Appeal No. 09-021-D

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 16, 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 Mikisew Cree 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: *Mikisew Cree First Nation* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Nexen Inc.* (16 April 2010), Appeal No. 09-021-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.

The Board received a Notice of Appeal from the Mikisew Cree First Nation appealing the Approval.

The Board asked the participants to answer the following questions based on the motions raised by Alberta Environment and Nexen 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, thereby requiring this Board to dismiss the appeal?
3. How is the Mikisew Cree First Nation directly affected by the Approval? and
4. Did the Mikisew Cree First Nation file a statement of concern with Alberta Environment, a prerequisite to filing a notice of appeal?

The Board received submissions on the motions and determined that, even though the Mikisew Cree were directly affected and had filed a Statement of Concern, the appeal must be dismissed. The issues raised in the Notice of Appeal were primarily constitutional matters outside of the Board's jurisdiction. In addition, the Board found the Appellant participated in a review by the Energy Resources Conservation Board in which the issues raised in the Notice of Appeal were adequately dealt with.

BOARD PANEL:		Mr. Delmar W. Perras, Chair; Ms. A.J. Fox, Board Member; and Mr. Gordon Thompson, Board Member.
SUBMISSIONS BY:		
	Appellant:	Mikisew Cree First Nation, represented by Ms. Anita M. Floden, Prowse Chowne LLP.
	Director:	Mr. Kem Singh, Director, Northern Region, Environmental Management, Alberta Environment, represented by Mr. Andrew Bachelder, Alberta Justice.
	Approval Holder:	Nexen Inc., represented by Mr. Bradley S. Gilmour, Bennett Jones LLP.

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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[1] and the Mikisew Cree First Nation (the "Appellant") appealing the Approval.

[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 ("NRCB"), the Energy Resources Conservation Board ("ERCB"), and the Alberta Utilities Commission ("AUC") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB and the AUC responded in the negative.

[5] The Board received letters on October 30, 2009, from the Director and the Approval Holder which both raised the motion that 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. The Board distributed a copy of the Record to the Approval Holder and Appellant on November 5, 2009.

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[1] The appeal of the Fort McMurray First Nation was dismissed. See: *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.).

[6] The ERCB responded to the Board on October 15, 2009, advising it 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 it 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 questions based on the motions raised by the Director and Approval Holder:

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 Mikisew Cree First Nation directly affected by Nexen's Approval?

4. Did the Mikisew Cree 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 Board received submissions from the Participants between December 17, 2009, and February 8, 2010.

II. CONSTITUTIONAL ISSUES

A. Appellant's Submissions

[9] The Appellant submitted the first issue noted in their Notice of Appeal, which dealt with the failure of the Province of Alberta and the Government of Canada to have meaningful consultation, was a constitutional issue. However, the Appellant argued the failure of the Approval Holder to have meaningful consultation and incorporate traditional land use into the project was not a constitutional issue since the Approval Holder had a duty to consult with anyone who is potentially directly and adversely affected by the project. The Appellant explained their treaty rights allow them to occupy and use the lands, but they were not asking the Board to rule on these rights. The Appellant stated these rights provide the foundation and their entitlement to be concerned about the environmental impacts more than the average Albertan.

[10] The Appellant stated the second issue raised in the Notice of Appeal regarding cumulative effects was not a constitutional issue and can be ruled on separate and apart from the constitutional duty to consult with First Nations. The Appellant argued the rejection of the cumulative effects assessment as incomplete because it was not based on a true pre-development baseline and the failure of the Approval Holder to include analyses of trends and regional issues, are issues that are within the Board's jurisdiction.

[11] The Appellant argued they are affected differently than the general public because they have a greater reliance on the project lands.

B. Approval Holder's Submission

[12] The Approval Holder stated the Board does not have jurisdiction to hear those matters related to the constitutional duty to consult and, therefore, the issues pertaining to the duty to consult are beyond the jurisdiction of the Board and must be dismissed.

