

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision: July 22, 2022

**IN THE MATTER OF** sections 91, 92, 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** an appeal filed by Robert Tomlinson with respect to the decision of the Director, Regional Approvals, Alberta Environment and Parks, to issue *Environmental Protection and Enhancement Act* Approval No. 248406-01-00 to Evergreen Regional Waste Management Services Commission.

Cite as: *Tomlinson v. Director, Regional Approvals, Alberta Environment and Parks, re: Evergreen Regional Waste Management Services Commission* (22 July 2022), Appeal No. 19-048-D (A.E.A.B.), 2022 ABEAB 32.

**WRITTEN SUBMISSIONS BEFORE:**

Ms. Meg Barker, Acting Board Chair.\*

**PARTIES:**

**Appellant:** Mr. Robert Tomlinson.

**Director:** Mr. Michael Lapointe, Regional Approvals Manager, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.

**Approval Holder:** Evergreen Regional Waste Management Services Commission, represented by Mr. Derek King, Brownlee LLP.

\* Meg Barker was the Acting Board Chair at the time this decision was made.

## EXECUTIVE SUMMARY

Evergreen Regional Waste Management Services Commission (Evergreen) holds an Approval to operate a Class II landfill near the Town of St. Paul, Alberta. In 2017, Evergreen applied for a renewal of the Approval. In 2019, Alberta Environment and Parks issued the renewal (the Approval). The decision to issue the Approval was appealed by Mr. Robert Tomlinson (the Appellant) who provided the Environmental Appeals Board (the Board) with a Notice of Appeal.

In May, 2020, Evergreen requested the Board dismiss the appeal for being frivolous, vexatious, and without merit. The Board requested the parties provide comments on Evergreen's request. The Board reviewed the written submissions received from the parties and found no evidence that circumstances have changed since an earlier appeal involving the Evergreen landfill, and found that the Appellant made unsupported allegations against Evergreen and other parties. The Board found the appeal was frivolous and without merit.

The Board dismissed the appeal pursuant to section 95(5)(a)(i) of the *Environmental Protection and Enhancement Act* on the basis that it was frivolous and without merit.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	ISSUES .....	2
IV.	APPLICABLE LEGISLATION .....	2
V.	SUBMISSIONS .....	3
	(i) Appellant .....	3
	(ii) Evergreen .....	5
	(iii) Director .....	8
	(iv) Appellant's Rebuttal .....	11
VI.	ANALYSIS .....	12
VII.	DECISION .....	17

## **I. INTRODUCTION**

[1] This is the Environmental Appeal Board's (the "Board") decision on a preliminary motion regarding a Notice of Appeal filed by Mr. Robert Tomlinson (the "Appellant"). The Appellant appealed the decision (the "Director's Decision") of the Director, Regional Approvals, Alberta Environment and Parks (the "Director"), to issue Approval No. 248406-01-00 (the "Approval") to Evergreen Regional Waste Management Services Commission ("Evergreen"), for the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II). The Approval was issued under the *Environmental Protection and Enhancement Act*, R.S.A., 2000, c. E-12 ("EPEA").

[2] Evergreen requested the Board dismiss the appeal for being frivolous, vexatious, or without merit. The Board reviewed the written submissions received from the Appellant, Evergreen and the Director and accepted Evergreen's motion to dismiss the Notice of Appeal. In the Board's view, the Notice of Appeal is frivolous and without merit. The Board's reasons are below.

## **II. BACKGROUND**

[3] On December 30, 2008, Alberta Environment and Parks ("AEP") issued Approval No. 248406-00-00 (the "Original Approval") to Evergreen for the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II) (the "Landfill"), located at W-15-56-10-W4M in the County of St. Paul, Alberta. On December 1, 2017, Evergreen applied for a renewal of the Original Approval. On November 29, 2019, the Director issued a new Approval for ten years.

[4] On November 30, 2019, the Board received a Notice of Appeal from the Appellant seeking to amend the Approval. The Board advised the Director and Evergreen of the Notice of Appeal and requested the documents related to the Approval (the "Director's Record")

from the Director, which was provided on January 29, 2020. The Board distributed the Director's Record to the Appellant, the Director, and Evergreen (collectively, the "Parties").

[5] The Board held a mediation on March 13, 2020, however, the Parties did not reach an agreement. The Board requested the Parties' available dates for a hearing to be held in September 2020.

[6] In its May 14, 2020 letter to the Parties, the Board requested responses to a number of matters arising from the Appellant's Notice of Appeal, in order to assist the Board in planning for a potential hearing.

