ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 7, 2011

IN THE MATTER OF sections 91, 92, 93, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Harvey and Elaine Visscher and Henryk Farms Ltd. with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 9995-02-01 and *Water Act* Approval No. 00266528-00-00 issued to Provident Energy Ltd. by the Director, Northern Region, Environmental Management, Alberta Environment.

Cite as: *Visscher* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Provident Energy Ltd.* (07 February 2011), Appeal Nos. 10-011-012-ID1 (A.E.A.B.).

BEFORE:	Mr. Eric McAvity, Q.C., Panel Chair; Mr. Gordon Thompson, Board Member; and Mr. Nick Tywoniuk, Board Member.
SUBMISSIONS BY:	
Appellant:	Mr. Harvey and Ms. Elaine Visscher and Henryk Farms Ltd., represented by Mr. Keith Wilson, Wilson Law Office.
Approval Holder:	Provident Energy Ltd., represented by Ms. Joanne Jamieson, Twyman Jamieson LLP.
Director:	Mr. Pat Marriott, Director, Northern Region, Environmental Management, Alberta Environment, represented by Ms. Alison Altmiks, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an approval under the *Water Act* for the placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water, or water body located at NW 1-56-22-W4M, and an amending approval under the *Environmental Protection and Enhancement Act* to Provident Energy Ltd. for the Redwater fractionation and storage facility at the same location in Sturgeon County, Alberta, all of which are required for the construction of a brine pond.

The Board received Notices of Appeal from Mr. Harvey and Ms. Elaine Visscher and Henryk Farms Ltd. appealing the *Water Act* Approval and the EPEA Amending Approval.

The Board received submissions on the following preliminary motions:

1. Was the appeal of the *Water Act* Approval filed on time?
2. Did the Visschers file a valid Statement of Concern with respect to the *Water Act* Approval?
3. Are the Visschers directly affected by the EPEA Amending Approval and the *Water Act* Approval?
4. Should the appeals of the EPEA Amending Approval and the *Water Act* Approval be dismissed on the grounds they are frivolous, vexatious or without merit? and
5. What are the issues to be heard, should one be held, with respect to the EPEA Amending Approval and the *Water Act* Approval?

After reviewing the submissions, the Board found the appeal of the *Water Act* Approval was filed late and no reason was provided that would justify the Board extending the legislated appeal period. Since the appeal of the *Water Act* approval was filed late, the Board did not have to consider the validity of the Statement of Concern relating to the *Water Act* appeal.

The Board found the Visschers are directly affected by the EPEA Amending Approval because they own property that is adjacent to the site that is down gradient relative to Provident's lands. The Board found the Visschers had legitimate concerns regarding the additional brine pond approved under the EPEA Amending Approval. Therefore, the appeals were not frivolous, vexatious, or without merit.

The issues to be heard at the hearing are:

1. Is the design of the brine storage pond, including the berm, adequate to effectively mitigate risk?
2. Are the surface water assumptions and designs used in the surface water management plan adequate to effectively mitigate risk?
3. Are the surface water and groundwater monitoring plans adequate to effectively detect brine releases to minimize potential impacts?

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I. BACKGROUND

[1] On June 28, 2010, the Director, Northern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 00266528-00-00 (the "*Water Act* Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to Provident Energy Ltd. (the "Approval Holder") for the placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water, or water body located at NW 1-56-22-W4M in Sturgeon County, Alberta. On June 30, 2010, the Director issued Approval No. 9995-02-01 (the "EPEA Amending Approval")[1] under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), to the Approval Holder for the Redwater fractionation and storage facility at the same location. The Approvals allow for the construction and operation of a fourth brine storage pond.

[2] On July 22, 2010, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Harvey and Ms. Elaine Visscher and Henryk Farms Ltd. (the "Appellants") appealing the EPEA Amending Approval. On July 28, 2010, the Board received a Notice of Appeal from the Appellants appealing the *Water Act* Approval. The Board notified the Director and the Approval Holder of the appeals, and requested the Director provide the Board with a copy of the records (the "Records") relating to the appeals. The Appellants, Approval Holder, and Director (collectively, the "Participants") were asked to provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Director provided a copy of the Records on August 24, 2010, and a copy was forwarded to the Appellants and Approval Holder on September 3, 2010.

[3] The Board held a mediation meeting on October 6, 2010, in Edmonton, Alberta. No resolution was reached.

[4] On October 27, 2010, the Board set the schedule to receive submissions on the following preliminary motions:

1. Was the appeal of the *Water Act* Approval filed on time?
2. Did the Appellants file a valid Statement of Concern with respect to the *Water Act* Approval?

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[1] In this decision, the *Water Act* Approval and EPEA Amending Approval will be referred to collectively as the "Approvals."

3. Are the Appellants directly affected by the EPEA Amending Approval and the *Water Act* Approval?

4. Should the appeals of the EPEA Amending Approval and the *Water Act* Approval be dismissed on the grounds they are frivolous, vexatious or without merit? and

5. What are the issues to be heard, should one be held, with respect to the EPEA Amending Approval and the *Water Act* Approval?

[5] The Board received submissions from November 10, 2010 to December 6, 2010. The Appellants did not provide a rebuttal submission, and stated they were relying on their initial submission.