C. Director's Submission

[13] The Director noted the Appellant acknowledged that part of its submission was a constitutional issue. The Director stated the Province engages in and requires proponents to engage in stakeholder consultation. The Director explained the constitutional duty to consult with First Nations arises from the *Constitution Act, 1982* and is distinct from statutory consultation. The Director stated the Province takes its constitutional duty to consult seriously, and if a decision has the potential to adversely affect the rights or traditional uses of First Nations, the Alberta Consultation Policy and Guidelines on Land Management and Resource Development requires consultation.[2]

[14] The Director submitted the Board does not have the jurisdiction to consider social, economic, or cultural issues or whether the Appellant's traditional way of life or constitutionally protected rights have been infringed or adversely impacted. The Director stated the Appellant had intertwined potential impacts on the environment with the other broad reaching issues so it may be impossible to separate them.

[15] The Director argued Alberta Environment does not have the resources to analyze issues outside the environmental considerations, and it should not be expected to consider economic effects, perform financial analyses, or investigate mitigating options prior to issuing a licence. The Director stated these issues are public interest issues and should be left to bodies that have the responsibility of ensuring the proposed project is in the public interest, such as the NRCB and ERCB.

[16] The Director stated constitutional issues must be considered by the courts, not the Board, and determining whether a project will impact on the Appellant's traditional way of life or have social, economic, or cultural impacts is not the mandate of the Board.

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[2] See: http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf.

D. Analysis

[17] The Appellant raised three issues in its Notice of Appeal: (1) the Approval Holder, Province of Alberta, and the Government of Canada failed to have a meaningful consultation process with the Appellant regarding the project; (2) cumulative effects studies were incomplete since they were not based on true pre-development baseline; and (3) lack of information on the social, cultural, environmental, and economic impacts of the project on the Appellant's rights and interests because they are affected differently than the general public.

[18] Under section 11 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-23, the Board does not have the jurisdiction to determine matters related to the constitutional duty to consult.[3]

[19] It is clear the first issue raised in the Notice of Appeal concerning the level of consultation with the provincial and federal governments is a constitutional matter and is, therefore, not within the Board's jurisdiction to hear. The Board will consider the level of consultation conducted by the Approval Holder as part of the third issue raised by the Appellant.

[20] The third issue, the impacts of the project resulting from the Appellant's use of the land that is different from the general public's use of the land, ties into constitutional issues. The Board cannot assess the adequacy of the information on social, cultural, and economic impacts because these are directly related to constitutional matters.

[21] The Appellant raised a number of environmental impacts as part of the third issue, in a list of matters they considered were not sufficiently addressed in the Approval application. They argued that, as a result, they were not able to properly address the impact of the project on their rights and interests. Based on the wording of the Notice of Appeal and the wording of this issue, the Appellant considers this perceived lack of information resulted in inadequate consultation. From the Appellant's perspective, adequate consultation could not occur without more information included relating to the environmental impacts of the project.

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[3] Section 11 of the *Administrative Procedures and Jurisdiction Act* states:

"Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so."

[22] The assessment of the adequacy of the consultation undertaken is not within the Board's jurisdiction, and therefore, the third issue raised by the Appellant cannot be considered by the Board.

[23] The one issue that was less obvious for the Board was the second issue raised by the Appellant, which was whether the cumulative effects assessments were adequate given the baseline data used. When reading this issue separate from the remainder of the Notice of Appeal, it appears cumulative effects and the adequacy of the baseline data are within the Board's jurisdiction. However, in the introductory comments of the Notice of Appeal, the Appellant refers to cumulative impacts on their rights as protected by Treaty 8 and entrenched in the *Constitution Act*. The Board concluded the effects the Appellant wants the Board to consider as part of the second issue are the effects on the Appellant's constitutional rights, which are outside the Board's jurisdiction.

[24] Based on the Board's interpretation of the Notice of Appeal, the Board dismisses the appeal, because the issues raised were constitutional matters and outside of the Board's jurisdiction.

[25] If the Board's interpretation of the Notice of Appeal is incorrect with respect to the second issue, the Board will assess the issue of cumulative effects and baseline data under the second question identified by the Board, which is, 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?

III. ERCB HEARING

A. Appellant's Submissions

[26] The Appellant stated they did not receive notice of or have the opportunity to participate in any hearing or review by the ERCB. The Appellant noted the November 13, 2009 letter from the ERCB stating it did not hold a review hearing or a public hearing on the application.

[27] The Appellant stated their concerns described in their Statement of Concern letter were never resolved or withdrawn. The Appellant explained they participated in a third party review completed for the Chipewyan Prairie Dene First Nation IRC, but they did not have a technical meeting with the Approval Holder to follow up on the review because the Approval Holder believed the Appellant's concerns had been addressed.

