

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 10, 2010

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 Robert Tomlinson, Amil Shapka, and Yvonne Tomlinson with respect to *Environmental Protection and Enhancement Act* Approval No. 248406-00-00 issued to the Evergreen Regional Waste Management Services Commission by the Director, Northern Region, Environmental Management, Alberta Environment.

Cite as: *Tomlinson and Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

PANEL MEMBERS:

Mr. Alex G. MacWilliam, Panel Chair,
Dr. Alan J. Kennedy, Board Member, and
Dr. Dan L. Johnson, Board Member.

SUBMISSIONS BY:

Appellants:

Dr. Amil Shapka, represented by Ms. Eva
Chipiuk, Ackroyd LLP; Mr. Robert
Tomlinson; and Ms. Yvonne Tomlinson.

Approval Holder:

Evergreen Regional Waste Management
Services Commission, represented by Mr.
William Barclay, Reynolds Mirth Richards &
Farmer LLP.

Director:

Mr. Kem Singh, Director, Northern Region,
Environmental Management, Alberta
Environment, represented by Ms. Michelle
Williamson, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to the Evergreen Regional Waste Management Services Commission, authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II). The landfill will accept more than 10,000 tonnes of non-hazardous waste per year and is located in the County of St. Paul, Alberta.

The Board received appeals from Dr. Amil Shapka, Mr. Robert Tomlinson, and Ms. Yvonne Tomlinson. The Board was asked to dismiss the appeals on the grounds that Ms. Tomlinson had not filed a valid Statement of Concern and that Dr. Shapka and Mr. and Ms. Tomlinson were not directly affected. The Board also asked for submissions on what issues should be considered at the hearing, if one is held.

The Board dismissed the Tomlinsons' appeals. The appeal of Ms. Tomlinson was dismissed because she did not submit a valid Statement of Concern. The Board dismissed Mr. Tomlinson's appeal on the basis that he was not directly affected by the Approval.

The Board determined that Dr. Shapka is directly affected by the Approval and his appeal will be heard. The Board also determined the issues to be heard at the hearing, scheduled for January 18 and 19, 2010, will be:

1. Does the Approval adequately address the potential impacts of the expanded landfill on the groundwater and the local wells? and
2. Did the Director (Alberta Environment) adequately consider the potential impacts of the expanded landfill on surface water run-off and surrounding watersheds?

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I. BACKGROUND

[1] On December 30, 2008, the Director, Northern Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 248406-00-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to the Evergreen Regional Waste Management Services Commission (the “Approval Holder”) authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II), (“Landfill”). The Landfill will accept more than 10,000 tonnes of non-hazardous waste per year and is located in the County of St. Paul, Alberta. The Landfill previously operated under a registration, and the Approval allows the Landfill to expand.

[2] On January 30, 2009, and February 2 and 4, 2009, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Robert Tomlinson, Dr. Amil Shapka, and Ms. Yvonne Tomlinson (the “Appellants”).

[3] On February 2 and 5, 2009, 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 that the Director provide the Board with a copy of the records relating to the appeals (the “Record”), and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received on March 12, 2009 and copies were subsequently forwarded to the Participants.

[4] On March 6, 2009, the Approval Holder requested that the Board determine whether the Appellants are directly affected by the Approval and determine which of the issues raised by the Appellants are within the Board’s jurisdiction and which of those issues, if any, will be heard by the Board.

[5] On March 12, 2009, the Director made two submissions to the Board: first, the appeal of Ms. Tomlinson should not be accepted because she did not submit a Statement of Concern as required under EPEA; and second, the Board should determine the issues to be heard or mediated, as many of the statements made by the Appellants were too vague or related to matters outside the Board’s jurisdiction.

[6] The Board asked the Participants to hold the motions in abeyance and proceed to a mediation meeting. The Participants agreed, even though the Approval Holder was concerned "...the mediation would be futile..."¹ After consulting with the Participants, the Board scheduled a mediation meeting for April 23, 2009, in St. Paul, Alberta. The Participants held an additional meeting as part of the mediation process, but no resolution was reached.

[7] On July 27, 2009, the Board established the process to receive submissions on the preliminary motions made by the Approval Holder and Director. Submissions were received on the following motions:

1. Did each of the Appellants file a Statement of Concern with Alberta Environment?
2. Are the Appellants directly affected by the Approval under appeal?
3. What are the issues in the Notices of Appeal that are within the Board's jurisdiction to address?
4. What are the issues that should be considered at the hearing, if one is held?

[8] On July 29, 2009, Mr. Tomlinson requested a Stay of the Approval. The Board asked the Appellants to respond to certain additional questions as part of the submission process.²

[9] On August 10, 2009, the Board received the Tomlinsons' responses to the Stay questions. Based on the responses, the Board determined the Tomlinsons had provided sufficient information [a *prima facie* case] to warrant asking the Approval Holder and the Director to respond to the Stay application.

[10] On August 24, 2009, the Board received the Appellants' submissions on the preliminary motions. Response submissions on the Stay application and preliminary motions were received from the Director and Approval Holder on September 18, 2009. Rebuttal

¹ Approval Holder's letter to the Board, dated March 25, 2009.