II. *WATER ACT* APPROVAL APPEAL

A. Submissions

1. Appellants

[6] The Appellants argued their appeal was filed within the statutory timeline. The Appellants stated that, based on section 22(3) of the *Interpretation Act*,[2] the computation of the seven days does not include the date the decision was received nor the final date on which the appeal is to be filed. The Appellants stated they received notice of the Director's decision on July 15, 2010, and therefore, their Notice of Appeal had to be filed on or before July 23, 2010. The Appellants noted they provided a letter to the Board dated July 23, 2010, containing the number of the *Water Act* Approval and the date the Appellants received it, the names of the Approval Holder and Director, details of the Appellants, the Appellants' intent to appeal the *Water Act* Approval, and the requested relief to have the Board confirm the Appellants' right to appeal the *Water Act* Approval. The Appellants submitted their July 23, 2010 letter provided the required information for a valid Notice of Appeal within the time limit as defined in the *Interpretation Act*.

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[2] Section 22(3) of the *Interpretation Act*, R.S.A. 2000, c. I-8 states:

> "If an enactment contains a reference to a number of days expressed to be clear days or to 'at least' or 'not less than' a number of days between 2 events, in calculating the number of days, the days on which the events happen shall be excluded."

[7] The Appellants explained they filed two Statements of Concern, one against the application for the EPEA Amending Approval and the other against the application for the *Water Act* Approval. The Appellants noted Alberta Environment received both Statements of Concern, but the Statement of Concern against the *Water Act* Approval was misfiled, and the Director did not consider these concerns in making his decision to issue the *Water Act* Approval. The Appellants noted the processing error was not detected until they made inquiries as to the status of the *Water Act* Approval application.

[8] The Appellants stated the Director sent a letter to them on July 15, 2010, explaining why their Statement of Concern was not considered. The Appellants said the Director took the position the Statement of Concern was invalid because there was a typographical error in the reference to the application number in the subject line.

[9] The Appellants explained their counsel treated the Director's July 15, 2010 decision to not accept their Statement of Concern as a decision under section 116(1)(b) of the *Water Act*, which allows for a 30 day appeal period. The Appellants stated their letter to the Board on July 23, 2010, asked the Board to rule on the Director's decision with respect to the validity of their Statement of Concern. They argued that, unless the Director's decision to disregard their Statement of Concern was overturned, they would not have had a right to appeal.

[10] The Appellants stated they made a concerted effort to file their appeals in time by providing three letters to the Board between July 22, 2010 and July 28, 2010, expressing their desire to appeal the Approvals. The Appellants stated there was some confusion as to whether the decision to issue the *Water Act* Approval or the treatment of the Statement of Concern was being appealed, but the cause of the confusion was Alberta Environment's inability to determine which file the April 20, 2010 Statement of Concern related to.

[11] The Appellants also requested the Board exercise its discretion to accept an appeal after the expiry of the timeline for the following reasons:

1. They demonstrated initiative to comply with the timelines for the filing of the Statements of Concern and the appeals;
2. A number of the grounds of appeal relate to the *Water Act* Approval;
3. If the *Water Act* Approval appeal was filed late, it was only by a couple of days;

4. There is no substantial prejudice to the Approval Holder by granting the appeal compared to the prejudice the Appellants would experience by not having the Board hear their concerns; and

5. The Board may determine the goals of the *Water Act* would be better achieved by placing additional conditions on the *Water Act* Approval.

2. Approval Holder

[12] The Approval Holder argued the *Interpretation Act* and the proper computation of time do not apply to the appeal period under the *Water Act*, because section 116 of the *Water Act* requires the appeal be submitted "not later than" seven days after receiving notice of the decision. The Approval Holder noted section 22(3) of the *Interpretation Act* states that one must exclude the days on which the events happen when counting days described as "clear days" or "at least" or "not less than" a number of days between two events. The Approval Holder argued "clear days" is a completely different phrase than "no later than," and "at least" and "not less than" allow for the time period to be greater than the minimum set out in the legislation. The Approval Holder submitted, therefore, the *Interpretation Act* does not apply.

[13] The Approval Holder also argued the Appellants received adequate notice of the decision. It stated the deadline for the appeal was July 22, 2010, seven days after the Appellants received notice of the Director's decision regarding the *Water Act* Approval.

[14] The Approval Holder noted the Appellants claimed their July 23, 2010 letter to the Board regarding the handling of their Statement of Concern should be read as a Notice of Appeal. The Approval Holder stated that, even though the letter includes some of the required elements of a Notice of Appeal, two key elements were missing, specifically the provision of the Act under which the Notice of Appeal was submitted, and an adequate description of the relief requested. The Approval Holder noted the only relief requested by the Appellants was to have the Board confirm the Appellants had the right to file an appeal of the *Water Act* Approval; no relief was sought in regard to the *Water Act* Approval itself.

[15] The Approval Holder argued the Appellants were attempting to distort the meaning of section 116(1)(b) of the *Water Act* when they tried to include their circumstance under "any other case," thereby giving them a 30 day appeal window. The Approval Holder submitted section 116(1)(b) of the *Water Act* relates to what a party receives notice of and not

the circumstances surrounding the notice. The Approval Holder argued the Appellants received notice of a decision regarding an approval and therefore, they fall within the 7 day appeal period set out in section 116(1)(a) of the *Water Act*.