[28] The Appellant argued the matters in the Notice of Appeal were not adequately addressed by the ERCB. The Appellant stated the ERCB issued an approval without any detailed decision outlining its reasons, and without reasons, it cannot be determined that the Appellant's concerns were adequately addressed. The Appellant noted the test is whether the matters were adequately dealt with in the ERCB proceedings.

[29] The Appellant noted the Approval Holder's claim that the matters were dealt with in the environmental impact assessment ("EIA") and the supplemental information requests. The Appellant argued this indicates the information was put before the ERCB, but it does not provide confirmation that the ERCB adequately addressed the matters when it reached its decision. The Appellant submitted that a lack of meaningful reasons does not explain what evidence was considered and what was not.

B. Approval Holder's Submission

[30] The Approval Holder submitted the Appellant had notice of and participated in an ERCB review that adequately considered the issues listed in the Appellant's Notice of Appeal. The Approval Holder submitted the appeal must be dismissed.

[31] The Approval Holder noted the ERCB confirmed that, while there was no public hearing or review (meaning a review under sections 39 or 40 of the *Energy Resources Conservation Act*), the ERCB did actually review the application over the course of several months and an approval was issued.

[32] The Approval Holder stated the Appellant had notice of the ERCB review, because the Appellant filed a Statement of Concern with the ERCB and Alberta Environment on April 10, 2007, in response to the Notice of Filing published in local newspapers. The Approval Holder explained it published a Notice of Application towards the later stages of the ERCB

review, and the notice stated the ERCB would continue to process the application without further notice if no objections were received.

[33] The Approval Holder submitted the Appellant participated in the review of the project (within the meaning of section 95(5)(b)(i) of EPEA) by reviewing the application and EIA, filing a Statement of Concern, receiving the supplemental information request responses, participating in consultations with the Approval Holder, and accepting funding for internal and third party technical reviews of the EIA.

[34] The Approval Holder explained it contacted the Appellant prior to publishing the Notice of Filing to set a meeting to discuss the application in more detail. The Approval Holder stated it provided the Appellant with copies of the application and the EIA, and after reviewing the application and EIA, the Appellant filed a Statement of Concern. In the Statement of Concern, the Appellant indicated their intent to participate in a joint technical review of the project. The Approval Holder stated the Appellant's concerns about the project included the duty to consult and accommodate, cumulative effects of the project, impacts on wildlife, biodiversity, water quality and quantity, and reclamation.

[35] The Approval Holder stated that, throughout the ERCB review period, it undertook additional consultation, including: (1) various one-on-one meetings, emails, and telephone conversations with representatives from the Appellant; (2) a workshop to promote better understanding of the Appellant's concerns; and (3) an open house to provide regulatory timelines, maps, project highlights, commitments, and employment opportunities.

[36] The Approval Holder explained it provided various forms of funding to assist the Appellant in reviewing the application and EIA. The Approval Holder stated it provided funding through: (1) the Athabasca Tribal Councils All Parties Core Agreement to assist the review of the project; (2) directly compensating the Appellant for their time and effort in reviewing the application and EIA; and (3) funding a review of the EIA for the benefit of several First Nations, including the Appellant; and (4) reviewing the socio-economic impact assessment section of the EIA solely for the Appellant.

[37] The Approval Holder stated it maintained open communication with the Appellant throughout the entire review process, including consulting with the Appellant and providing copies of the supplemental information requests and the responses. The Approval Holder prepared a written response to the issues and questions raised in the initial report prepared by the third party reviewers, and the Approval Holder also met with the reviewers and the Appellant to further discuss the written responses. The Approval Holder understood that, on completion of the third party review process, the Appellant's concerns had been adequately addressed.

[38] The Approval Holder argued the nature and extent of the participation by the Appellant in review of the project met or exceeded the requirements of section 95(5)(b)(i) of EPEA.[4] The Approval Holder stated the Appellant filed written concerns and participated in multiple meetings and discussions. The Approval Holder stated the Appellant played an active role in the application review process even though the ERCB did not hold a *formal* hearing according to the ERCB legislation. The Approval Holder argued the Appellant is now attempting to duplicate the ERCB process by filing a Notice of Appeal with the Board.