² The Appellants were asked to answer the following questions:

1. What are the serious concerns that Mr. Tomlinson has that should be heard by the Board?
2. Would Mr. Tomlinson suffer irreparable harm if the Stay is refused?
3. Would Mr. Tomlinson suffer greater harm if the Stay was refused pending a decision of the Board, than the Commission would suffer from the granting of a Stay?; and
4. Would the overall public interest warrant a Stay?

submissions were received from the Tomlinsons on October 9, 2009, and from Dr. Shapka on October 13, 2009.

II. STATEMENT OF CONCERN

A. Summary of Submissions

1. Appellants

[11] **Dr. Shapka:** submitted that he filed a Statement of Concern with Alberta Environment on July 25, 2008, in which he described his concerns with respect to public consultation, the Approval Holder's leachate management program, and groundwater protection.

[12] **Mr. Tomlinson:** submitted that he filed a Statement of Concern and attached a copy to his submission.

[13] **Ms. Tomlinson:** submitted that she believed she had submitted a Statement of Concern. She explained:

- (a) She was new to the process.
- (b) She had difficulty obtaining a copy of the application and the time to file a Statement of Concern was passing.
- (c) She believed she would receive a letter of acknowledgement from the Director confirming her as a valid Statement of Concern filer when he received Dr. Shapka's Statement of Concern that she had endorsed by signing.
- (d) She is passionate about the environment in the area and the impact the Approval will have on it.

2. Approval Holder

[14] The Approval Holder made the following submissions:

- (a) Ms. Tomlinson did not file a Statement of Concern.

- (b) Ms. Tomlinson signed an attachment to Dr. Shapka's Statement of Concern under the heading: "We the undersigned are in agreement with the Statement of Concern prepared by Dr. Amil Shapka."³
- (c) Ms. Tomlinson's signature represents her support for Dr. Shapka's position but it is not an independent Statement of Concern.
- (d) Mr. Tomlinson was aware of the need to file a separate Statement of Concern even though he signed the same statement of support as did Ms. Tomlinson.

3. Director

[15] The Director made the following submissions:

- (a) The Director acknowledged that Dr. Shapka and Mr. Tomlinson filed Statements of Concern, and that he accepted them as valid Statements of Concern based on the proximity of their residences to the Landfill and the concerns expressed were within the Director's jurisdiction.
- (b) Ms. Tomlinson's name, signature, and contact information were included in pages attached to Dr. Shapka's Statement of Concern. Ms. Tomlinson's signature was one of many under the heading "We the undersigned are in agreement with the statement of concern prepared by Dr. Amil Shapka."⁴ Ms. Tomlinson's signature was not included at the close of Dr. Shapka's Statement of Concern where it was signed by "Dr. Amil Shapka and concerned County of St. Paul residents."⁵
- (c) At no time did the Director consider Ms. Tomlinson to have filed a Statement of Concern.
- (d) There is no evidence to suggest Ms. Tomlinson considered herself to be a Statement of Concern filer until she filed her appeal.

³ Approval Holder's submission, dated September 18, 2009, at paragraph 5.

⁴ Director's submission, dated September 18, 2009, at paragraph 5.

⁵ Director's submission, dated September 18, 2009, at paragraph 5.

- (e) Ms. Tomlinson's signature on Dr. Shapka's Statement of Concern did not identify her as a concerned resident of the County of St. Paul. She did not provide her residential location, contact information, or explain her concerns as to how the project might affect her. Her signature merely represented a show of support for Dr. Shapka's concerns.
- (f) There is an important distinction between expressly filing a Statement of Concern and merely showing support for another individual's position. The filing of a Statement of Concern acquires certain rights under the legislation, such as rights to information, a copy of the decision, and standing.
- (g) The Director noted that Mr. Tomlinson also signed in support of Dr. Shapka but also filed his own individual Statement of Concern.
- (h) To allow individuals to attach their right of appeal to a Statement of Concern filed by a group with which the individual does not identify would create an unfavourable precedent. This would lower the acceptable standard of what is required in a Statement of Concern. In order to properly address concerns raised by Statement of Concern filers, the Director must be able to readily identify the Statement of Concern filer and the specific concerns that are relevant to that filer.
- (i) Ms. Tomlinson did not file a valid Statement of Concern, and therefore, her appeal should be dismissed because she failed to meet the statutory requirements for standing.

B. Analysis

[16] At issue is the question of what constitutes a valid Statement of Concern. There are no specific requirement in the legislation as to what must be provided in order to be accepted by the Director as a Statement of Concern. The Board must look at the purpose of a Statement of Concern to understand what is minimally required. The filing of a Statement of Concern serves two purposes. First, it provides the Director with information regarding the concerns of those affected by the proposed project and allows the filer to provide input into the decision the

Director must make. Second, in most circumstances, filing a Statement of Concern is a prerequisite to filing a valid Notice of Appeal, and it preserves the filer's right to appeal.⁶

[17] In these appeals there is no question, and the Approval Holder and the Director do not dispute, that Dr. Shapka and Mr. Tomlinson filed Statements of Concern. What is at issue is whether Ms. Tomlinson filed a Statement of Concern.

[18] The Board discussed what it sees as the minimum information required in a Statement of Concern in *Higgins v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (26 August 2005), Appeal No. 04-054-D (A.E.A.B.):

“To assist the Director in making appropriate approval conditions, a Statement of Concern must contain specific information, including the name, address, and contact information of the filer, a clear indication of the approval or licence application that is of concern, and how the filer is potentially directly affected by the proposed project. When the Director determines directly affected status of an appellant, he may consider proximity to a project as one of the indicators for standing. But it is also important to note that proximity is not the only factor that is determinative in finding a person directly affected or not.