[16] The Approval Holder stated the Appellants had notice of the Director's decision on the *Water Act* Approval on July 15, 2010, and they knew or ought to have known of the 7 day appeal deadline. The Approval Holder noted the Appellants did not offer an explanation or event that prevented them from filing an appeal within the 7 day period. Therefore, the Approval Holder did not believe the Appellants had demonstrated sufficient grounds to merit an extension of the filing period.

3. Director

[17] The Director stated his decision to issue the *Water Act* Approval was not advertised because he believed there were no interested persons since he did not receive any Statements of Concern. The Director stated the Appellants received notice of his decision on July 15, 2010, and the Appellants initiated their appeal on July 23, 2010, eight days after receiving direct notice. The Director submitted that, since it is arguable whether the Notice of Appeal of the *Water Act* Approval was filed in time, any discrepancy in counting the days should be resolved in the Appellants' favour.

B. Analysis

[18] In assessing whether the Board should consider a late filed appeal, the Board must consider the applicable legislation, in this case sections 116(1) and (2) of the *Water Act*. These sections provide:

> "116(1) A notice of appeal must be submitted to the Environmental Appeals Board
>
> (a) not later than 7 days after
>
> (i) receipt of a copy of a water management order or enforcement order, or

> (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,
>
> or
>
> (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.
>
> (2) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so."

Therefore, in this case, the appeal period is seven days after receipt of a copy of the *Water Act* Approval.

[19] The legislation clearly defines the time frames in which an appeal must be filed. However, section 116(2) of the *Water Act* gives the Board the authority to extend the deadline for filing a Notice of Appeal when there are sufficient grounds to do so.

[20] As stated in previous decisions,[3] the Board considers certainty as a cornerstone to the appeal process. By having timeframes in which to file a Notice of Appeal, the participants involved will know when the process is complete. The time lines included in the legislation, and the certainty they create, balance the interests of all participants involved. The Board recognizes the appeal period for a *Water Act* approval is short, but it was set by the legislators and the Board must abide by the legislation. Therefore, the Board is generally reluctant to allow extensions to file a Notice of Appeal except under special circumstances. Unless the Appellant can give substantial reasons as to why the Notice of Appeal was filed late, the Board will generally not exercise its discretion to extend the timeline.

[21] The Appellants acknowledged they received notice of the Director's decision on the *Water Act* Approval on July 15, 2010. Based on secion 116(1)(a)(i) of the *Water Act*, the appeal period ended 7 days after receipt of the Director's decision, so their Notice of Appeal should have been filed by July 22, 2010. Even if the Notice of Appeal received by the Board on

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[3] See: *Biggart* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.); *Moses* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Ducks Unlimited Canada* (29 November 2004), Appeal No. 04-001-ID1 (A.E.A.B.).

July 23, 2010, clearly stated the Appellants were appealing the *Water Act* Approval, the appeal was filed late. If the July 28, 2010 letter was intended to be the Notice of Appeal of the *Water Act* Approval, then it was received six days after the appeal period had ended.

[22] No reason was provided in the Appellants' submission to explain why the Notice of Appeal was filed late. In the July 23, 2010 Notice of Appeal, the Appellants ask the Board to review the action of the Director in not considering their Statement of Concern prior to issuing the *Water Act* Approval. The Board notes the Appellants filed the EPEA Notice of Appeal on July 22, 2010, and had the Notice of Appeal for the *Water Act* Approval been filed on the same day, it would have been filed in time.

[23] The Approval Holder's argument regarding the application of the Interpretation Act is interesting, but, with respect, the Board does not agree. The *Interpretation Act* does apply in determining when the time period for filing an appeal has ended. In calculating the latest date an appeal can be filed, the date the decision was made or the appellant received notice of the decision is not counted in the calculation, thus making the "clear days" relevant in the calculation. The Appellant's arguments regarding the calculation of the appeal period was also interesting, but respectfully, the Board does not agree with the argument.

[24] The Approval Holder noted the Appellants' July 23, 2010 letter to the Board did not contain all of the elements of a Notice of Appeal, specifically the provision of the Act under which the appeal is filed and an adequate description of the relief requested. Although the Board prefers to have all of the information provided in a Notice of Appeal, it generally will not find the notice defective if it is clear as to which decision of the Director is being appealed, who is filing the appeal, and contact information.

[25] The Appellants argued their July 23, 2010 letter should be considered their Notice of Appeal. However, in reading the July 23, 2010 letter, it is clear they were not appealing the Director's decision to issue the *Water Act* Approval. Instead, the Appellants were appealing the actions of the Director regarding the Appellants' Statement of Concern regarding the *Water Act* Approval application, not the Director's decision to issue the Amending Approval itself. Whether the Director accepts a Statement of Concern as valid or not is not an appealable

decision. Section 115 of the *Water Act* clearly states which decisions of the Director are appealable.

[26] Even if the appeal of the *Water Act* Approval was filed only one day late, the fact remains, it was filed late. The Appellants did not provide reasons or identify any special circumstances that prevented the Appellants from filing their Notice of Appeal with the Board within the 7 day time limit.