[39] The Approval Holder argued the matters raised by the Appellant in their Notice of Appeal were adequately dealt with by the ERCB, and the Appellant had ample opportunity to raise each of the issues with the ERCB during the review process. The Approval Holder stated the issues of consultation and inaccurate baseline data and an incomplete cumulative effects assessment were raised by the Appellant in their Statement of Concern and are not new matters.

[40] The Approval Holder stated the ERCB adequately addressed the issues of consultation and adequacy of the baseline data in the review process in the following manner:

1. The public consultation process is described in the EIA. The Appellant was identified as one of the stakeholders and the consultation method was detailed. The concerns raised, including impacts on traditional use, and how they were

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[4] Section 95(5)(b)(i) of EPEA provides:

"The Board shall dismiss a notice of appeal if in the Board's opinion the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately

mitigated are described in the EIA. Two traditional land use studies were conducted by First Nations and incorporated into the project plans.

2. Two supplemental information requests were made, and the responses provided additional information and clarity. Updated consultation reports were provided in the supplemental information requests.

3. Third party technical reviews were conducted on behalf of the Appellant, and additional clarification was provided in writing and during follow-up meetings. Recommendations made by the third party consultant have been supported in principle by the Approval Holder.

4. The Appellant had the opportunity to comment on the draft terms of reference for the EIA. The baseline case used in the EIA includes existing environmental conditions and existing and approved projects or activities. The cumulative effects assessment cases include past studies, existing and anticipated future environmental conditions, existing and approved projects or activities, and other planned projects. Data were also collected from previous environmental assessments and government and non-government databases. The baseline and cumulative effects assessments followed appropriate methods and the EIA was reviewed and deemed complete by Alberta Environment.

[41] The Approval Holder stated the third issue raised by the Appellant, inadequate information on the impacts on the Appellant, was adequately addressed by the ERCB and is not a new issue that can now be raised before the Board. The Approval Holder argued the Appellant could have raised the concern when they were provided with the EIA or during the third party review of the EIA, but they chose not to. The Approval Holder argued that, if the Appellant had further concerns, they had an opportunity to raise them prior to the close of the ERCB review. The Approval Holder argued the Appellant had an obligation to raise the concerns in their Statement of Concern or some other time during the ERCB review. Accordingly, the Approval Holder submitted the issue of inadequate information on the impacts of the project on the Appellant is not an appropriate matter to be considered by the Board.

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dealt with…."

[42] The Approval Holder stated that, even though the issue was not raised by the Appellant, the issue was adequately dealt with by the ERCB through its review and consideration of the EIA. The Approval Holder explained social and economic impacts on the Appellant's rights and interests were included in the EIA. The Approval Holder stated it was committed to creating comprehensive solutions to the issues and was committed to specific initiatives. The Approval Holder stated the EIA contained an assessment of cultural impacts on the Appellant's rights and interests, including a section that specifically evaluated the impacts on aboriginal communities and traditional lifestyle.

[43] The Approval Holder argued the Appellant failed to provide any evidence or information to demonstrate the issues raised were not adequately dealt with by the ERCB in its review process. The Approval Holder submitted there are no new issues contained in the Notice of Appeal that have not already been adequately considered by the ERCB.

[44] The Approval Holder submitted the elements of section 95(1)(b)(i) of EPEA have been met, and therefore, the Board should dismiss the appeal.

C. Director's Submission

[45] The Director stated the ERCB provided notice to the Appellant of the project in 2007, and in response, the Appellant submitted objections to the application to the ERCB and Alberta Environment. The Director accepted the objections as a Statement of Concern.

[46] The Director noted a letter from the ERCB dated November 13, 2009, acknowledging the Appellant filed objections, but the objections were resolved.

[47] The Director argued the Appellant had the opportunity to participate under section 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10,[5] but instead the

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[5] Section 26(2) of the *Energy Resources Conservation Act* provides:

"Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person

(a) notice of the application,

(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,

(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,

Appellant indicated to the ERCB that they were satisfied with the project. The Director stated the ERCB did not hold a formal review hearing or public hearing because all objections to the project were resolved or withdrawn. The Appellant had the opportunity to participate in a hearing conducted by the ERCB, but failed to engage in timely and meaningful participation.

[48] The Director stated the Appellant removed themselves from the ERCB process because their concerns were resolved, but now they seek to have their concerns addressed through the Board's process. The Director submitted this is an abuse of process and should not be permitted. The Director submitted the appeal should be dismissed because the Appellant had the opportunity to participate in an ERCB hearing on the matter.

