letters the Approval Holder highlighted, it appears the Director was determining the best method to provide public notice, recognizing the public interest in the matter, and he chose publishing a notice in a local newspaper as the best way to inform the public about the application. The Board does not read the Director's letters to mean the Director was discussing whether or not an Amending Approval was required. All of the documents in the Record indicate the Director believed an Amending Approval was required for the proposed project. The Director simply wanted to ensure public notice of the application for the Amending Approval was adequate given the concern in the area.

[99] EPEA, as with other environmental legislation, is intended to be protective of the environment and if there is an effect, remedial actions are incorporated to minimize any adverse effect. A precautionary approach requires environmental legislation to anticipate and prevent environmental degradation.

[100] There is no doubt the construction of the Reservoir is a component of a waterworks system as defined in the *Activities Designation Regulation* and an activity includes the construction of a waterworks system. Section 67(1) of EPEA requires that any change to an activity subject to an approval needs to be authorized by the Director. The waterworks system currently operated by the Approval Holder has an Approval that was issued in 1997.[24]

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[23] Director's submission, dated January 26, 2007, at paragraph 50.

[24] See: Approval No. 1242-01-00, issued December 1997.

[101] The activity approved – the waterworks system – is changed with the addition of the Reservoir and the way in which the water system operates is altered because water can be used from the Reservoir or from the existing source wells. Therefore, it is clear, based on section 67(1), an Amending Approval is required for the Reservoir.

[102] The Approval Holder argued that section 67(3) of EPEA applies in this case, and therefore it is exempt from requiring an Amending Approval, because it is not increasing substance releases into the environment. The Board agrees it is not releasing any substances, unless the Appellant's concerns are realized and there is a potential for contaminants to enter the raw water stored in the Reservoir. Even then, release of contaminants to the environment would not be directly from the waterworks system that is the subject of the Amending Approval.

[103] The Board believes section 67(3)(a) applies to those approval holders who are already authorized to release substances into the environment under their existing approvals. For approval holders who are authorized to release substances into the environment, if they make a change to the activity approved that would result in an increase in released substances, then an amendment of the approval is required. Such authorization does not apply to the waterworks system that is the subject of the Amending Approval.

[104] Because the Board believes that section 67(3)(a) does not apply in this case, the Approval Holder is not exempt from requiring an Amending Approval for the Reservoir.

VI. STAY REQUEST

A. Submissions

[105] In her submission, Ms. Abrams stated the Stay should be granted because the Amending Approval is insufficient given the site for the Reservoir.

[106] With respect to the Stay application, Ms. Walsh referred to the issues that should be heard at a hearing and argued further work on the Reservoir site should not be continued until the issues have been addressed.

[107] The Approval Holder argued Ms. Walsh's concerns seem to focus on the inadequacy she sees in the responses or information provided, but the Director felt due diligence

had been conducted prior to issuing the Amending Approval. The Approval Holder stated communications between the Director and the Approval Holder's experts are still continuing.

[108] The Approval Holder stated the Director listed the steps the Approval Holder has taken to ensure the stored water will not be contaminated by material used in the construction of the Reservoir or by contaminated groundwater, and the Amending Approval contains site specific clauses to ensure the quality of the stored water will not be impacted.

[109] The Approval Holder stated Ms. Walsh, who is not an expert, continues to have doubts about the process, its efficacy, and whether expert reports are adequate, but she has no evidence to support her personal doubts. The Approval Holder argued there is no serious issue that remains to be tried, and therefore, Ms. Walsh does not succeed on the first element of the Stay test.

[110] The Approval Holder stated irreparable harm includes whether there are alternatives available if the applicant does suffer damages. The Approval Holder argued other sources of drinking water are available to Ms. Walsh should any harm occur in the time it takes for the Minister to release his decision following the hearing, should one be held, and therefore, Ms. Walsh failed to provide any evidence to show how the harm she would receive, if any, would be irreparable.

[111] The Approval Holder stated it would suffer financially if the Stay was granted which would be passed onto its ratepayers and other water users. The Approval Holder estimated the six week delay of the Reservoir to address the concerns of Ms. Walsh cost the Approval Holder approximately $103,000, and further delays would cause the costs to mount. The Approval Holder stated it is wholly responsible for providing safe drinking water for its residents, and the Reservoir is a solution to the serious shortage of potable water at certain times during the year. The Approval Holder argued Ms. Walsh failed to demonstrate that she would suffer a greater harm as the operations have been in place for a number of years, and the additional time to hear the appeals would not result in any additional effect. The Approval Holder stated no raw water will be processed through the Reservoir until it meets with the approval of the Director. The Approval Holder stated there will be no additional impacts on Ms. Walsh's water source in the short time it will take to process her appeal.