A Statement of Concern should also indicate the person's specific concern with the proposed project and how it will affect the person. Usually, broad, general statements, such as ‘I am concerned about air pollution in the Province,’ are insufficient to find it a valid Statement of Concern. There must be some specific connection to the proposed project. From there, the Statement of Concern should include how the specific environmental effect will affect the person directly. The clearer the connection between the environmental effect and the effect on the person, the stronger the Statement of Concern will be and the more clearly the

⁶ Section 91(1)(a) states:

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

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
 - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)”

filer's specific concerns will be able to assist the Director in making a better approval decision."⁷

[19] As described above, Ms. Tomlinson signed her name to a form attached to Dr. Shapka's Statement of Concern. The top of the form stated: "We the undersigned are in agreement with the statement of concern prepared by Dr. Amil Shapka". She included her mailing address and telephone number. However, she did not elaborate as to *her* specific concerns with the application or where she lives in relation to the proposed project. It is understandable why the Director considered Ms. Tomlinson's signature as showing her support for Dr. Shapka and not as her own Statement of Concern.

[20] The Board does not generally accept a name signed as part of a petition as a Statement of Concern unless additional information is provided explaining why that person believes he or she is directly affected by the issuance of the approval. In this case, Ms. Tomlinson did not provide any additional information to demonstrate how she is affected by the Landfill. She also did not expressly request, or otherwise indicate, that her signature on the form should be considered by the Director to be a Statement of Concern. Ms. Tomlinson also did not provide any explanation in her submissions to the Board as to why she did not file a Statement of Concern of her own. Without the additional information, the Board does not consider Ms. Tomlinson's signature on a form sufficient to be a Statement of Concern.

[21] Under section 91(1)(i) of EPEA, a person filing a Notice of Appeal must have previously filed a Statement of Concern. The Board finds Ms. Tomlinson did not file a Statement of Concern. Therefore, the Board must dismiss Ms. Tomlinson's appeal.

[22] Mr. Tomlinson and Dr. Shapka filed Statements of Concern, so the Board must now determine if these two individuals are directly affected by the issuance of the Approval.

⁷ *Higgins v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (26 August 2005), Appeal No. 04-054-D (A.E.A.B.) at paragraphs 32 to 33.

III. DIRECTLY AFFECTED

A. Summary of Submissions

1. Appellants

[23] **Dr. Shapka** made the following submissions:

- (a) He is a resident of the County of St. Paul, and his residence and water well are located about two kilometers from the Landfill. He has experienced, and will continue to experience, environmental, social, and economic consequences of the Landfill.
- (b) Since the Approval Holder itself concluded that "...it is not expected that the groundwater users will be affected, ... there is a potential that he will be harmed by the approved project,"⁸ because if the groundwater is impacted, his water well could be affected. Dr. Shapka questioned the comprehensiveness and quality of the Approval Holder's hydrogeological site investigation and groundwater monitoring system on which the Approval Holder based its conclusion.
- (c) The general area of the Landfill has no well-developed surface water drainage pattern, suggesting much of the precipitation is lost to "evapotranspiration" or infiltrates into the groundwater system. The water-level monitoring in the piezometers, particularly in the late spring/early summer of 2003, indicated groundwater recharge is very active, at least to a depth of 20 metres below ground level in Piezometer No. 02-19C.
- (d) The 1998 report entitled Risk of Groundwater Contamination of the Regional Groundwater Assessment for the County of St. Paul indicates the area immediately west of the Landfill is identified as an area where the risk of groundwater contamination from surface activities is high.
- (e) The Approval Holder's application stated it was possible that about 21 m³ of groundwater may have infiltrated into cell 1 in 2007. This refers to the leachate

balance. The groundwater elevation was higher than the elevation of the leachate in the Landfill. The groundwater level monitoring data indicate groundwater levels rose more than four metres between 2001 and 2008. Dr. Shapka questioned whether the 21 m³ of leachate will enter the groundwater if the groundwater elevation declines to levels observed in 2001.

- (f) The chemical analysis results for the groundwater samples collected from Piezometer No. 04-42 showed an increase in chloride concentration over time, which suggests leachate may be present in the groundwater at a depth of between 4.9 and 8.5 metres below ground level in glacial till. There is no permeability reading for the till at that location, but other permeability tests on the site with completion intervals from 6.4 to 8.4 metres below ground level showed the till has a permeability of 9.7×10^{-10} m/s. This suggests the till is more permeable than permeability tests indicate or conditions are different at the site of Piezometer No. 04-42.
- (g) Dr. Shapka's land is adjacent to an unnamed body of water known locally as Snake Lake. Fish from Lac Sante have made their way into Snake Lake. He and his family consume wild meat and fish harvested in the area.
- (h) The Approval can potentially impact surrounding watersheds. According to the Alberta Geologic Survey, the Landfill is completely within an areal extent of a clean gravelly sand deposit. The linear bedrock below is a tributary to the Vegreville Buried Bedrock Valley Aquifer, a significant aquifer, which extends from the area of Bellevue Lake beneath the general area of the Landfill to the Vegreville Buried Bedrock Valley Aquifer.
- (i) The sand and gravel deposits underlying the Landfill and the surrounding area provide a mechanism for liquid contaminants to move downward and into the surrounding watersheds and groundwater, thereby affecting his water wells.
- (j) When the Approval Holder stated the Appellants are not directly affected because the groundwater flow over the Landfill site is generally to the southwest and away

⁸ Dr. Shapka's submission, dated August 24, 2009, at paragraph 15.

from the Appellants, it did not consider the vertical component to the flow regime in the region. The water well data show the bedrock surface slopes to the northeast and groundwater flows from at least part of the Landfill toward the northeast and toward Dr. Shapka's property.