[27] Therefore, the Board dismisses the appeal of the *Water Act* Approval.

III. STATEMENT OF CONCERN

A. Submissions

1. Appellants

[28] The Appellants stated there is no dispute the Statement of Concern was received by Alberta Environment, and the only issue is why it was not sent to the staff working on the application.

2. Approval Holder

[29] The Approval Holder argued the Appellants attempted to cite improper notification of the application as the basis for their incorrect Statement of Concern. The Approval Holder said it complied with the legislation and the instructions of the Director, and no further notification steps were required.

[30] The Approval Holder stated the Appellants' attempt to file a Statement of Concern failed, because their Statement of Concern was not sufficiently clear. Their error in the application number cited in the Statement of Concern rendered it invalid because it prevented the Appellants' concerns from reaching the Director.

3. Director

[31] The Director explained the Approval Holder applied for the Amending Approval for the construction, operation, and reclamation of an additional brine pond, and due to the size of the proposed brine pond, an approval under the *Water Act* was also required. The Director stated the Appellants filed submissions to be considered Statements of Concern on April 20 and 22, 2010 in relation to the *Water Act* and EPEA applications. The Director explained the submissions were sent to the Regulatory Approvals Centre and distributed to the regional offices and filed according to the file number, but the April 20, 2010 submission in relation to the *Water Act* application was not received by the Director due to an incorrect file number referenced by the Appellants. The Director stated the incorrect file reference was not identified and remedied until after the *Water Act* Approval was issued and the Appellants asked the status of the *Water Act* application.

[32] The Director believed that had the April 20, 2010 submission been received, he would likely have accepted it as a Statement of Concern. The Director clarified he did not have an opportunity to consider the submission prior to issuing the *Water Act* Approval, he made no determination on whether it would be accepted as a Statement of Concern, and he did not advise the Appellants on whether their submission was accepted as a Statement of Concern.

[33] The Director noted that, even when a submission is not accepted as a Statement of Concern, a person can file a Notice of Appeal with the Board and argue they are directly affected by the Director's decision.

B. Analysis

[34] Based on the Board's finding that the appeal of the *Water Act* Approval was filed late and therefore dismissed, the Board finds it unnecessary to make a determination on whether the Appellants filed a valid Statement of Concern with respect to the *Water Act* Approval. In any event, the Board notes that the two Statements of Concern filed by the Appellants on April 20 and April 22, 2010, respectively, were substantially similar in substance and, therefore, the Appellants' concerns were effectively considered by the Director and incorporated into the EPEA Amending Approval.

IV. DIRECTLY AFFECTED

A. Submissions

1. Appellants

[35] The Appellants explained they own land located immediately east of the Approval Holder's facility which is the site of the proposed brine pond expansion, and the North Saskatchewan River is located east of the Appellants' lands. The Appellants said there is a high level of industrial development in the area surrounding their lands.

[36] The Appellants noted the Approval Holder operates brine ponds at the site, and the new brine pond is intended to hold up to 329,754 cubic meters or 87 million gallons of brine. The Appellants stated brine is water that has been contaminated with high levels of sodium chloride and is a known soil sterilant. The Appellants said the harmful environmental effects of brine on soils and groundwater are well known, including inhibition of plant growth, chloride and sodium toxicity in plants, reducing soil tilth, reducing soil quality by crusting, and contamination of groundwater by leeching brine ponds and brine spills. The Appellants added that brine has a deleterious effect on aquatic environments and wildlife, including ducks and birds.

[37] The Appellants explained the brine pond is located on high ground adjacent to natural water course that flows into a defined ravine that flows directly into the North Saskatchewan River. The Appellants stated their lands and the North Saskatchewan River are down gradient of the existing and proposed brine ponds. The Appellants stated the Approval Holder has been unable to contain its existing brine ponds, and there is known subsoil contamination moving down gradient toward their land and the North Saskatchewan River.

[38] The Appellants argued they meet the test for directly affected because their land is immediately adjacent to the facility and brine ponds. The Appellants also argued that their land is at a lower elevation and down gradient in terms of surface water runoff and groundwater movement should there be a problem with the liner or a breach of the berms.

[39] The Appellants stated the Approval Holder has been unable to stop the migration of known subsurface saltwater contamination toward the Appellants' lands, and presumably onto their lands, from existing brine pond areas, and adding additional brine storage can exacerbate the movement of the known contamination plume;

[40] The Appellants noted the Approval Holder does not dispute it had problems with its existing brine ponds and asked the Board to review and assess the Approval Holder's mitigation measures. The Appellants argued the Approval Holder emphasizes its groundwater monitoring program but fails to point out its own consultants identified deficiencies in the monitoring particularly as it relates to shallow groundwater monitoring.

[41] The Appellants noted the Approval Holder's assessment concluded it will take 300 years for the contamination plume to reach the Appellants' land, but the drill logs show there are sand lenses and other potential groundwater pathways that are not monitored. The Appellants stated the Approval Holder has not considered the potential for the bedrock interface to increase the speed of the migration of the contamination plume down gradient to their land.