[112] The Approval Holder argued it will suffer the greater harm because it will not be able to ensure a steady supply of safe drinking water for its residents and will face increased construction costs if there are further delays.

[113] The Approval Holder stated the current waterworks system has been operating for a number of years, and since the Director issued the Amending Approval, the Director was convinced the terms and conditions were sufficient to address any concerns. The Approval Holder listed the conditions that needed to be met prior to filling the Reservoir.

[114] The Approval Holder noted only one Statement of Concern was filed and only two people filed appeals, and the Approval Holder was unaware of any additional concerns raised by potentially interested parties. Therefore, according to the Approval Holder, many of the concerns brought forward have been addressed.

[115] The Director took no position with respect to the Stay application. The Director pointed out the conditions under the Amending Approval that must be in place before water can be pumped into the Reservoir, and none of the steps have been completed.

B. Discussion

[116] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[117] The Approval Holder argued a Stay should not be granted. At the Preliminary Meeting, when questioned, the Approval Holder explained it would take almost six months for it to complete the construction of the Reservoir and to fill it. The Approval Holder agreed to withhold using water from the Reservoir for six months or until the Minister releases his decision following the hearing, should one be held. Without the Reservoir entering the water treatment system and being released to the public, Ms. Walsh's concerns will not materialize during this time.

[118] Therefore, the Board accepts the Approval Holder's offer, and it will not make any further determinations on the matter of the Stay request. The Approval Holder will not use water from the Reservoir in its waterworks system until August 15, 2007, or until the Minister releases his decision on this matter in which he allows the use of the Reservoir, whichever occurs first.

VII. SECURITY

A. Submissions

[119] With respect to the matter of security being required, Ms. Abrams stated the public process should be allowed to transpire without the fear of financial retribution.

[120] Ms. Walsh argued this is a public process that must be protected and it must be accessible to all residents of Alberta without the pressure of having to post a bond. Ms. Walsh explained that she cannot accommodate the demand for posting security.

[121] The Approval Holder stated that, if the Board grants the Stay, then the Board must determine if Ms. Walsh must post meaningful security for damages. The Approval Holder explained construction has started on the multi-million dollar project for which its ratepayers are financially responsible. The Approval Holder stated any interruption on the project could cost the Approval Holder hundreds of thousands of dollars due to interruptions of the contracts.

[122] The Approval Holder argued that Ms. Walsh thinks the proposed project:

> "…should be stopped until her apprehensions of contamination of the Town of Turner Valley's water supply, which she believes others should share, are resolved by way of 'town-hall' type meetings seeking to further educate the public, allay her fears and come to a unanimous approval for the Reservoir Project. Whether that could ever come to pass is speculative, but realistically it is unlikely such a utopian result could be achieved."[25]

[123] The Approval Holder stated Ms. Walsh has not agreed to indemnify the Town of Turner Valley's ratepayers from any delay resulting from her opposition to the Reservoir, and Ms. Walsh has not provided any evidence that she has assets with which to satisfy any damages.

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[25] Approval Holder's submission, received January 26, 2007, at paragraph 107.

[124] The Approval Holder explained the site for the Reservoir has been carefully researched and examined by experts to locate any contamination, remedial and contingency plans have been made by the experts, raw water from the Reservoir must be tested for contaminants, and if the raw water is used, the resulting treated water must be further tested before it is distributed to the public. The Approval Holder argued that:

> "In order for Ms. Walsh's fears to become a reality, the experts' analysis and plans must be wrong, the construction must be conducted under the supervision of experts who are negligent or malicious, the Town of Turner Valley must become duplicitous, the testing of the raw water must not be done or be done negligently or with a malicious intent, the Town of Turner Valley's water treatment facility must fail to treat the water and the Town of Turner Valley must then stop testing treated water (contrary to its statutory duties) or test it negligently or with a malicious intent (as happened in Walkerton, Ontario)."[26]

[125] The Approval Holder stated that it is well aware of the risk and therefore, it engaged reputable experts to design, construct, monitor, test, and complete the Reservoir. The Approval Holder argued "…Ms. Walsh's fears amount to paranoia – not evidence…. Ms. Walsh's personal fears can be resolved by the simple expedient of drinking readily available bottled water."[27] The Approval Holder claimed there are no special circumstances that would suggest that the ratepayers in Turner Valley should not be effectively indemnified from the risk of added costs if the Reservoir is interrupted again.