[7] On May 28, 2020, Evergreen responded arguing the appeal filed by the Appellant is without merit and should be dismissed.

[8] The Board understood Evergreen's comment to be a preliminary motion to dismiss the appeal under section 95(5)(a)(i) of EPEA.<sup>1</sup> The Board established a written submission schedule for the preliminary motion to dismiss, and submissions were received from the Parties between June 8, 2020, and June 24, 2020.

### **III. ISSUES**

[9] The issues to be considered by the Board is whether the Appellant's appeal should be dismissed for being frivolous, vexatious, or without merit.

### **IV. APPLICABLE LEGISLATION**

[10] The Board received a preliminary motion by Evergreen to dismiss the appeal under section 95(5)(a)(i) of the EPEA. This section provides:

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<sup>1</sup> Section 95(5)(a)(i) of EPEA provides: "The Board (a) may dismiss a notice of appeal if (i) it considers the notice of appeal to be frivolous or vexatious or without merit...."

“The Board

- (a) may dismiss a notice of appeal if
  - (i) it considers the notice of appeal to be frivolous or vexatious or without merit....”

[11] Issue estoppel is a relevant factor in considering whether an appeal is frivolous, vexatious, or without merit. Issue estoppel and the test the Board uses to determine if it applies is described in *Fenske v. Director, Central Region, Environmental Management, Alberta Environment* (“*Fenske*”):

“Issue estoppel is a judicial concept that is used to prevent parties from re-litigating the same issues. The Board uses a three-part test to determine if issue estoppel applies to the specific circumstances. The three steps are: ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decisions ... were the same persons as the parties to the proceedings in which the estoppel is raised...”<sup>2</sup>

## V. SUBMISSIONS

### (i) *Appellant*

[12] The Appellant submitted the Notice of Appeal is not frivolous or vexatious and has merit. The Appellant stated the appeal is materially different from the previous appeal involving the Landfill, *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment, re: Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.) (“*Shapka*”).<sup>3</sup>

[13] The Appellant explained his Statement of Concern was materially different from

<sup>2</sup> Preliminary Motions: *Fenske v. Director, Central Region, Environmental Management, Alberta Environment, re: Beaver Regional Waste Management Services Commission* (22 September 2008), Appeal No. 07-128-ID1 (A.E.A.B.), at paragraph 120.

<sup>3</sup> *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment, re: Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.).

the *Shapka* appeal, and addressed several different subjects such as:

- the use of estimates for groundwater movements;
- options to prevent groundwater infiltration;
- re-circulation of leachate;
- the “*de novo*” 2010 hearing;
- the exceptional aquifer;
- contravention of Ministerial Order MO 03/2010;
- video inspections;
- cell 1 being clogged;
- mercury waste;
- independent audits;
- greater good for municipalities, public health and welfare;
- land values;
- keeping area residents/farmers whole;
- the potential sale of the Landfill;
- financial reporting; and
- EAB Appeal No. 12-033.

[14] The Appellant submitted that he thinks and approaches matters quite differently from Dr. Shapka, the appellant in *Shapka*, and therefore his evidence will be presented “*de novo*.”

[15] The Appellant stated that Evergreen contends *Shapka* has dealt with his concerns, but both AEP and Evergreen’s consultant are in error. The Appellant stated all submitted information is materially different from anything the Board heard in *Shapka*.

[16] The Appellant submitted the Director failed to consider all legislative requirements regarding groundwater quality. The Appellant also said the language and phrases

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used in the Approval are vague, open-ended, unenforceable, and should be changed.

[17] The Appellant stated if the Landfill's operations are so complicated for the Director and AEP's experts that they need to rely on Evergreen's consultant instead of using enforceable parameters and language, then the Board should reverse the Director's Decision and have the Director try again.

[18] The Appellant noted the Director could only issue an approval based on a complete application, but the application for the Approval was incomplete and incorrect in law. The Appellant emphasized that the Director and Evergreen must comply with all applicable legislation.

**(ii) Evergreen**

[19] Evergreen submitted the appeal should be dismissed on the basis that the concerns, evidence, and information provided by the Appellant in support of his claims were unfounded and not materially different than those raised in *Shapka*.<sup>4</sup>

[20] Evergreen submitted that the Appellant's claim that the Director issued the Approval while Evergreen was in contravention of Ministerial Order 03/2010, and his allegations that documents in the Application were fraudulent, were not included in the Appellant's Notice of Appeal filed on November 29, 2019, and were instead submitted without supporting documentation in an email to the Board on April 21, 2020. Evergreen stated it complied with Ministerial Order 03/2010 to the satisfaction of the Director several years before filing the renewal application on which the current Approval is based. Evergreen argued the Appellant's contention regarding Ministerial Order 03/2010 is, therefore, without merit.