- (k) The last reported reading of the elevation of the water level in Piezometer No. DS02-24 showed it was 10 metres higher than the water elevation at his water well. Therefore, Dr. Shapka did not agree with the Approval Holder's argument that he is up-gradient from the Landfill.
- (l) Given the proximity of his water well to the Landfill and the potential or reasonable probability that the Approval can result in a change to the local groundwater, surface water regimes, and surrounding watersheds, Dr. Shapka is of the view that he has established that he is directly affected by the Approval.

[24] **Mr. Tomlinson** made the following submissions:

- (a) He is directly affected by the Approval. The Lac Sante Area Structure Plan identifies an environmentally significant area in the section of land on which he lives. The property provides an ecological function for wildlife migration corridors and as a groundwater recharge area.
- (b) He is directly affected because it is a common occurrence for him to share water from the wells of friends and relatives in the area of the Landfill. Pollutants from the Landfill that affect these wells therefore also affect him.
- (c) Lac Sante is connected to the Landfill by a number of water courses, and pollutants from the Landfill that affect the lake will also affect him. He consumes fish from the lake and uses the lake for recreation.
- (d) The Approval Holder does not comply with the requirements of the *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, and therefore Mr. Tomlinson is concerned with his family's health and safety when they visit the Landfill. The transfer station where local residents dispose of their waste is located within the Landfill.

- (e) The Tomlinson home is eight kilometers from the Landfill. The Approval Holder has not properly identified the aquifers beneath the Landfill. The aquifers may connect to the aquifer the family draws its water from.
- (f) The Tomlinson farm is located on Highway 36, and the leachate removal trucks and garbage trucks drive past the property, posing a risk to the property and water well. Garbage trucks travel at high speeds on local roads, posing a risk to the family and the community that uses the roads. Visibility is often poor and the roads are narrow. There may be additional traffic on the road past his property due to the expansion of the Landfill.
- (g) He has consumed meat and fish from the area and drinks the water and well water within a five-kilometer radius of the Landfill.
- (h) There are local feeder springs and hand-dug wells near the Landfill.
- (i) There is potential for surface waters to reach Lac Sante, Lac Poitras, Lac Bellevue, and the North Saskatchewan River. The area is a fish migration route and spawning habitat. There is a potential risk to potable water due to run-off from the Landfill.
- (j) There are environmental and public safety concerns with the construction and operation of the facility and the impact of the Landfill on adjacent lands. An environmental impact assessment should have been completed because the Landfill is in an environmentally sensitive area. It is difficult to be involved in the process because full operating plans, management plans, emergency response plan, and an environmental contingency and response plan were not submitted prior to the issuance of the Approval.
- (k) High chloride levels were measured in the north and south ditches from the Landfill. The testing for chloride levels is inadequate and there is no testing for chemical elements of uncontrolled substance release.
- (l) The Director did not have sufficient hydrology information for the entire site. The surface and groundwater impacts on the entire east half of the site should be assessed in their totality.

- (m) There is a question of whether the cells were constructed according to the design. The Director failed to review the drawings and quality assurance and control for the construction of Cells 1 and 2. Cells 1 and 2 were constructed without a protective corner and a continuous clay liner.
- (n) The storm water retention pond on the Landfill is full and overflowing, demonstrating the Approval Holder's run-on and run-off control measures are ineffective. The leachate levels could harm the cell design and the environment. Precipitation does not affect leachate levels. If run-off was a contributing factor to the exceedance of the leachate head level in 2009, then it would have had to have entered through groundwater infiltration and a breach of the cell liner.
- (o) The Approval Holder has not been operating in accordance with its Approval. The Approval Holder has released water off-site from the burn pit area and no test results from the water have been provided.
- (p) The Approval Holder continues to have high leachate levels, leachate releases, and water released off-site that has not been tested. The surface water may not reach his property, but he is affected through recreation and the consumption of fish and wildlife from the area.

2. Approval Holder

[25] The Approval Holder made the following submissions:

- (a) The Tomlinsons live over eight kilometers from the Landfill. Although Dr. Shapka explained his residence is located approximately two kilometers from the Landfill, the residence is actually 2.8 kilometres from the edge of the active Landfill area.
- (b) Although physical proximity is not determinative in finding an appellant directly affected, it is an important factor.
- (c) The water flow over the Landfill site is generally towards the southwest, away from the Appellants. There is a small portion at the north end of the site that is

currently not being developed where the flow is to the northwest. There is no means by which this groundwater or surface water flow connects to Lac Sante, Lac Poitras, and Lac Bellevue, and it is impossible for any run-off or discharge to reach the Appellants' lands.

