

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 26, 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 an appeal filed by the Fort McMurray First Nation with respect to *Environmental Protection and Enhancement Act* Approval No. 236394-00-00 issued to Nexen Inc. by the Director, Northern Region, Environmental Management, Alberta Environment.

Cite as: *Fort McMurray First Nation v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Nexen Inc.* (26 January 2010), Appeal No. 09-020-D (A.E.A.B.).

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to Nexen Inc. for the Long Lake South enhanced recovery in-situ oilsands or heavy oil processing plant and oil production site.

On September 29, 2009, the Board received a Notice of Appeal from the Fort McMurray First Nation appealing the Approval.

Alberta Environment and Nexen raised the following motions challenging the validity of the appeal:

1. What issues in the Notice of Appeal are not constitutional issues because this Board is not designated under the *Administrative Procedures and Jurisdiction Act* to hear constitutional matters?
2. Did the Energy Resources Conservation Board conduct a review or hearing under their legislation with respect to the subject matter of the appeal, whereby requiring this Board to dismiss the appeal?
3. How is the Fort McMurray First Nation directly affected by the Approval? and
4. Did the Fort McMurray First Nation file a statement of concern with Alberta Environment, a prerequisite to filing a notice of appeal?

The Board set a schedule to receive submissions on the motions. The Fort McMurray First Nation did not file a submission and did not respond to the Board's requests. The Board therefore dismissed the appeal for failing to respond to the Board and not filing a submission.

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I. BACKGROUND

[1] On August 21, 2009, the Director, Northern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 236394-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ("EPEA") to Nexen Inc. (the "Approval Holder") authorizing the construction, operation, and reclamation of the Long Lake South enhanced recovery in-situ oilsands or heavy oil processing plant and oil production site.

[2] On September 29 and October 1, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from the Fort McMurray First Nation and the Mikisew Cree First Nation appealing the Approval. This Decision relates to the appeal filed by the Fort McMurray First Nation (the "Appellant") only.

[3] On September 30, 2009, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

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

[5] The Board received letters on October 30, 2009 from the Director and the Approval Holder requesting the appeal be dismissed for lack of standing. In the same letter, the Director provided a copy of the Record excluding the information related to consultation with the Appellant, and the Board distributed a copy to the Approval Holder and Appellant on November 5, 2009.

[6] The Energy Resources Conservation Board (the “ERCB”) responded to the Board on October 15, 2009 advising they did not hold a review or public hearing on the subject matter of the appeal. On November 2, 2009, the Board sought clarification on the ERCB’s response and provided a copy of a joint ERCB and Alberta Environment Notice of Filing from 2007 and ERCB Approval No. 9485F issued on February 25, 2009 to OPTI Canada Inc. and Nexen Inc. A further letter was received from the ERCB on November 13, 2009 confirming “they did not hold a review hearing or public hearing...” The Board received a letter dated December 18, 2009 from the ERCB addressed to the Approval Holder advising they received an application from Nexen; however, it “...was not the subject of a review hearing pursuant to section 39 or 40 of the *Energy Resources Conservation Act*.” Based on the information received from the ERCB, the Board advised the Participants it was unclear if a hearing or review took place as described in EPEA, and they would need to address the issue in their submissions.

[7] On November 19, 2009, the Board set the schedule to receive submissions on the following motions:

1. What issues in the Notice of Appeal relate to constitutional issues that are not within this Board’s jurisdiction? What are the issues in the Notice of Appeal that are not constitutional issues? In accordance with section 11 of the *Administrative Procedures and Jurisdiction Act* this Board is not designated under this legislation to hear constitutional matters.
2. Did the ERCB conduct a review or hearing under their legislation with respect to the subject matter of the appeal, where the Appellant received notice of and participated in or had the opportunity to participate in a hearing or review by the ERCB?
3. How is the Fort McMurray First Nation directly affected by Nexen’s Approval?
4. Did the Fort McMurray First Nation submit a statement of concern in accordance with section 73 of EPEA, a prerequisite to filing a Notice of Appeal pursuant to section 91(1)(a)(i)?

[8] The initial submission from the Appellant was due December 17, 2009, the response submissions from the Director and the Approval Holder were due January 15, 2010, and the rebuttal submission from the Appellant was due February 6, 2010.

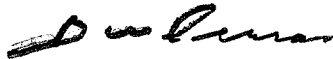
[9] As no initial submission was received on December 17, 2009, the Board wrote to the Participants on December 18, 2009 extending the deadline for the Appellant to file their initial submission by December 22, 2009. The Board also cautioned the Appellant that failure to respond to the Board may result in the dismissal of their appeal pursuant to section 95(5)(a)(iv) of EPEA. As no submission was received from the Appellant, on December 23, 2009 Board staff attempted to contact the Appellant via telephone, however the voice mail advised the office was closed until January 4, 2010. The Board then extended the date for the Appellant to file their initial submission to noon on January 5, 2010. On the morning of January 5, 2010, the Board sent an email to the Appellant reminding them of the submission deadline, and on January 6, 2010 a voice message was left requesting the Appellant contact the Board. The Board did not receive a response to any of its requests, and no submission was received.

[10] On January 8, 2010, the Board wrote to the Appellant advising that their Notice of Appeal was dismissed for failing to respond to the Board, and written reasons for the dismissal would follow in due course. No subsequent communications have been received from the Appellant.

II. DECISION

[11] Pursuant to section 95(5)(a)(iv) of EPEA, the Board hereby dismisses the appeal of the Fort McMurray First Nation, Appeal No. 09-020, for failing to comply with a written notice.

Dated on January 26, 2010, at Edmonton, Alberta.



Delmar W. Perras
Chair