[42] The Appellants stated the existing water course and seasonal flows near the proposed brine pond subsequently flow directly into the adjoining North Saskatchewan River.

[43] The Appellants argued the ongoing contamination and its migration to their land, the Approval Holder's failure to clean it up, and the plans to further intensify the storage of hazardous materials in the brine ponds impacts the Appellants' property value.

[44] The Appellants stated the Director assumed construction of the pond would not begin until after the Approvals were issued, but construction commenced before the Approvals were issued and it was not done in accordance with the specifications stipulated by the Director.

[45] The Appellants listed their concerns as siting, construction, operations, maintenance, monitoring, and related issues. The Appellants argued that, since the original EPEA approval and the EPEA Amending Approval apply to the existing brine ponds as well as the new brine pond, the Board has jurisdiction with respect to modifying the conditions to ensure the environment and the Appellants' property are protected from adverse effects of the ponds.

[46] The Appellants argued that "…having an industrial plant expanded on neighbouring lands that are above you in elevation, with known problems in being able to stop

its brine ponds from leaking, with water courses that flow directly into the North Saskatchewan River, and above-ground berm construction practices inconsistent with the Approval requirement meet the prima facie case"[4] that the Appellants are directly and adversely affected.

2. Approval Holder

[47] The Approval Holder acknowledged the Appellants own land immediately east of the facility, but the site of the fourth brine pond is located on the other side of the facility, about 1.2 kilometres from the Appellants' land.

[48] The Approval Holder stated the EPEA Amending Approval applies to the fourth brine pond, and there is no expansion of the existing brine ponds. It explained brine, commonly known as salt water, is used to displace hydrocarbons and is required to ensure the integrity of the caverns. The Approval Holder stated brine: is not a hazardous substance; is not a listed substance in the context of the Major Industrial Accidents Council of Canada List of Substances or the *Canadian Environmental Protection Act*, S.C. 1999, c. 33, Schedule 1 List of Toxic Substances; does not exhibit characteristics of flammability, corrosivity, reactivity, or toxicity; and does not meet the criteria for a hazardous substance as set out in Schedule 1 of the *Waste Control Regulation*, Alta. Reg. 192/96. The Approval Holder stated the extent and speed of the migration of a brine release would depend on the properties of the soil and groundwater systems, and in the area of the facility, the average groundwater velocity is less than one metre per year.

[49] The Approval Holder acknowledged there is historical brine contamination located on-site from the original, unlined brine pond constructed in the 1970s. The Approval Holder stated the brine pond was constructed with the approved technology of the day, but it has upgraded the pond to include a geosynthetic liner and continues to work with Alberta Environment to manage the historical brine impacts.

[50] The Approval Holder submitted the Appellants failed to meet the test for establishing they are directly affected. The Approval Holder said the Appellants rely on proximity to the new brine pond as a basis for establishing direct effect. The Approval Holder argued proximity is one factor to consider, but it is not decisive of the question of direct affect

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[4] Appellants' submission, dated November 9, 2010, at paragraph 55.

because the need to establish a potential or reasonable probability that they will be harmed by the approved project and the potential effect must be within reason, plausible, and relevant to the Board's jurisdiction.

[51] The Approval Holder took issue with the suggestion that a release of any sort is a reasonable probability, and if in the unlikely event a release occurs, the Approval Holder does not agree that any brine would reach the Appellants' land.

[52] The Approval Holder explained the brine pond will be designed, constructed, and operated to meet the requirements of EPEA, the *Water Act*, the Dam and Canal Safety Requirements Guidelines, the Approvals, and all other applicable requirements and best practices. The Approval Holder stated the brine pond was designed by a professional engineering firm to comply with industry standards and current technology. The Approval Holder explained the liner system includes two high density polyethylene liners separated by Geonet, a leak detection system, and continuous monitoring. The Approval Holder argued there are extensive risk mitigation measures in place that were accepted by the Director, which make the potential for a release highly unlikely, namely:

1. A quality control program that will be adhered to during installation of the liner system to prevent leaks due to improper installation;
2. A leak detection system will be placed between the primary and secondary liners and continually monitored;
3. If leaks are detected through regular monitoring, the brine in the pond will be pumped to a cavern, one or more of the other brine ponds, or an injection well, and once emptied, the liner will be repaired;
4. Periodically, the pond will be emptied and visually inspected to ensure the integrity of the liner;
5. The pond will be visually inspected at least once per shift during operations, and if the brine level appears to be approaching the requisite one metre freeboard level, brine will not be pumped into the pond;
6. During heavy rainfall events, the pond will be monitored closely, and if the one metre freeboard is encroached upon, brine will be pumped to another pond, cavern, or injection well. A one metre freeboard is sufficient to prevent overtopping through wind and wave action;
7. The berms will be inspected on a regular basis and if erosion channels form, they will be immediately repaired; and
8. The berm faces will be vegetated to reduce the potential for erosion.

[53] The Approval Holder said the Board must determine if there is a potential or reasonable probability that the Appellants will be harmed by the proposed brine pond. The Approval Holder submitted the Board is entitled to consider the design of the pond, applicable regulatory standards, and the proposed risk mitigation measures in assessing the likelihood that brine will escape from the pond. The Approval Holder argued that, if the Board cannot consider the risk mitigation measures, then the result would lead to the assumption the pond will leak.