- (d) Letters of support from persons who own and lease lands to the south, west, and southwest of the Landfill indicate there has been no adverse effect on surface and subsurface water. The Tomlinsons indicated they drank water from their neighbours' wells, and these are the people that provided a letter indicating there has been no adverse effect on their wells.
- (e) There is no evidence to indicate that Lac Sante is connected to the Landfill by a number of water courses. A review of air photographs spanning 50 years did not find any evidence of such water courses. Ms. Tomlinson's use of the word "potential" indicates she recognizes that there are no connecting water courses to Lac Sante, Lac Poitras, Lac Bellevue, and the North Saskatchewan River.
- (f) The Tomlinsons showed no substantial connection to or risk from the Landfill or its operations.
- (g) An estimated two garbage trucks per week utilize Highway 36 past the Tomlinson property. Vacuum trucks may use the route infrequently. Other heavy traffic, including oil field traffic, uses the route much more frequently.
- (h) The Landfill has been operating for five years, the Tomlinsons have not been prohibited from camping in the vicinity of the Landfill, and there is no suggestion they will be prevented from the using the area in the future.
- (i) The leachate breakout was minor and fully contained and was documented in the Annual Report provided to the Director. The chloride levels have always been within regulated standards.
- (j) Dr. Shapka lives closer to the Landfill than the Tomlinsons but he is up-gradient from the Landfill site and his water supply is not at risk. The surface water flow is in the opposite direction.

- (k) Dr. Shapka did not provide any evidence as to how his groundwater could potentially be harmed by the issuance of the Approval. No domestic wells of any depth or yield will be impacted by the Landfill.
- (l) Water well drilling records within five kilometers of the Landfill do not indicate any tributary to the Vegreville Buried Bedrock Valley Aquifer is present or is in close proximity to the Landfill. When the Alberta Research Council prepared the Bedrock Topography map in 1973, there were no water well records available for 56-10-W4M, so any discussion about such a formation was speculative. Current information shows there is no such formation in the vicinity of the Landfill.
- (m) Based on detailed hydrogeological findings, groundwater monitoring results, extensive monitoring systems in place, and the required contingency and remediation programs, "...there is no realistic probability that local groundwater resources will [be] harmed as a result of the Approval."⁹
- (n) The Appellants do not meet the test to be directly affected.

3. Director

[26] The Director made the following submissions:

- (a) The Director accepted Dr. Shapka's Statement of Concern based on the proximity of his residence to the Landfill. Although the Director did not make any detailed submissions on whether Dr. Shapka is directly affected, he noted it is the responsibility of Dr. Shapka to demonstrate he is personally affected in a manner that exceeds that of the general public.
- (b) The Director accepted Mr. Tomlinson's Statement of Concern based on the fact that his residence is within 10 kilometers of the Landfill.
- (c) Mr. Tomlinson is not directly affected because his concerns are indirect and hypothetical. In response to Mr. Tomlinson's concerns regarding the potential for contamination of groundwater and surface water run-off affecting local wells and

⁹ Approval Holder's submission, dated September 18, 2009, at paragraph 36.

watersheds, the 2005-2007 Annual Reports provided by the Approval Holder showed no evidence of environmental integrity of the area being impacted in terms of groundwater and surface water quality.

- (d) Mr. Tomlinson lives approximately eight kilometers north northwest of the project. The direction of groundwater flow is to the south and east from the Landfill, eventually flowing into the North Saskatchewan River. It is virtually impossible for Mr. Tomlinson to be directly affected because his property is up-gradient.
- (e) Mr. Tomlinson's concerns about consuming water from his friends' and relatives' wells are too remote to be considered a direct effect. The surface water drainage was mapped out and, even though some surface water may, in certain circumstances, flow west to Lac Sante, there is no evidence it could flow to Mr. Tomlinson's property. It is unlikely there would be any environmental affect on Mr. Tomlinson given the distance between his property and the Landfill.

B. Analysis

[27] The Board has discussed the issue of "directly affected" in numerous prior decisions. The Board received guidance on this issue 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*").

[28] 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.”¹⁰

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....”¹¹

[29] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that 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 he or she is directly affected.¹²

[30] The Court of Queen’s Bench in *Court*¹³ 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, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing.

¹⁰ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*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.) (“*Mizera*”); 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.).

¹¹ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

¹² 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.).

1. Is Mr. Tomlinson directly affected?

[31] Mr. Tomlinson stated that he lives about eight kilometres from the Landfill and is concerned that the Landfill will affect his water well and his use and enjoyment of the land surrounding the Landfill.

[32] Although distance from a project is not determinative in assessing directly affected, it is certainly a factor that is considered. Eight kilometres is generally considered to be a significant distance when assessing impacts on surface and groundwater regimes. Although there appeared to be some confusion as to the direction of water flow from the Landfill, none of the Participants believed the water flowed towards the Tomlinson property. In fact, Mr. Tomlinson acknowledged that surface water may not reach his property. To be found directly affected at this distance, Mr. Tomlinson would have to provide some evidence that there may be a connection between the Landfill and his property. This evidence was not provided.

[33] What is apparent in the submissions is that even though there is conflicting statements about the direction of water flow from the Landfill, it appears that Mr. Tomlinson lives up-gradient to the flow of water from the Landfill. This indicates that the groundwater under his property could not be contaminated by operations at the Landfill. The same can be said for surface water flows. The evidence indicates that it cannot flow onto the Tomlinson property.