D. Analysis

[49] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear a matter if it has been heard and adequately dealt with by the ERCB and the person had the opportunity to participate in the hearing. Section 95(5)(b)(i) states:

> "The Board shall dismiss a notice of appeal if in the Board's opinion the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with…."

[50] Further, under section 95(2)(a) of EPEA, the Board has the authority to limit the issues that it will hear with respect to an appeal taking into account whether a matter was addressed by the ERCB. Section 95(2)(a) states:

> "Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following: (a) whether the matter was

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> (d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and
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> (e) an adequate opportunity of making representations by way of argument to the Board or its examiners."

> the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review…."

[51] There are two basic conditions in the legislation that have to be met in order for the Board to dismiss the appeal under section 95(5)(b)(i). First, it must be determined whether the Appellant received notice of, participated in, or had the opportunity to participate in an ERCB review of the project at issue, and second, whether the ERCB adequately dealt with the matters raised by the Appellant.

[52] The ERCB notified the Board that no public hearing was held with respect to the proposed project. Therefore, the Board must determine whether the Appellant was given the opportunity to participate in the ERCB process or whether the Appellant had the opportunity to make their views known to the ERCB.

[53] Although no formal public hearing was held by the ERCB, it must be understood that the ERCB has alternative ways of processing an application. If the ERCB receives concerns from the public regarding an application, an oral hearing may be held. However, if there are no concerns expressed by the public, or if the concerns are mitigated by the proponent and the individual no longer has concerns, then the application can be reviewed by the ERCB without holding a public hearing.

[54] The ERCB notified the Board on November 13, 2009, that the Appellant had filed an objection to two applications related to the project, but it withdrew its objection to one application and its objections were resolved for the second application. As a result, the ERCB completed its review without a public hearing. This review of the written documents is still a review as contemplated by section 95(5)(b)(i) of EPEA. If the Appellant was not satisfied with the ERCB decision, it could have requested the ERCB reconsider its decision or the Appellant could have filed an appeal to the Court of Appeal.

[55] It is clear from the Record and the submissions the Appellant filed a Statement of Concern in response to the Notice of Filing for the project. The Approval Holder provided the Appellant with responses to the issues raised in the supplemental information requests. The Approval Holder stated the Appellant participated in consultations with the Approval Holder, the Appellant was compensated for their review of the application and environmental impact assessment, and the Appellant accepted funding for having a third party conduct a technical review of the environmental impact assessment. This indicates the Appellant was aware of the application and the ERCB review of the application and had the opportunity and did participate in the process in different ways. Therefore, the first condition of section 95(5)(b)(i) of EPEA has been met.

[56] It is important to note the legislation only requires that a party have the opportunity to participate in the ERCB process. If they had the opportunity to participate in an ERCB process but failed or chose not to participate, the Board must still dismiss the appeal. This is to prevent parties from using the Board to duplicate hearings or reviews held by the ERCB.[6]

[57] The second condition is to determine whether all of the issues raised by the Appellant were adequately dealt with by the ERCB.

[58] As stated in the previous case, *Carter Group*:[7]

> "The jurisdiction of this Board to become involved in a 'review' of ERCB decisions that led to approvals which are eventually appealed here – is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence….

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[6] See: *Bildson* v. *Acting Director of North Eastern Slopes Region #2, Alberta Environmental Protection* re: *Smoky River Coal Limited* (8 December 1998) Appeal No. 98-230-D2 (A.E.A.B.) at paragraph 12:

> "…the Legislature's apparent objectives in adopting section 87(5)(b)(i) [now section 95(5)(b)(i)] are to promote efficiency and fairness – i.e., to prevent this Board from duplicating an [A]EUB review, at least, when the appellant before the [A]EUB had a reasonable chance to participate in the [A]EUB' review. Notably, by requiring dismissal if the appellant chose not to participate in the [A]EUB review but 'received notice of' and 'had the opportunity to participate in' that review, the Legislature intended to preclude this Board from addressing particular concerns simply because they were never raised before the [A]EUB." [Note: The AEUB is the predecessor board of the current ERCB.]

[7] *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (December 8, 1994), E.A.B. Appeal No. 94-012 ("Carter Group").