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<sup>4</sup> *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment, re: Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.).

[21] Evergreen stated this is now the third appeal of the Landfill's approvals by the Appellant or his spouse and Evergreen is concerned that the Appellant has been permitted to raise the same concerns regarding the Landfill even though they were settled through the previous appeals or responses provided by Evergreen and AEP over the past ten years.

[22] Evergreen noted the Board may dismiss a notice of appeal if it considers the notice of appeal to be frivolous or vexatious or without merit. Evergreen provided the following definitions:

- “‘Frivolous’: Having no sound basis (as in fact or law) (Merriam-Webster) Not having any serious purpose or value (Oxford)
- ‘Vexatious’: Intending to harass (Merriam-Webster) Denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the Defendant (Oxford)”

Evergreen submitted the Appellant's concerns and complaints are both frivolous and vexatious and are without merit.

[23] Evergreen stated the Appellant made numerous complaints to AEP throughout the Approval period for the Original Approval. Evergreen submitted that many of the complaints were repeats of previously answered complaints and were frivolous and vexatious. All complaints were addressed by Evergreen or investigated by AEP to the Director's satisfaction. Evergreen noted that AEP's Compliance Division had no outstanding issues or concerns related to the Landfill.

[24] Evergreen submitted that, as documented in its Annual Reports, it complied with the surface and groundwater quality requirements of the Original Approval over the approval period, justifying the Board's conclusion in *Shapka* that the Original Approval provided the necessary conditions to protect the water resources around the Landfill. Evergreen stated that because the Approval is simply an extension of the Original Approval, has more and clearer conditions, and imposes more protective groundwater quality controls at the compliance

boundary than the old ones, the appeal is frivolous, vexatious and without merit.

[25] Evergreen stated the Appellant cited the Board's appeal EAB 12-033 in support of his claim that the Approval is vague, open-ended, and subject to interpretation that could negatively impact the environment.<sup>5</sup> Evergreen noted that appeal EAB 12-033 was filed by Ms. Yvonne Tomlinson with respect to *Water Act* Licence No. 00311837-00-00, which was issued in 2012, and that the Board's decision regarding appeal EAB 12-033<sup>6</sup> does not relate in any way to the operations of the Landfill as required by the Original Approval and the Approval.

[26] Evergreen submitted that the Appellant's assertion that an exceptional underlying aquifer underlies the Landfill is incorrect. Evergreen stated that the Appellant, as a layperson, is confused by the definition of this hydrogeological entity. Evergreen argued that the Appellant's continued assertions in this regard are untrue and vexatious.

[27] Evergreen further stated there is nothing in the Board's decision regarding appeal EAB 12-033 to support the contention that the Approval currently under appeal is vague, open ended, or would impact negatively on the environment. Therefore, in Evergreen's opinion, the Appellant's reference to appeal EAB 12-033 is frivolous, vexatious, and without merit.

[28] Regarding the Appellant's allegations about leachate migration from the Landfill, Evergreen noted the Appellant only provided the Board with the first page of a November 22, 2017, letter from Evergreen's consultant, Omni-McCann, to the Director. Had the Appellant provided the complete submission from Omni-McCann, it would have shown that any groundwater nitrate concentration was not related to leachate migration from the Landfill. Evergreen argued the Appellant's selective method of presenting information and unfounded allegations are frivolous and vexatious.

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<sup>5</sup> Evergreen's Submission, June 24, 2020, at page 2.

<sup>6</sup> *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033-ID1 (A.E.A.B.).

[29] Evergreen explained that this is now the third appeal of its landfill's approvals by the Appellant and/or Ms. Tomlinson. Evergreen submits that the Appellant's behaviour indicates a personal vendetta against Evergreen and all associated parties, and he should not be permitted to continue to advance this vendetta through the Board's appeal process.

[30] Evergreen stated its application to renew the Original Approval followed the content requirements outlined in AEP's application form and was deemed complete by AEP. Evergreen noted the Appellant's allegations that the application is "incomplete" is not supported by evidence. Evergreen submitted that such casual and unsupported statements are entirely without merit, frivolous, and vexatious.