[34] Mr. Tomlinson raised other concerns such as increased traffic resulting from the Landfill expansion. He lives near a highway which carries traffic from a number of industrial activities conducted in the area. He did not provide any additional information as to how the traffic past his property could impact him.

[35] Mr. Tomlinson submitted that he consumes fish and game from the area around the Landfill. He did not provide any further details, such as frequency of consumption or estimated intake amounts. There are a number of links required in order for Mr. Tomlinson to be affected by the consumption of impacted fish and game. Leachate would have to leave the Landfill and enter water or feed sources used by the wildlife. Mr. Tomlinson would also have to

¹³ *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.).

consume sufficient quantities of impacted fish and game in order to be affected. The more links required from the approved project to the appellant, the less likely the appellant will be found directly affected. There are too many steps required in this case, and some are speculative in nature, to find that there is a potential or reasonable possibility that Mr. Tomlinson could be impacted in this manner.

[36] Based on the evidence provided, the Board determined that Mr. Tomlinson has not proven that he is directly affected by the issuance of the Approval and therefore, his appeal is dismissed.

2. Is Dr. Shapka directly affected?

[37] Dr. Shapka lives two to three kilometres northeast of the Landfill, within the area that could be affected by the operations at the Landfill. There are questions, however, regarding the direction of groundwater flow and surface water regimes in the Landfill area. The Approval Holder submitted that the flow is mainly to the south, except for a section on the north end of the Landfill that flows to the northwest. The Director submitted that the flow was to the south and west. Dr. Shapka provided data that infers his well may be affected by the Landfill even though his property is to the northeast. This uncertainty as to the direction of flow from the Landfill is sufficient to raise concerns.

[38] Dr. Shapka lives close enough to the Landfill that, if there is an impact on the groundwater or surface water regimes, he could be affected. Therefore, the Board is of the view that the evidence establishes that Dr. Shapka is directly affected and his appeal will be heard.

IV. Stay Application

[39] The Stay application was filed by the Tomlinsons. According to section 97(2) of EPEA, only a party, or a participant who has demonstrated a *prima facie* case of the likelihood of being granted standing, can make an application for a Stay. Section 97(2) of EPEA provides “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...”

[40] The Board acknowledges the submissions from all of the Participants. However, for the reasons set out above, the Board has dismissed the appeals of the Tomlinsons. Therefore, they are no longer parties to the appeal. Based on the requirements of section 97(2) and the decisions of the Board regarding the Tomlinsons' standing, the Board cannot consider the Stay application.

V. Issues for Hearing

A. Summary of Submissions

1. Appellant

[41] Dr. Shapka made the following submissions:

- (a) The Board should recommend that the Approval Holder complete a detailed hydrogeological investigation and establish a groundwater monitoring program. Dr. Shapka's consultant, Mr. Roger Clissold, Hydrogeological Consultants Ltd., found there were no data provided by the Approval Holder to indicate the shallow aquifer is an "exceptional underlying aquifer,"¹⁴ nor is there any meaningful data to show that it is not an exceptional aquifer. If the aquifer was exceptional or if the aquifer underlying the Landfill is hydraulically continuous with an exceptional aquifer, the Approval Holder did not meet the Standards. The Approval Holder's hydrogeological data warrant further investigation to determine the extent to which the shallow sand aquifer underlies the Landfill.
- (b) Based on the hydrogeological data presented by the Approval Holder, the W½ - 16-56-10-W4M is not a suitable location for a landfill. A detailed hydrogeological investigation for Phases I and II of the Landfill should have been

¹⁴ In the Draft Standards for Landfills in Alberta 2007 ("Standards"), "exceptional underlying aquifer" is defined as

"a hydrostratigraphic unit with a transmissivity of greater than 2.5×10^{-3} m²/sec yielding water with a total dissolved solids (TDS) concentration not exceeding 4000 mg/L."

completed prior to issuing the Approval or at least prior to development on the north half of Phase I and the northern third part of Phase II.

- (c) The Landfill could result in changes to the local groundwater and surface water regimes and must be investigated more thoroughly before development of the cells further north. The leachate/groundwater monitoring program is not adequate and must be strengthened and should include an automatic weather reporting station at the site. The Approval Holder must establish a groundwater monitoring program to provide nearby landowners confidence that the groundwater is not compromised.
- (d) The leachate management program requires further investigation given the increase in recorded leachate volumes and the Approval Holder's inability to control the volumes. The Approval Holder must be required to identify the cause of the increased leachate levels, assess the adequacy of the cell design, and establish appropriate leachate monitoring programs. If the increase in leachate levels is due to a higher water table, the cell design is not water-tight and the integrity of the liner may be compromised.
- (e) The issue of public consultation is within the Board's jurisdiction and should be part of the hearing given that section 2(g) of EPEA recognizes the opportunities made available through EPEA for citizens to provide advice on decisions affecting the environment. The Approval Holder's public consultation efforts have not been adequate and, as a result, there are questions as to the Approval Holder's ability to maintain a positive relationship with community members and to make decisions that are in the public interest. Dr. Shapka asked for reassurance that the Approval Holder's board members and staff are appropriately trained and qualified to operate a landfill.

[42] The Board did not consider the Tomlinsons' submissions in determining the issues for the hearing because their appeals have been dismissed. As Dr. Shapka is the only appellant with a valid appeal before the Board, only his submission on the issues has been summarized and considered by the Board.