> The Board interprets s. 87(5)(b)(i) [now section 95(5)(b)(i)] of [the] *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually…. In other words, there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB."[8]

[59] In *Graham*,[9] the Board examined the specific terms of section 95. The Board interpreted "matter" to mean:

> "…subject matter or issues raised in the proceedings before the NRCB and before this Board. But it cannot encompass generic subject matters, such as air pollution, generally. Nor is 'matter' a static concept so that a subject once raised before the NRCB can never be the subject of appeal to this Board…. [C]ounsel for the Director acknowledged that new information that substantially alters one's previous understanding of the facility may be a new matter."[10]

The Board then interpreted the term "considered" as meaning "to look at closely, examine, contemplate." The Board continued:

> "Consideration, in the context of this appeal, requires that a matter be raised or presented through submissions by parties or questions by the NRCB. This must be reasonably explicit rather than merely inferential, and must not be arbitrary. The matter must then be subject to a meaningful consideration. Further, consideration requires that the NRCB respond to the matter, at least by treating it as relevant and properly taking it into account in its decision."[11]

[60] Although the Board was referring to hearings held by the NRCB, it is equally applicable to a review undertaken by the ERCB.

[61] In the Appellant's Notice of Appeal, issues were raised related to cumulative effects and the sufficiency of the baseline data, specifically as it relates to hydrology, hydrogeology, water quality, terrestrial ecology, and socio-economic issues. Most of these issues were also raised in the Appellant's Statement of Concern.[12] The Approval Holder, as part

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8 *Carter Group* v. *Director of Air and Water Approvals, Alberta Environmental Protection* (December 8, 1994), E.A.B. Appeal No. 94-012 at page 9.

9 *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025.

10 *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025 at page 15.

11 *Ed Graham et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 28, 1996), E.A.B. No. 95-025 at page 17.

12 See: Director's Record at Tab 23.

of its application, included information on the stakeholder consultation undertaken; information on a traditional land use study that was completed; and an environmental impact assessment report. In reviewing the table of contents for the environmental impact assessment, there are sections assessing the impacts of the project on hydrology, hydrogeology, surface water quality, soils and terrain, vegetation, wildlife, and biodiversity.[13] There are also sections discussing the socio-economic impacts and a separate section on traditional land use. This information was included in the application and was reviewable by the ERCB. The Appellant also had the opportunity to review the assessments included within the environmental impact assessment and to provide questions or comments on the content of the reports. Based on the information included in the application and provided to the ERCB, it is evident the ERCB had the information available to it to review and include in its consideration of the application. Although it may have been helpful to have the ERCB discuss its reasons for its decision in more detail, there is nothing in the ERCB's decision that indicates it did not review all of the information available to it.

[62] If a person has a specific concern regarding the project and how they will be affected, it is important to convey the information to the ERCB. It is not acceptable to withhold an issue in an attempt to leave the door open for the matter to be heard by a different board. If the opportunity is there to participate and provide information to the ERCB, that opportunity must be taken, unless new information surfaces that was not available at the time the ERCB was making its decision. The Appellant was given the opportunity to submit concerns regarding the terms of reference for the environmental impact assessment and to raise concerns regarding the completed assessment. If the Appellant considered the information included in the environmental impact assessment was insufficient or the baseline data were not accurate, it should have been raised during the ERCB process.

[63] The Appellant has not brought forward any new information or concerns that were not considered by the ERCB. Therefore, the Board finds the environmental issues raised by the Appellant that are within the Board's jurisdiction were adequately dealt with in an ERCB review.

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[13] See: Director's Record at Tab 4.

[64] The Board finds the Appellant received notice of and participated in the ERCB review of the application. All of the issues within the Board's jurisdiction were adequately dealt with by the ERCB.

[65] Therefore, pursuant to section 95(5)(b)(i) of EPEA the appeal must be dismissed.

IV. DIRECTLY AFFECTED

A. Appellant's Submissions

[66] The Appellant explained they use their entire lands for traditional purposes such as hunting, trapping, fishing, berry picking, and gathering plants used for traditional purposes. The Appellant explained they are in the process of conducting a traditional land use study. They stated there are 600 to 700 members who reside in Fort McMurray, and many of them would likely use the project area for traditional purposes rather than the lands near Fort Chipewyan.

[67] The Appellant stated their traditional lands are not restricted to the reserve, and although the Fort Chipewyan reserve may be approximately 270 kilometres from the project, their members use the project site and surrounding lands. The Appellant stated the project will disturb the existing wildlife and the growth of the berries, thereby directly affecting their members' ability to hunt, trap, and pick berries.

