ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 25, 2011

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 Kent and Ingrid Vipond, Bernie and Margie Brown, Robert and Lisa Cowling, Bruce and Marcia Jeffers, Ian and Corrinne Zeer, and Jesse, Sarah, and Harji Hari and Haralta Ranches with respect to *Environmental Protection and Enhancement Act* Approval No. 241939-00-00 issued to EcoAg Initiatives Inc. by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Intervenor Decision: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (25 January 2011), Appeal Nos. 09-006-009, 016, & 019-ID3 (A.E.A.B.).

BEFORE: Mr. Alex G. MacWilliam, Panel Chair.

SUBMISSIONS BY:

Appellants:	Mr. Kent and Ms. Ingrid Vipond; Mr. Bernie and Ms. Margie Brown; Mr. Robert and Ms. Lisa Cowling and Mr. Bruce and Ms. Marcia Jeffers, represented by Ms. Teresa Meadows, Miller Thomson LLP; and Mr. Ian and Ms. Corrinne Zeer.
Director:	Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
Approval Holder:	EcoAg Initiatives Inc., represented by Mr. Kelly Nicholson, Field LLP.
Intervenor Applicants:	Mr. Bill and Ms. Kathy Blain; Ms. Cheryl Bachelder; Mr. Lauchlan Currie; Mr. Ian and Ms. Laurie Currie; Mr. Orville and Ms. Linda Norstrom; Mr. Colin and Ms. Karin Dumais; and Mr. Matthew and Ms. Jennifer Harty.

EXECUTIVE SUMMARY

Alberta Environment issued an approval under the *Environmental Protection and Enhancement Act* to EcoAg Initiatives Inc., authorizing the construction, operation, and reclamation of the High River Waste Management Facility, located near High River, Alberta, for the collection and processing of waste to produce fuel (commonly referred to as biogas).

A number of persons appealed the decision to issue the Approval. The Board found six of these persons had standing as Appellants. The Board scheduled the hearing of the appeals for February 9 to 11, 2011, in Okotoks, Alberta, and published a Notice of Hearing in local newspapers.

In response to the Notice of Hearing, the Board received intervenor applications from Mr. Bill and Ms. Kathy Blain, Ms. Cheryl Bachelder, Mr. Lauchlan Currie, Mr. Ian and Ms. Laurie Currie, Mr. Orville and Ms. Linda Norstrom, Mr. Colin and Ms. Karin Dumais, and Mr. Matthew and Ms. Jennifer Harty.

Based on consideration of the submissions provided by the applicants and written responses provided by the existing parties to these appeals, the Board determined the Blains, Ms. Bachelder, Mr. Lauchlan Currie, the Norstroms, the Dumais, and the Hartys did not raise any new arguments or evidence that was not duplicative of the concerns stated in the Appellants' submissions and Notices of Appeal. Other concerns raised were not within the Board's jurisdiction. Therefore, the Board did not accept these applications for intervenor status.

Mr. Ian and Ms. Laurie Currie raised concern with respect to the handling of bio-wastes on the lands outside the facility during the period prior to completion of construction of the facility. The Board found this concern had not been raised by the Appellants, would not be duplicative of the Appellants' arguments, and fell within the parameters of the hearing issue. Therefore, the Board allowed the Curries' application for intervenor status but restricted their involvement to the provision of written submissions on their concern as it relates to the hearing issue, which is: Do the terms and conditions of the Approval adequately address the impacts of the facility on the environment?

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I. BACKGROUND

[1] On June 23, 2009, the Director, Southern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 241939-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), to EcoAg Initiatives Inc. ("EcoAg" or the "Approval Holder") authorizing the construction, operation, and reclamation of the High River Waste Management Facility (the "Facility") located near High River, Alberta, for the collection and processing of waste to produce fuel. Such fuel is commonly referred to as biogas.