[54] The Approval Holder stated the Appellants failed to provide any plausible explanation as to how there could be a problem with the liner or how the brine would reach the Appellants' land. The Approval Holder stated that any leak would be detected by the leak detection system and contained by the second liner, and in the highly unlikely event both liners fail, the compacted clay liner would capture the brine.

[55] The Approval Holder stated that if there is an escape of brine, any release would be minimal, localized to the immediate vicinity of the pond, detected by groundwater monitoring wells, and remediated. The Approval Holder stressed the brine would not reach the Appellants' land.

[56] The Approval Holder said it is highly improbable that a breach of the berm could occur because:

1. The construction of the berm was designed by professional engineers with the standards set out in the Dam and Canal Safety Requirements Guidelines;
2. The design includes a 3 to 1 grade on the inner and outer embankments. The top of the berm includes a 5 metre wide road allowance for inspection and other access;
3. The south berm is the highest above base elevation at approximately 6 metres;
4. All material placed in the embankments was spread and smoothed in successive layers and compacted to a minimum of 98 percent standard Proctor density;
5. The berm will be seeded with grass to minimize erosion, and if erosion channels begin to form, they will be immediately repaired.

[57] The Approval Holder explained that, in the unlikely event of a catastrophic failure of the berm, less than half of the brine contained in brine pond number 4 would escape and it would not reach the Appellants' land. The Approval Holder explained that if the brine flows to

the north, it could potentially reach a natural water course that runs along the northern edge of the property, but there is a new culvert and berm that are part of the drainage plan that could intercept and hold much of the released brine before it reaches the drainage course. The Approval Holder said the natural drainage course eventually leads to a ravine that flows into the North Saskatchewan River, all north of the Appellants' land. The Approval Holder stated that if the brine flows to the south, it will be intercepted by a series of ditches, culverts, and rock chutes that are designed to control and guide surface water run-off away from the rail yard and into an on-site slough. The Approval Holder explained that many of the culverts, including those exiting the slough, can be closed to prevent brine flowing off-site. The Approval Holder explained that, if the brine escapes off-site, it would drain into a diversion ditch that runs south of the site to the North Saskatchewan River, all south of the Appellants' land. Any brine left behind would be removed with the surficial soils so migration of brine would not be an issue.

[58] The Approval Holder submitted that the Appellants did not meet their burden of demonstrating a reasonable probability that they will be harmed by the approved project because the brine would not reach the Appellants' land in an unlikely event of a major release from the new brine pond.

[59] The Approval Holder argued the historical contamination from the original brine pond and located on the east side of the existing ponds is irrelevant to the current appeal and cannot support the Appellants' directly affected argument. The Approval Holder submitted the entire site is not open for re-examination under the appeal of the EPEA Amending Approval.

[60] The Approval Holder argued that extrapolating the performance of the new brine pond from an old, unlined pond is not reasonable. The Approval Holder stated that monitoring wells around the newer ponds indicate there are no leakage issues. The Approval Holder said that, given the location of the historical contamination, even with a failure of a berm, an overlap between a release of brine from the new pond with the historical contamination is remote because any brine release would bypass the existing contamination.

[61] The Approval Holder said the current monitoring well network includes 18 wells located between the brine ponds and the Appellants' property and none contain chloride concentrations exceeding Alberta Environment guidelines. The Approval Holder explained the

historical contamination has remained on-site. The Approval Holder explained its hydraulic conductivity testing and groundwater monitoring results suggest the sand lenses are localized with no evidence of widespread connectivity either vertically or horizontally.

[62] The Approval Holder said it did not start construction prior to the issuance of the EPEA Amending Approval. It stated that, in fall of 2008, it stored clay to use for the future construction of the brine pond, but no further work was done in the area until it received its EPEA Amending Approval.

3. Director

[63] The Director acknowledged he accepted the Appellants' April 22, 2010 submission as a Statement of Concern regarding the EPEA application since the Appellants own land immediately adjacent to the Approval Holder's lands. The Director stated the Appellants have expressed concerns about historical contamination on the Approval Holder's lands and the potential for contamination to migrate to the Appellants' lands through soil and groundwater.

B. Analysis

[64] 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*").

[65] 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."[5]

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…."[6]

[66] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, 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.[7]

[67] The Court of Queen's Bench in *Court*[8] 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 in order for the Board to consider it sufficient to grant standing.

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[5] *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.).

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

[7] 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.).

[8] *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.).

[68] One of the factors considered in assessing whether an appellant is directly affected is the distance between the proposed project and the appellant's property. In this case, the Appellants' property is adjacent to the Approval Holder's property and approximately 1.2 kilometers from the new brine pond. The Appellants' property is down gradient of the new brine pond, so if brine escapes from the new brine pond, there is the potential it could flow towards the Appellants' lands.

[69] The Board has not heard all of the evidence on the substantive matter of the appeals. Although the Approval Holder has provided substantive evidence, the directly affected status of the Appellants is based on whether there is a potential or reasonably probable impact on the Appellants' interests.