[31] Evergreen reiterated that the Notice of Appeal is without merit, frivolous, and vexatious, has no environmental or public benefit, and should be dismissed.

**(iii) Director**

[32] The Director noted the Board has the power under EPEA to dismiss a notice of appeal if it considers the notice of appeal to be frivolous or vexatious or without merit.<sup>7</sup> The Director did not take a position on whether the appeal is frivolous or vexatious. However, the Director agreed with the concerns raised by Evergreen that many of the issues the Appellant raised lack merit, as they were previously determined by the Board and decided by the Minister of Environment and Parks (the "Minister").

[33] The Director stated that the Board has previously used the concept of issue estoppel to limit the issues on appeal in *Bailey et al. v. Director, Northern East Slopes Region*,

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<sup>7</sup> Section 95(5)(a) of EPEA provides:

"The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit..."

*Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation (“TransAlta”)*<sup>8</sup> and *Fenske*.

[34] The Director stated that in *TransAlta*, the Board considered the argument that issue estoppel does not apply to Board hearings, which are effectively *de novo*. The Board noted that section 87 of EPEA (currently section 95), “gives the Board wide jurisdiction to streamline the issues before it and to focus the hearing - whether or not issue estoppel applies.”<sup>9</sup> The Board found that dissatisfaction with previous decisions on the same subject matter did not form the foundation for revisiting the issues that were the basis of a previous decision. The Board decided not to revisit issues in its previous decision as there were no significant changes in circumstances that would warrant the Board to consider those issues again.

[35] The Director stated that in *Fenske*, the Board heard an appeal of a renewal of an approval issued a decade prior. The Board accepted that issue estoppel applied if a three-step test was met:

- (a) the same question has been decided;
- (b) the judicial decision which is said to create the estoppel was final; and
- (c) the parties to the judicial decisions were the same persons as the parties to the proceedings in which the estoppel is raised.

[36] The Director noted the Board in *Fenske* found that issue estoppel applied to groundwater issues and issues respecting the composite liner, as those issues had been previously heard in the appeal of the initial approval. The Board also indicated that if all the terms and conditions in the initial approval were the same as the renewal, it “could be argued all of the

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<sup>8</sup> *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011 (A.E.A.B.).

<sup>9</sup> *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011 (A.E.A.B.), at paragraphs 42, and 57-58.

issues were heard previously.”<sup>10</sup>

[37] The Director stated the principle of issue estoppel is available to the Board in this appeal based on the three-part test used in *Fenske*. The Director noted that the Appellant participated in *Shapka*, which included issues raised again in this appeal. In *Shapka*, the Board examined the Original Approval, the renewal of which is the subject of this appeal. The Minister made a final decision on those issues based on the Board’s Report and Recommendations.

[38] The Director stated the Board made several findings in *Shapka* about the Landfill that, absent evidence to the contrary, still apply to the Landfill today. Although the Appellant was an intervenor in *Shapka*, he had the opportunity to make submissions and did so on many issues that he has raised again in the present appeal. The Director submitted that the Appellant’s lease of Dr. Shapka’s land at NW-22-056-10-W4M is the sole connection upon which the Appellant’s current appeal is founded. The Director noted that this is exactly the same land on which Dr. Shapka’s appeal (EAB 08-037) of the Original Approval was based.

[39] The Director stated the Board addressed in *Shapka* the issue of whether an exceptional aquifer existed beneath the Landfill. The Board accepted the Director’s conclusion that no exceptional aquifer existed as a reasonable finding based on the data provided.

[40] The Director also stated that the Board previously addressed increased leachate levels in the Landfill cells. The Appellant, as an intervenor in *Shapka*, claimed that the cell design, construction, monitoring and testing were inadequate and that leachate, therefore, posed a threat to the environment. The Director had investigated the leachate levels and attributed the increase to a significant rain event. The Board stated in *Shapka* there was no evidence to indicate the Director’s conclusions were incorrect.

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<sup>10</sup> Preliminary Motions: *Fenske v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (22 September 2008), Appeal No. 07-128-ID1 (A.E.A.B.), at paragraph 123.

[41] The Director stated the Appellant, as an intervenor in *Shapka*, raised numerous concerns that the Board addressed in its decision. The Director submitted that each of the amendments the Minister made to the Original Approval to meet the hydrological and hydrogeological concerns raised in *Shapka* were incorporated by the Director into the current Approval.