[2] Between July 22 and September 29, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Kent and Ms. Ingrid Vipond (the "Viponds") (09-006), Mr. Bernie and Ms. Margie Brown (the "Browns") (09-007), Mr. Robert and Ms. Lisa Cowling (the "Cowlings") (09-008), Mr. Bruce and Ms. Marcia Jeffers (the "Jeffers") (09-009), Mr. Ian and Ms. Corrinne Zeer (the Zeers") (09-016), and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches (the "Haris") (09-019) (collectively, the "Appellants").

[3] On January 6, 2011, the Board issued its decision on the preliminary motions.[1] The Board granted the Appellants standing, and stated the issue for the hearing is: Do the terms and conditions of the Approval adequately address the impacts of the Facility on the environment?

[4] The Board published the Notice of Hearing in the High River Times, Okotoks Western Wheel, Vulcan Advocate, and Nanton News, and provided the notice to the Government of Alberta news release service, Municipal District of Foothills, and the Town of High River. In response to the Notice of Hearing, the Board received intervenor applications from Mr. Bill and Ms. Kathy Blain (the "Blains"), Mr. Lauchlan Currie, Ms. Cheryl Bachelder, Mr. Ian and Ms. Laurie Currie (the "Curries"), Mr. Orville and Ms. Linda Norstrom (the "Norstroms"), Mr. Colin and Ms. Karin Dumais (the "Dumais"), and Mr. Matthew and Ms. Jennifer Harty (the "Hartys") (collectively, the "Applicants"). Between December 28, 2010, and January 6, 2011, the Board

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[1] See: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006-009, 016, 017, & 019-ID1 (A.E.A.B.).

received written responses to the intervenor applications from the Approval Holder, Director, and some of the Appellants.

II. SUMISSIONS

A. Applicants

[5] The Hartys explained their home is two miles west of the Facility. They believed the premise of the Facility is positive, but took the position that the Approval Holder has failed to manage the Facility properly and in a way that it is viable on an environmental and community basis. The Hartys raised questions regarding the storage of waste, the regulatory entity in charge of regulating the Approval Holder, environmental impacts on surface and groundwater, odour, scavenger animals, flies, decline of land value, and industrial versus agricultural use.

[6] The Blains and Dumais referred to the odours and flies, the need for independent and regular monitoring requirements to identify changes in air, water, and soil quality, operating standards, and plant design. They also stated there has been a lack of planning and understanding, resulting in a project that has negative impacts on community members.

[7] Ms. Bachelder explained she owns land close to the Facility and is directly impacted by the pollution generated by it. She raised concerns regarding the odours, water wells, and the lack of any independent and regular monitoring requirements in the Approval.

[8] Mr. Lauchlin Currie explained he owns land two miles northeast of the Facility. He stated the odours originating from the Facility have become stronger, more frequent, and more pungent over the last few years. Mr. Currie believed the project is not “financeable” given the inherent risk in the project, the lack of capital for this sector, and the strong opposition from the surrounding community. He also did not see the Approval Holder abiding by the terms and conditions of the Approval including the terms regarding construction of the Facility and odour reduction and management. Mr. Currie questioned why the project would be approved in a densely populated rural area, impacting the air quality for so many people and impacting the land value in the area. Mr. Currie said the project should be forced to strictly comply with the conditions in the Approval or it should be shut down.

[9] The Curries explained they own property approximately two miles east of the Facility. They expressed concern regarding the odours and the loss of land value. In addition, the Curries raised the following arguments:

1. The Approval inadvertently created a loophole which allows the Approval Holder to temporarily conduct operations in an environmentally irresponsible manner while claiming to be under construction. The Approval Holder is operating on an extended temporary basis outside, releasing odours the Facility was designed to abate. The Approval was used to secure contracts to handle the bio-solids but the Facility is not yet built. There is no incentive for the Approval Holder to build proper bio-filtration equipment when the Approval allows it to operate in an open air environment. Enforcement of the Approval is restricted because all the conditions assume construction of the Facility has taken place.
2. Construction did not begin by May 30, 2010, as stipulated in the Approval, and the Approval Holder did not request an extension. Construction implies actual biodigestion equipment being purchased and brought onto the site, not just erecting a shell of a building that could be used for various purposes.
3. The Approval Holder will never receive financial backing to move the project forward. Part 5 of the Approval states financing must be in place prior to commencement of the operations.[2] Cargill intends to build its own biodigestor, so the Approval Holder will not obtain financing without the major feedstock from Cargill.