[70] The test as determined in *Court* is that there only needs to be a potential effect the appellant's interest could be harmed. The determination of directly affected is a preliminary step in the hearing process. At the hearing, once all parties have provided their evidence and arguments, the Board will weigh the evidence and make its recommendations. It is after all of the evidence has been heard that the Board assesses the level of risk to the environment affecting the appellant. If there is a significant risk the environment will be harmed, including risk of harm to the appellant's use of the natural environment, the Board may recommend the approval be reversed; if there is minimal risk to the environment, then the Board may recommend confirmation of the approval as written; and, if, there is a manageable risk to the environment, the Board may recommend variations to the approval.

[71] Although the issue of historic contamination is not relevant to the current appeals and the assessment of directly affected, it does demonstrate why the Appellants have concerns regarding contamination moving from the Approval Holder's property to the neigbouring lands, including the Appellants' property.

[72] Although the Approval Holder provided information on the steps it has taken to mitigate the potential impacts, the Appellants raised questions on the construction of the brine pond and berm and whether the monitoring plans are adequate to detect any leaks at an early stage. These are valid concerns. As was stated in *Court*, the Appellants need not prove they

will be harmed by the project in order to be found directly affected. Once the Board hears all the evidence of the parties, it will make an assessment of the actual risk to the Appellants.

[73] Accordingly, the Board finds that the Appellants are directly affected by the Director's decision to issue the EPEA Amending Approval.

V. FRIVOLOUS, VEXATIOUS OR WITHOUT MERIT

A. Submissions

1. Appellants

[74] The Appellants stated their grounds of appeal are substantive, reasonable, and meritorious. They explained they have been impacted by the Approval Holder's facility for several years, and they have written and spoken with regulators but little has been done to address their concerns. The Appellants argued there is nothing improper with them exercising the rights afforded to them by law, and they are entitled to pursue their interests through the regulatory process. They stated their efforts to protect their land and the North Saskatchewan River are proper and noble.

[75] The Appellants argued the Approval Holder's submissions and supporting affidavits contain hearsay, innuendo, and defamatory comments. The Appellants said the Approval Holder is unfairly portraying them as trying to extract extra-ordinary payments from the Approval Holder. The Appellants stated this is contradicted by an experienced realtor in the area and by the Appellants' effort to have the Approval Holder improve its environmental performance and protect the environment. The Appellants stated they are concerned landowners who want to protect their land and the environment. They explained they are not opposed to progress but they are unwilling to sell their land at the 300 percent discount described by the Approval Holder.

[76] The Appellants submitted the Approval Holder failed to show their appeals are anything other than reasonable and proper.

2. Approval Holder

[77] The Approval Holder noted the Appellants are entitled to avail themselves of the procedural rights afforded to them where they are directly affected by a project. However, according to the Approval Holder, the Appellants continue to object to every project at its site in order to further their objective of selling their lands at their desired price.

[78] The Approval Holder argued the fact the Appellants' appeal would not attract liability for the tort of abuse of process does not mean the appeals are meritorious. The Approval Holder submitted that matters that are frivolous, vexatious, or without merit are those matters that are brought to harass, annoy, or embarrass a party and further, are claims in which a claimant can present no rational arguments based upon evidence or law in support of a claim, or are actions without reasonable cause, which will not lead to a practical result.

[79] The Approval Holder submitted an appeal based on past grievances can be frivolous or vexatious.

[80] The Approval Holder stated it is not trying to convince anyone the Appellants' land has marginal agricultural value, but it does believe the Appellants value their land at least 300 percent higher than market value in the area. The Approval Holder based the land values on:

1. Its own purchases of land in the area;
2. An appraisal of the Appellants' land completed by a certified land appraiser indicated the Appellants' land is valued at $15,817 to $20,970 per acre;
3. Land sales in the vicinity ranged from $10,000 to $16,878 per acre; and
4. Current listings from $10,413 to $28,970 per acre.

[81] The Approval Holder stated the Appellants sold adjoining land for $16,878 per acre during the height of the anticipated development boom in the area. The Approval Holder noted the Appellants and their realtor believe the Appellants' remaining land is worth $55,000 to $65,000 per acre even though much of the previously announced industrial growth has been cancelled or postponed.

[82] The Approval Holder stated it has no use for the Appellants' lands since it has no intention of expanding or developing its facilities onto those lands. The Approval Holder said it was prepared to purchase the Appellants' property at reasonable terms in order to prevent

continuous objections to its activities and ability to grow. The Approval Holder took exception to the use of the regulatory process to leverage a higher selling process.

[83] The Approval Holder submitted the Board should dismiss the appeal on the basis no meritorious grounds were raised.

3. Director

[84] The Director said he has no independent information or observations to suggest the Appellants do not have a genuine interest in the Approvals or that the appeals are frivolous, vexatious, or without merit. The Director was concerned the potential remedies of interest to the Appellants may be beyond the scope of the Approvals and the Board.

B. Analysis

[85] Under section 95(5)(a)(i) of EPEA, the Board "…may dismiss a notice of appeal if it considers the notice of appeal to be frivolous, vexatious or without merit.".

[86] The Board finds the Appellants have genuine concerns regarding the construction and operation of the new brine pond and the potential impact a release might have on their property. Although the Approval Holder argued the Appellants were using the process to leverage a higher selling price for their lands, there is no indication in their submission that this is what they are seeking.