2. Approval Holder

[43] The Approval Holder made the following submissions:

- (a) Many of the issues raised in the Statements of Concern, Notices of Appeal, and submissions are not environmental in nature. Many of the issues raised come within the jurisdiction of the *Municipal Government Act*, R.S.A. 2000, c. M-26, *Occupational Health and Safety Act*, and other non-environmental statutes. There is no *Water Act*, R.S.A. 2000, c. W-3, approval or licence currently before the Board.
- (b) There have been times when the maximum acceptable leachate head has been exceeded and there was some confusion as to the proper method to read leachate head levels. This has been corrected and a proper procedure has been put in place. Leachate head levels have been exceeded during times of excessive precipitation and run-off, and the Landfill is particularly susceptible when the cells are open or not filled above grade so the proper run-off can be achieved. The only time the maximum acceptable leachate head was exceeded in 2009 was when heavy spring run-off combined with an unforeseen precipitation event. The Approval contemplates such occurrences, and there is a 90 day period to bring the levels into compliance. There was no escape of leachate and no risk to the environment.
- (c) The Landfill has been operated in accordance with its Approval. Run-off and run-on control systems are incorporated on site and have worked efficiently. Water quality is tested and no evidence was submitted to suggest there have been any discharges outside of allowed limits. Monitoring equipment to detect whether there has been groundwater contamination has been installed, and after five years of operation of the Landfill, no contamination has been detected.
- (d) There has been extensive hydrogeological investigation of the site, and there is no evidence of contamination, adverse effect, or harm to the Appellants. There is no evidence the Landfill could result in a fundamental change to the local

groundwater and surface water regimes, and any such allegations are based on conjecture.

- (e) There is a shallow sand deposit underlying a portion of the Landfill site, but it is overlain by 10 or more metres of glacial till and is not an aquifer. This was disclosed in the hydrogeological report provided to the Director, and water quality is monitored to ensure compliance with groundwater standards. The Approval contemplates additional hydrogeological testing be completed in the area prior to the development of Phases III and IV. Development is not likely to occur within the next 50 years so there is no utility in conducting testing at this time, because regulations can change as well as testing techniques and equipment.
- (f) The Landfill is underlain by an aquitard, not an aquifer. There is no “exceptional aquifer” in the vicinity of the Landfill. There is an extensive groundwater monitoring program in place, and there has been no indication of any issue to date.
- (g) Leachate levels in 2009 have been within regulated limits. On one occasion this spring the head limit was exceeded when there was a heavy rainfall event, but the Approval contemplated such events. The situation was temporary so the concern expressed by Dr. Shapka does not have any foundation and is conjecture. Alberta Environment conducted compliance investigations in 2008 and 2009 and there was no suggestion of any problems with the cell liners.
- (h) The Landfill was operated under a registration prior to applying for the Approval. The applicable standards were different under the registration, but the Approval Holder committed to the highest standards from the outset. Current operations, including Cells 1 and 2, the leachate collection system, the monitoring system, and the run-on and run-off systems were constructed to approval standards.
- (i) Incidents that have occurred in the past have limited relevance to the Approval. The leachate release reported in the 2008 Annual Report was minor in nature, and no enforcement or other proceedings were taken by Alberta Environment.

- (j) It complied with all legislated notice requirements and its staff are competent and have all necessary certificates.
- (k) The Appellants are opposed to the Landfill for reasons that are not environmental in nature. The public consultation process referred to by the Appellants relates to other issues, such as acceptance of waste from outside sources. The Approval Holder followed proper processes. The Appellants' real complaint is that their point of view was not accepted. This does not equate to an improper consultation process.
- (l) There is ongoing dialogue between the Approval Holder and Dr. Shapka and others who opposed the Landfill's acceptance of outside waste.
- (m) Public consultation and the competence of its staff are not proper issues for the Board, and an inquiry regarding the Approval Holder's Board of Directors is inappropriate.

3. Director

[44] The Director made the following submissions:

- (a) In order to have an issue heard at a hearing, it must be one that was raised in the Notice of Appeal, within the jurisdiction of the Director under EPEA, relevant to the application that was before the Director, and clearly stated so the other parties can address it.
- (b) The concerns that are within the Board's jurisdiction and should be addressed are whether the Approval adequately addresses the potential impacts on groundwater and local wells and the potential impacts on surface water run-off and surrounding watersheds.
- (c) Compliance is a separate, distinct issue from the decision under review, therefore, any concerns relating to compliance with Approval conditions are not within the jurisdiction of the Board.

- (d) Concerns regarding the ability of the Approval Holder to manage the project, make decisions in the public interest, and train its staff are not related to the decision to issue the Approval and therefore not within the Board's jurisdiction.