[10] The Curries stated their concerns relate to how the Facility operates, and if no bio-solids were handled outside, they would be satisfied.

B. Appellants

[11] The Jeffers and Cowlings had no objections to the Board granting all of the Applicants' requests. They stated the additional perspectives would contribute to the hearing process.

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[2] Part 5 of the Approval provides:

"5.1.1 The approval holder shall have the financial security in place before commencing operations.

5.1.2 The approval holder shall maintain the financial security for the plant until returned in accordance with the Act or the regulations.

5.1.3 The approval holder shall provide additional financial security as required in writing by the Director."

[12] The Browns stated the Applicants should be allowed to present their views. The Browns stated the impact of the Facility on the area has been underrepresented because of the manner in which the Facility started up.

[13] The Zeers approved of all the applications so that the Board would be aware of the negative impact the Facility has caused.

[14] The Viponds believed all of the Applicants had valid concerns regarding the Facility, and they should be given an opportunity to present submissions at the hearing.

C. Approval Holder

[15] The Approval Holder noted the Board's open and transparent process does not mean the Board's proceedings are like a public inquiry or that standing is granted as of right. The Approval Holder argued none of the Applicants established they would materially assist the Board in this matter or provide additional evidence that is not duplicative of material that can be or has been provided by the Appellants. The Approval Holder stated the Applicants' focus is on the effect of existing composting and feedlot operations that are not at issue in these appeals.

[16] The Approval Holder stated the material provided by the Hartys did not indicate they would be able to assist the Board by providing evidence or argument that significantly differs from what the Appellants will likely include in their submissions. The Approval Holder noted the Hartys posed a number of questions which were previously raised by the Appellants, were irrelevant, or were not in the Board's jurisdiction. The Approval Holder submitted the Hartys did not meet the requirements to be granted intervenor status.

[17] The Approval Holder argued the Blains did not provide any material to support their assertion that they are directly affected by the pollution generated by the Facility. The Approval Holder stated the Blains did not provide any material to indicate they can provide the Board with evidence or arguments that is not duplicative of material that can be supplied by the Appellants. The Approval Holder noted the Blains' application was a reproduction of a letter written by one or more of the Appellants that was submitted in the context of a meeting with the Municipal District of Foothills No. 31. The Approval Holder argued "… the very submission provided by the Blains in order to demonstrate that they can provide something to the Board that is not duplicative of the existing Appellants is itself a duplication of material generated by

someone else - most likely one or more of the existing Appellants."[3] The Approval Holder stated the issues raised in the material, including fear of air, soil, and water contamination from the Facility, have been raised by the Appellants, and the Blains did not supplement the issues in any useful way. The Approval Holder submitted the Blains have not met the test to be granted intervenor status, because they have not demonstrated their concerns or information differ from the Appellants or will materially assist the Board.

[18] The Approval Holder noted the Dumais used the same letter as the Blains as their intervenor application. For the same reasons as stated above, the Approval Holder argued the Dumais' application for intervenor status should be denied.

[19] The Approval Holder argued Ms. Bachelder did not provide any further support that she has a tangible interest in the appeals other than she owns land close to the Facility and is directly impacted by the pollution generated by the Facility. The Approval Holder noted the two concerns raised by Ms. Bachelder, specifically the smell and fear of water contamination, have been addressed by the Appellants, and she did not provide any evidence or information that materially differs from the evidence or information available from the Appellants. The Approval Holder argued Ms. Bachelder has not met the requirements to grant her intervenor status.

[20] The Approval Holder stated Mr. Lauchlin Currie's correspondence does not conform to section 9(1) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), in that it does not indicate whether Mr. Currie will be represented by a lawyer or other agent. The Approval Holder stated Mr. Currie's concern regarding odour and air quality have been addressed by the Appellants, and he does not indicate he can provide the Board with information or evidence that is not duplicative of the Appellants. The Approval Holder argued Mr. Currie's concerns regarding land values and financing of the Facility are not relevant. Therefore, according to the Approval Holder, Mr. Currie has not met the technical and substantive requirements to grant him intervenor status.