[126] The Director made no submissions on the issue of security.

B. Discussion

[127] The Approval Holder argued that Ms. Walsh should be required to post security if a Stay is granted. The Approval Holder stated there has been a six-week delay in the construction of the Reservoir, but work has started on the project. The Amending Approval is in place and the Approval Holder has the right to operate under that Amending Approval, and in this case, that includes the construction of the Reservoir. Although the Approval Holder is running the risk that the Board may recommend changes to the Amending Approval as a result of the appeal, the Approval Holder can proceed with construction. To suggest the mounting costs

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[26] Approval Holder's submission, received January 26, 2007, at paragraph 110.

resulting from delays are due to Ms. Walsh, does not appear reasonable. There may have been delays, but during the Preliminary Meeting, the Approval Holder explained there were issues with identifying pipelines and other facilities on the site. The Approval Holder also referred to the booming market in Alberta and the scarcity of skilled labourers to complete the work. These factors could certainly have contributed to the delay and cost escalation.

[128] Under section 97(3)(b) of EPEA, the Board may require security in very limited circumstances:

> **"**Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out, … order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)…."

[129] The Board can only require security with respect to an enforcement order or an environmental protection order under EPEA, or a water management order or an enforcement order under the *Water Act*. The Amending Approval currently being appealed is not one of these orders, and therefore, section 97(3)(b) does not apply. Although the common law may permit security to be granted when a Stay is issued, this section of the legislation overrides the common law. The legislators directed their mind to when security would be required, and the legislation clearly specifies when the Board can order security. As stated in *Driedger on the Construction of Statutes*:

> "By enacting a specific provision …, the legislature indicated that it had considered the matter but was not satisfied to leave it to the common law; it wished to deal with the matter as set out in the legislation. The specific provision would be superfluous if the general law applied."[28]

[130] Therefore, in relation to the appeal of an approval or an amending approval, as is the case in these appeals, the Board cannot order security against the Appellant.

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[27] Approval Holder's submission, received January 26, 2007, at paragraph 110.

[28] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham: Butterworths Canada, 1994) at page 312.

VIII. ISSUES

A. Submissions

[131] Ms. Abrams argued the issues raised in Ms. Walsh's Notice of Appeal are directly related to the Amending Approval, and Ms. Walsh's submission shows the validity of the appeal, and the Amending Approval is not sufficient given the nature of the site.

[132] Ms. Abrams stated the Board will decide on the issues to be heard at a hearing, should one be held.

[133] Ms. Walsh provided details on the issues she considered were important for the Board to hear at a hearing, should one be held. The issues included:

1. Report used as basis for Amending Approval application – inconsistencies (identification and number of wells and location of wells; sweet or sour), thoroughness (location of wells and facilities; follow-up with identified issues); actual area studied;
2. contamination from existing and previous wells and facilities (wells, pipelines, transformer, storage tanks);
3. further investigations required (wells abandoned, operating, orphan well);
4. migration of contaminants offsite and into the Sheep River;
5. location of pumphouse;
6. testing for hydrocarbons;
7. gas detection methods;
8. did the Director review the application documents to ensure they were complete and documentation was received?
9. site chosen for the Reservoir;
10. groundwater testing;
11. piezometers – location and what to measure; and
12. remediation of the site – what has been done and who is responsible?

[134] The Approval Holder argued the grounds of appeal are not related to the Amending Approval and Ms. Abrams' appeal should be dismissed as it is without merit. The Approval Holder stated Ms. Abrams' main concern was the deficiency she saw in the public consultation process, but according to the Approval Holder, it went beyond its statutory obligation to involve the public and address their concerns and Ms. Abrams attended and actively participated in the meetings and site visits.

[135] The Approval Holder submitted that the Appellants failed to achieve standing and have not presented substantive issues, and "…conjecture combined with speculation is not evidence; nor does it create issues. Hence, the Board has no jurisdiction to proceed."[29]

[136] The Director stated the issues raised in Ms. Abrams' Notice of Appeal are not tied to the Amending Approval and therefore are not properly before the Board. The Director explained Ms. Abrams' issues relate to "…some future, actual date unknown, when the Town of Black Diamond will participate with the Town of Turner Valley in a regional water system and the Town of Black Diamond will be a participant in a regional system when this is the most economically feasible option when upgrading their water systems…."[30] The Director stated these issues relate to possible future plans to create a regional water system between two municipalities.