4. Rebuttal Submission

[45] In response to the submissions made by the Approval Holder and the Director, Dr. Shapka made the following submissions:

- (a) Issues properly before the Board are groundwater, leachate management, and public consultation.
- (b) The letters of support introduced by the Approval Holder have no bearing as to whether he is directly affected by the Approval and should not be given any weight.
- (c) In response to the Approval Holder's submission that there is no evidence the Landfill could result in a fundamental change to the local groundwater and surface water regimes and that such allegations are based on conjecture, evidence that the local groundwater and surface water regimes could be impacted was in fact provided.
- (d) The Approval Holder should not assess the site and surrounding hydrogeology piece-by-piece, and the impacts on groundwater and surface water for Phases I and II should have been investigated prior to the Approval being issued or at least prior to development on the north half of Phase I and the northern third part of Phase II.
- (e) All the surface and groundwater impacts should be considered by the Board before development of the cells further north.
- (f) Leachate management is a relevant issue that should be addressed. The Landfill was originally constructed above the water table but now it is below the water table and the chloride concentration increased in Piezometer No. 04-42. This

change and the potential impacts it creates is relevant with respect to the operation of the Landfill and could affect groundwater quality.

- (g) Questions arise as to the Approval Holder's statement that the only time leachate exceeded the allowed maximum was at a time of unforeseen precipitation, given the precipitation measured at Two Hills from March 1 to May 30, 2009, was only 42.8 millimetres. The increase in leachate level is due to a higher water table, the cell design is not water tight, and the integrity of the liner may be compromised.
- (h) Compliance with all legislated notice requirements does not imply that the public consultation process was adequate. The public consultation efforts made by the Approval Holder were not done in good faith and did not present the proper information. The Approval Holder did not respond to questions raised by the public and responded to a number of questions with "no comment."

B. Analysis

[46] In order for a concern expressed by a party to an appeal to be considered by the Board as an issue at a hearing, the concern expressed must have been included in the Notice of Appeal, be specific to the approval being appealed, and be within the Board's jurisdiction.

[47] Dr. Shapka identified three concerns that he considered appropriate as issues at the hearing: groundwater, leachate management, and public consultation.

[48] Dealing with the last of the three concerns, the adequacy of the public consultation, the Board notes that public consultation is often a requirement in the approval process. It benefits the applicant by providing an opportunity for the proposed project to be explained to the public and provides feedback that could improve the project. It also provides the Director with a better understanding of the concerns with the project, to determine whether the applicant has addressed the concerns, and how the approval should be written to address valid concerns. Public consultation also, obviously, provides benefit to those members of the public who may be impacted by the proposed project.

[49] The Board does not have jurisdiction to determine whether or not public consultation was sufficient. The appeal of Dr. Shapka is from the Director's decision to issue an Approval for an expansion of the Landfill operated by the Approval Holder. There are no terms or conditions in the Approval that specify the extent of public consultation required by the Approval Holder, and there is nothing in the legislation specifying how public consultation should be conducted if required. Therefore, the matter of public consultation will not be an issue at the hearing.

[50] In his appeal, Dr. Shapka raised the issue of the potential impacts of the Landfill on groundwater and surface water regimes in the area of the Landfill and the issue of leachate management. The issues of groundwater and surface water flows and leachate management are interconnected, because it is essentially the leachate from the Landfill that could negatively impact groundwater and surface water in the area.

[51] Based on the submissions of Dr. Shapka and the Approval Holder, it is apparent there are questions regarding the groundwater flow in the area of the Landfill, including the direction of flow, whether there is a connection to an exceptional aquifer, and whether the operations of the Landfill could impact groundwater in the area. These are proper questions in the context of this appeal and are valid considerations when assessing whether the terms and conditions of the Approval adequately protect the groundwater in the area of the Landfill.

[52] Dr. Shapka raised concerns as to effects on the surface water flows off the Landfill resulting from the Landfill itself. This is also a valid issue in the context of this appeal, as there may be effects on the surface water regime on the Landfill site with the construction of a larger landfill. Accordingly, it is proper for the Board to hear evidence and argument on the extent of the impacts the Landfill may have on surface water regimes in the area of the Landfill.

[53] Therefore, the issues the Board will consider at the hearing are:

1. Does the Approval adequately address the potential impacts of the expanded landfill on the groundwater and the local wells?
2. Did the Director adequately consider the potential impacts of the expanded landfill on surface water run-off and surrounding watersheds?

[54] Pursuant to section 95(4) of EPEA, the parties to the hearing may not make representations on other matters.¹⁵ Submissions on other matters will not be considered by the Board.

VI. DECISION

[55] The Board dismisses the appeals of Mr. Robert Tomlinson and Ms. Yvonne Tomlinson. Ms. Tomlinson failed to file a Statement of Concern, a prerequisite to filing a valid Notice of Appeal. Mr. Tomlinson filed a Statement of Concern and a Notice of Appeal but he did not establish that he is directly affected by the decision of the Director to issue the Approval. The Board did not consider the Stay request filed by the Tomlinsons. A stay application can only be filed by a party to an appeal and, since the Tomlinsons' appeals have been dismissed, they are not parties to the appeal.

[56] The Board finds that Dr. Shapka is directly affected by the decision of the Director to issue the Approval and is therefore entitled to proceed with his appeal. The Board will hold a hearing on January 18 and 19 2010 to hear submissions on the following issues:

1. Does the Approval adequately address the potential impacts of the expanded landfill on the groundwater and the local wells? and
2. Did the Director adequately consider the potential impacts of the expanded landfill on surface water run-off and surrounding watersheds?

Dated on February 10, 2010, at Edmonton, Alberta.

"original signed by"
Alex G. MacWilliam
Board Member & Panel Chair

"original signed by"
Alan J. Kennedy
Board Member

"original signed by"
Dan L. Johnson
Board Member

¹⁵ Section 95(4) of EPEA provides: "Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."