[21] The Approval Holder argued the three concerns raised by Mr. Ian and Ms. Laurie Currie are either irrelevant or misguided. The Approval Holder explained the paunch going to the outside composting pads registered and operated by Tongue Creek Feeders and Roseburn Ranches has been accepted under contract since 1994, and the biosolids have been accepted from

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[3] Approval Holder's submission, dated January 6, 2011, at page 4.

the Town of Okotoks since 2005, long before the biogas Facility was contemplated. The Approval Holder stated the Curries' interpretation of construction is incorrect. The Approval Holder explained construction of the Facility commenced prior to May 30, 2010, including installation of internal equipment. The Approval Holder argued that had the Director required the biodigestion equipment be installed prior to May 30, 2010, then he could have said so in the Approval. The Approval Holder stated the Curries' concern regarding financial backing for the project is irrelevant. It pointed out the financial security referred to in the Approval is not synonymous with financial backing for the project. The Approval Holder submitted the Curries failed to demonstrate their evidence or information will materially assist the Board in the determination of the issue, and therefore, their request for intervenor status should be denied.

[22] The Approval Holder stated the Norstroms did not indicate what their evidence might be regarding their concerns about the odours and the environmental effects on Tongue Creek and the groundwater. The Approval Holder stated the Norstroms did not show how their evidence would be different from the Appellants. The Approval Holder explained the Norstroms are located close to a large feedlot operation and their valley is located along Tongue Creek, which flows east toward a large slaughter facility not more than four miles from their home. The Approval Holder submitted the dead smell the Norstroms identified might emanate from one or both of these facilities and not from the Approval Holder. The Approval Holder argued the Norstroms failed to establish a tangible interest in the subject of the appeals, and therefore, they have not met the test required to obtain intervenor status.

[23] The Approval Holder objected to including the Applicants as intervenors, because they did not raise any relevant issues or supply evidence that would materially assist the Board. The Approval Holder argued the Appellants raised the same issues, and including the Applicants would lead to duplication of evidence and delay the hearing process. The Approval Holder noted that most of the Applicants' submissions were directed toward the perceived effects of the existing feedlot and composting operations rather than the issue of the hearing.

D. Director

[24] The Director stated that many of the Applicants' requests appear to relate to the existing compost registration sites, including odours or management of the facility. The Director noted the Facility authorized by the Approval is currently non-operational so the comments

cannot relate to the approved Facility. The Director argued that any application based on the impacts of the registered compost site should not be granted as they do not relate to the issue for the hearing. The Director submitted that any perceived "loophole" between approvals and registrations is a matter for the Legislature and is not a proper ground to base an intervention request.

[25] The Director argued that some of the intervention requests raised only a possibility of an issue and did not raise tangible interests.

[26] The Director stated that any intervention requests related to land use or "financeability" of the project should not be granted since these issues are not within the Board's jurisdiction.

[27] The Director noted the intervenor requests substantially duplicate the matters set out in the Notices of Appeal, and it did not appear that any new or additional evidence relevant to the appeals will be provided by the Applicants. The Director argued the intervenor requests should be denied, but if any requests are granted, the intervention should be limited to written submissions only.

E. Analysis

[28] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

> "Subject to subsection (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."

[29] Section 9 of the Regulation, requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

> "(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.

> (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

[30] The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
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> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
> - the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
> - the intervention will not repeat or duplicate evidence presented by other parties…."

[31] Although the Dumais and Curries stated their submissions were "appeals," the submissions were provided in response to the Board's Notice of Hearing and invitation to apply for intervenor status. The Approval was issued on June 23, 2009, and there was a 30 day appeal period. The Dumais and Curries did not argue the submissions should be accepted as Notices of Appeal and they did not ask the Board to extend the appeal period. Therefore, the Board will consider the submissions as intervenor applications and not Notices of Appeal.