[137] The Director stated the issues at the hearing, should one be held, should be restricted to those arising from the Amending Approval and should not relate to a possible future regional water system that may or may not take place. The Director suggested the issues should relate to "…what information was provided in the Application, what assessments were completed and what terms and conditions were included in the [Amending Approval] to address the concerns raised by Ms. Walsh, in relation to contamination, and to ensure the provision of safe potable water within the purview of the *EPEA*."[31]

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29 Approval Holder's submission, received January 26, 2007, at paragraph 125.

30 Director's submission, dated January 26, 2007, at paragraph 38.

31 Director's submission, dated January 26, 2007, at paragraph 59.

B. Discussion

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

> "(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal….
>
> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

[139] The Board has the jurisdiction to determine the issues to be heard at a Hearing. Although the Appellants and the Director provided submissions on the issues to be heard, the Board notes the limited submission provided by the Approval Holder. Considering the Approval Holder is represented by counsel and that it is the Approval Holder's Amending Approval that is being appealed, the Board expected a more detailed response to the question of issues to be heard. To assume that the appeals would be dismissed and that it was not necessary to consider the possibility of a hearing being held, foregoes the opportunity provided to present the Approval Holder's position on what issues should be heard.

[140] The issues the Board can consider at a hearing of Ms. Walsh's appeal must relate to issues identified in her Notice of Appeal that are in response to the terms and conditions of the Amending Approval. The Board cannot assess the original Approval, except to the point that the implementation of the Amending Approval changes how the original Approval is implemented or how it can operate. For example, the Reservoir is a different source of water for the treatment plant so certain adjustments in the manner in which the treatment plant operates will have to be considered to accommodate this water source.

[141] The Board has determined that the following issues will be heard at the substantive hearing:

1. Is the Amending Approval sufficient to protect the Town of Turner Valley's water supply from contamination to ensure a safe water supply?
2. Is using clay from the site as a liner for the raw water storage reservoir the best practicable technology to protect the stored raw water from contamination arising from previous industrial activity?

3. Was the testing, investigation, and remediation of the site prior to and during construction adequate to identify risks from possible contaminants onsite, including the possible contamination of onsite clay used for the construction of the liner?

[142] Pursuant to section 95(4) of EPEA, Ms. Walsh, the Approval Holder, and the Director will be allowed to make representations on these issues only.[32] If matters beyond these defined issues are argued, the Board will not consider the arguments in its deliberations.

IX. DECISION

[143] The appeal of Ms. Abrams is dismissed because she did not file a Statement of Concern and her Notice of Appeal was filed past the legislated time frame. No special circumstances were provided to warrant an extension of time. The Board also found Ms. Abrams is not directly affected by the Director's decision to issue the Amending Approval.

[144] The Board finds Ms. Walsh directly affected for the purpose of her appeal. The issues to be heard at the hearing will be:

1. Is the Amending Approval sufficient to protect the Town of Turner Valley's water supply from contamination to ensure a safe water supply?
2. Is using clay from the site as a liner for the raw water storage reservoir the best practicable technology to protect the stored raw water from contamination arising from previous industrial activity?
3. Was the testing, investigation, and remediation of the site prior to and during construction adequate to identify risks from possible contaminants onsite, including the possible contamination of onsite clay used for the construction of the liner?

[145] The Board finds the Amending Approval is required for the construction, operation, and reclamation of the Reservoir, because it is an activity as defined in the legislation that requires authorization from the Director.

[146] The Board accepts the Approval Holder's offer to not use water from the Reservoir in its water treatment facility until August 15, 2007, or until the Minister releases his decision following the hearing, whichever occurs first. As the water from the Reservoir will not

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[32] Section 95(4) of EPEA provides:

"Where the Board determines that a matter will not be included in the hearing of an appeal, no

be used during the time it takes to hear the appeal, the Board does not have to deal with the Stay application. Pursuant to section 97(3)(b) of EPEA, the Board cannot award security with respect to the appeal of an approval or amending approval.

Dated on May 2, 2007, at Edmonton, Alberta.

"*original signed by*"

Steve E. Hrudey, FRSC, PEng
Chair

"*original signed by*"

Ron V. Peiluck
Vice-Chair

"*original signed by*"

Alex G. MacWilliam
Board Member

representations may be made on that matter at the hearing."