[87] Therefore, the motion to dismiss on the basis the appeals are frivolous, vexatious, or without merit is denied.

VI. ISSUES

A. Submissions

1. Appellants

[88] The Appellants submitted the following issues should be addressed at the hearing:

1. whether the disparity between the construction method used in the raised berm and that assumed by the Director put the environment, property, and public safety at risk;
2. whether surface runoff plans are adequate and properly account for seasonal runoff that moves onto the plant site;
3. whether the surface runoff controls are capable of holding back a combination of over-flowing brine ponds and normal surface runoff waters, thereby putting the North Saskatchewan River at risk;
4. whether the groundwater monitoring is adequate given the absence of any monitoring wells in known sand seams;
5. whether conditions should be added that would require the Approval Holder to remove known sources of contamination given the migration of the plume and the additional source of contamination being installed being pond number 4;
6. whether the brine pond management plan adequately protects the environment, particularly wildlife and migratory birds that land on the ponds; and
7. whether the design and construction of the elevated berms properly accounts for freeze-thaw cycles, wave action erosion, cracking, and leakage from desiccation of the clay liner.

2. Approval Holder

[89] The Approval Holder stated that only those issues related to the merits of brine pond number 4 are appropriate, and existing historical contamination associated with the original brine pond is irrelevant and outside the scope of a hearing.

[90] The Approval Holder suggested the following issues:

1. design, construction, and operation of brine pond number 4;
2. risks and mitigation associated with brine pond number 4;
3. expansion of the Overall Drainage Plan for the site to include brine pond number 4; and
4. expansion of existing groundwater monitoring program for the site to include brine pond number 4.

3. Director

[91] The Director stated the issues for the hearing should be restricted to the subject of the Approvals, which is the addition of the fourth brine storage pond to the existing facility. He submitted the issues should be:

1. Is the design of the brine storage pond suitable for its purpose?
2. Are the surface water assumptions and designs used in the surface water management plan accurate?
3. Is the monitoring regime adequate?

[92] The Director argued issues that are within the jurisdiction of other regulatory authorities, were not raised in the Statement of Concern, or are not within the Director's jurisdiction are not properly before the Board. The Director stated issues such as land use planning, wildlife, and competing assessments of land value should not be included as issues.

B. Analysis

[93] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing.[9] The Board has reviewed and discussed the submissions of the Participants and determined the issues for the hearing.

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

[95] The EPEA Amending Approval amends an existing approval that was issued previously for the construction and operation of the three existing brine ponds. The EPEA Amending Approval allows for the construction, operation, and reclamation of the fourth brine

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[9] Section 95 of EPEA states:

"(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which maters included in notices of appeal properly before it will be included in the hearing of the appeal….

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

pond. The Board cannot hear arguments on the original approval except for the operational components that have a direct link to the fourth brine pond.

[96] The Board cannot consider contamination and leakage issues related to the three existing brine ponds. The construction and operation of the three existing brine ponds do not fall under the terms and conditions of the EPEA Amending Approval and, therefore, cannot be issues at the hearing.

[97] The Appellants' concerns regarding the construction of the berm, surface run off calculations and resulting management plans, and the groundwater monitoring program are proper issues before the Board. These concerns were raised in the Notice of Appeal and are directly connected to the EPEA Amending Approval.

[98] Accordingly, the Board sets the following issues for the hearing:

1. Is the design of the brine storage pond, including the berm, adequate to effectively mitigate risk?
2. Are the surface water assumptions and designs used in the surface water management plan adequate to effectively mitigate risk?
3. Are the surface water and groundwater monitoring plans adequate to effectively detect brine releases to minimize potential impacts?

[99] Subject to the comments set out in paragraph 95 above, the Participants are reminded these issues relate to the fourth brine pond only and the terms and conditions in the EPEA Amending Approval.

[100] Pursuant to section 95(4) of EPEA, the Participants will be allowed to make representations on these issues only. If matters beyond these defined issues are argued, the Board will not consider the arguments in its deliberations.

VII. DECISION

[101] The Notice of Appeal regarding the *Water Act* Approval was filed out of time and, therefore, the appeal is dismissed. As the Notice of Appeal was dismissed, the Board did not find it necessary to make a decision on the validity of the Statement of Concern filed regarding the *Water Act* Approval.

[102] The Notice of Appeal filed regarding the EPEA Amending Approval is not frivolous, vexatious, or without merit. The Appellants are directly affected by the Director's decision to issue the EPEA Amending Approval.

[103] The issues that will be heard at the hearing are:

1. Is the design of the brine storage pond, including the berm, adequate to effectively mitigate risk?
2. Are the surface water assumptions and designs used in the surface water management plan adequate to effectively mitigate risk?
3. Are the surface water and groundwater monitoring plans adequate to effectively detect brine releases to minimize potential impacts?

Dated on February 7, 2011, at Edmonton, Alberta.

"*original signed by*"

Eric McAvity, Q.C.
Panel Chair

"*original signed by*"

Gordon Thompson
Board Member

"*original signed by*"

Nick Tywoniuk
Board Member