[32] In reviewing the intervenor applications, the Board notes the Applicants raised the same concerns as those raised by the Appellants, including odours, waste storage, water quality of ground and surface waters, independent monitoring of the Facility, air and soil quality, flies, and plant design. All of these concerns have been previously raised in submissions by the Appellants or in their Notices of Appeal. These concerns, albeit within the Board's jurisdiction and encapsulated as part of the issue for the hearing, should be adequately addressed by the Appellants in their submissions. The Applicants did not include any evidence or argument that has not already been raised by the Appellants with respect to these issues, and they did not demonstrate they would bring additional information on the issue.

[33] Some of the concerns raised by the Applicants are not within the Board's jurisdiction, including effects on land value and land use. Financing for the Facility also is not a matter within the Board's jurisdiction. There was also concern expressed about the regulatory agencies involved at the site. The Board can only hear appeals of certain decisions made by Alberta Environment. It does not have the jurisdiction to review decisions made by other regulatory agencies.

[34] Therefore, the Board denies the intervenor requests filed by the Blains, Ms. Bachelder, Mr. Lauchlan Currie, the Norstroms, the Dumais, and the Hartys. The Board notes the concerns of these Applicants as residents in the area. However, based on their intervenor applications, the Board finds these Applicants would duplicate the evidence anticipated to be presented by or capable of being dealt with by the Appellants in their submissions. Allowing these Applicants to participate in the hearing would not materially assist the Board in making its recommendations to the Minister.

[35] Mr. Ian and Ms. Laurie Currie raised three issues: the Facility construction deadline; the financial backing of the project; and handling of the wastes outside until the Facility is completely constructed. The Approval requires construction of the Facility to start by May 30, 2010. If the Approval Holder had not started construction by that date, it could request an extension from the Director. Based on the Approval Holder's submission and the Curries' submission, it is clear the Facility building was built prior to May 30, 2010. There is no requirement that all of the equipment be installed by that date or that the Facility had to be operational by that date. Therefore, based on the information provided, the Approval Holder met the construction deadline.

[36] Part 5 of the Approval requires the Approval Holder to provide security for the project. It appears the Curries consider the security required under the Approval to be a requirement to have financing for the project in place before starting operations. The security required in the Approval is a legislated requirement under section 84 of EPEA.[4] It is not

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[4] Section 84 of EPEA states:

"If required by the regulations, an applicant for or a holder of an approval, a registration, a remediation certificate, a certificate of qualification or a certificate of variance shall provide financial or other security and carry insurance in respect of the activity or thing to which the approval, registration, remediation certificate, certificate of qualification or certificate of variance relates."

equivalent to financing of the project, which, as stated above, is not within the Board's jurisdiction.

[37] In the opinion of the Board, the Curries' concern regarding the Approval Holder's ability to conduct operations while the Facility is under construction was not raised in the Appellants' submissions. The Curries described this as a "loophole" in the Approval that allows the Approval Holder to handle wastes outside the Facility until construction of the Facility is completed. The Board is of the view that evidence and argument on this issue would be relevant and of assistance to the Board in these appeals. Therefore, the Board allows the Curries to provide written submissions on the ability of the Approval Holder to conduct operations while the Facility is under construction and as it relates to the hearing issue identified by the Board.

III. DECISION

[38] For the reasons set out above, the requests for intervenor standing by the Blains, Ms. Bachelder, Mr. Lauchlan Currie, the Norstroms, the Dumais, and the Hartys are denied.

[39] The Board allows the application of Mr. Ian and Ms. Laurie Currie for intervenor status. Their participation is limited to the provision of written submissions on the handling of wastes outside the Facility while the Facility is under construction. Such submissions must be within the context of the issue that will be heard at the hearing, namely: Do the terms and conditions of the Approval adequately address the impacts of the Facility on the environment?

[40] As stated in the Board's January 20, 2011 letter, the written submissions of Mr. Ian and Ms, Laurie Currie were due on or before January 25, 2011. The parties to this hearing are requested to respond to these submissions in their oral evidence at the hearing.

Dated on January 25, 2011, at Edmonton, Alberta.

"*original signed by*"

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Alex G. MacWilliam
Panel Chair