B. Approval Holder's Submission

[68] The Approval Holder submitted the Appellant has not established that they are directly affected by the Approval and, therefore, the appeal should be dismissed.

[69] The Approval Holder explained the reserve is located approximately 270 kilometres from the project, which is a significant distance that reduces the causal connection between the Approval and the effect on the Appellant's rights and interests. The Approval Holder stated the Appellant did not provide any indication on how their ability to exercise their rights or use of the area will be affected by the project.

[70] The Approval Holder argued the Appellant's Notice of Appeal and submission lack specificity. The Approval Holder stated that, even if it can be established that the aboriginal rights specified by the Appellant are potentially impacted, the Appellant failed to provide information on the specific effects the Approval may have on their traditional use of the land, such as their ability to hunt, trap, or gather.

[71] The Approval Holder stated the Appellant speculated that some of their members would likely use the area for traditional purposes. The Approval Holder argued this is an inadequate basis for finding the Appellant directly affected. The Approval Holder argued the Appellant did not show the Director's decision would cause a direct effect on and be harmful to the Appellant's interests and rights, and the Appellant failed to show the effect will be actual or imminent and not just speculative.

C. Director's Submission

[72] The Director explained he accepted the Appellant was directly affected, but the extent the Appellant would be affected is questionable given the distance between the project and the Appellant's traditional lands.

D. Analysis

[73] 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*").

[74] 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 *Bildson v. Acting Director of North Eastern Slopes Region,*, [1998] A.E.A.B.D. No. 33 (Alta. Environmental App. Bd.) 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. <u>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.</u> 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. [Emphasis added.]

In *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)*, [1996] A.E.A.B.D. No. 10 (Alta. Environmental App. Bd.) 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."[14]

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…."[15]

[75] 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.[16]

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[14] *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.).

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

[16] 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.).

[76] The Court of Queen's Bench in *Court*[17] 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.

[77] In this appeal, the Appellant is in a different position than many of the other appellants to the Board. The Appellant in this case is a group of individuals, each with certain rights and privileges as given to them by the Constitution and applicable legislation. The reserve is located about 270 kilometers from the site of the proposed project. According to the Appellant's submission, some of its members live in the area of the proposed project and may use the area for traditional uses.

[78] The Board also understands there are no limits to the distance from the reserve First Nations can hunt or fish on. Although it is anticipated the further the distance from the reserve the less likely the members will use an area for traditional purposes, the Board is willing to accept the Appellant is directly affected with some question as to the extent the Appellant is actually directly affected.

V. STATEMENT OF CONCERN

A. Appellant's Submissions

[79] The Appellant stated it filed a Statement of Concern with the Director and the Alberta Energy and Utilities Board on April 10, 2007.

B. Approval Holder's Submission

[80] The Approval Holder took no position.

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[17] *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.).

C. Director's Submission

[81] The Director stated the Appellant filed a Statement of Concern on April 10, 2007, as part of the EIA process.

D. Analysis

[82] 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.[18]

[83] Neither the Director nor the Approval Holder argued against the Appellant's submission that they had filed a Statement of Concern. The Notice of Application that was published in the local newspapers included the application made under the ERCB legislation, the EIA process under EPEA, and the Approval application. The Appellant provided a Statement of Concern in response to the advertisement as required.

[84] The Director treated the letter from the Appellant as a valid Statement of Concern, and the Approval Holder explained it responded to the issues raised in the Statement of Concern.

[85] The Board finds the Appellant filed a valid Statement of Concern.

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[18] 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) …."

VI. DECISION

[86] The Appellant was found to be directly affected and to have submitted a Statement of Concern. However, pursuant to section 95(5) of EPEA, the Board dismisses the appeal of the Mikisew Cree First Nation, Appeal No. 09-021, because the issues in the Notice of Appeal are outside the Board's jurisdiction. The issues are constitutional and even if the environmental issues are not connected to constitutional issues, the issues were adequately dealt with by the ERCB.

Dated on April 16, 2010, at Edmonton, Alberta.

"*original signed by*"

Delmar W. Perras
Board and Panel Chair

"*original signed by*"

A.J. Fox
Board Member

"*original signed by*"

Gordon Thompson
Board Member