[42] The Director argued the Appellant's statement that he and Dr. Shapka "think and approach matters quite differently" was irrelevant to this appeal. The Director stated that as there was no evidence that the underlying circumstances regarding the Landfill have changed, presenting evidence that was available in the *Shapka* hearing using a different approach was not a sufficient reason to override the principle of judicial finality, as discussed in *Fenske*.

[43] The Director submitted that several of the issues raised by the Appellant are not of sufficient merit to be heard, as the Board and the Minister had already determined them.

**(iv) Appellant's Rebuttal**

[44] The Appellant responded to a number of items raised in the Director's submission. The Appellant stated that a September 2010, report Evergreen was required to provide to the Director as per the Ministerial Order 03/2010, did not include more than 12 traditional agriculture surface water users within a 5 km radius of the Landfill.

[45] The Appellant stated with regards to an aquifer underlying the Landfill:  
"Agreements made at AHS hearing state the water well located just off Evergreen property (undetermined whether or not is located on or off Evergreens property) 'It produces the highest water supply on the grazing reserve.' This evidence was made available in 2013 (3 years after the fact) which the Board has not heard. The Director was aware of the AHS hearing as I sent him a e-mail requesting him to incorporate the AHS information into the Approval."<sup>11</sup>

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<sup>11</sup> Appellant's rebuttal submission, June 25, 2020, at page 1.

[46] The Appellant said he presented evidence to AEP regarding leachate levels in the landfill cells, which was available to the Board during the hearing for *Shapka*. The Appellant submitted the Director did not properly investigate the evidence the Appellant provided. The Appellant also provided precipitation information from Environment Canada for the St. Paul area, which was not available to the Board during the *Shapka* hearing.

[47] The Appellant submitted that at the *Shapka* hearing, he was faced with time restrictions and could not cover everything in the 15 minutes allotted to him as an intervenor.

[48] The Appellant stated that Evergreen's accusation that the appeal is frivolous, vexatious and, without merit, is unfounded.

[49] The Appellant submitted that appeal EAB 12-033 raised numerous questions and concerns that have been unanswered, including an Alberta Health Services hearing, the withdrawal of a water license by Evergreen, and the existence of an exceptional aquifer. The Appellant stated that the Director's Record for appeal EAB 12-033 included calculations showing there is an exceptional aquifer located under or near the Landfill.

[50] The Appellant explained he did not include the second page of the November 22, 2017, letter from Evergreen's consultant to AEP because it was not applicable. The Appellant stated his concern was that the letter was not part of Evergreen's application or the Director's Record, and therefore, Evergreen's application was incomplete.

## **VI. ANALYSIS**

[51] The Board notes the standard dictionary definitions of "frivolous" and "vexatious" as provided by Evergreen<sup>12</sup> and discusses each separately below.

- "Frivolous": Having no sound basis (as in fact or law) (Merriam-Webster);

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<sup>12</sup> Evergreen's Submission, June 24, 2020, at page 1.

Not having any serious purpose or value (Oxford);

- “Vexatious”: Intending to harass (Merriam-Webster) Denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the Defendant (Oxford).

[52] The Board recognizes the Appellant’s concern for ensuring groundwater resource protection and ensuring landfills operate in compliance with regulatory requirements. However, the Board notes the Appellant made several allegations regarding Evergreen’s compliance with the regulations, errors made by the Director, and validity of the Approval, without providing supporting documentation or evidence to support his claims, which appear to form the basis for his Notice of Appeal.

[53] Usually, appeals based on concerns regarding approval holders and government representatives adhering to and operating in accordance with legislation, and concerns regarding the protection of the environment, in particular groundwater resources, would not be considered frivolous. However, in this case, the Board finds the Appellant’s Notice of Appeal may be considered frivolous for the following reasons:

- the Appellant persistently raised issues already considered and decided at previous hearings with no evidence of significant changes in circumstances that would warrant the Board to consider those issues again;
- the Appellant made unsupported allegations that documents used in the application appeared to be fraudulent, which cast unsubstantiated aspersions on the technical competency of both the Director and Evergreen; and
- the Appellant made irrelevant speculation regarding Evergreen’s financial standing.

[54] The Board notes Evergreen submitted that the Notice of Appeal is vexatious for multiple reasons, including that the Appellant’s concerns have been raised and dealt with through two previous appeals and that raising essentially the same concerns again in a third appeal constitutes an abuse of the appeal process. Further, the Board notes Evergreen is concerned the

Appellant's behaviour indicates a personal vendetta against Evergreen. However, the Board finds there is insufficient evidence to make a finding that the Notice of Appeal is vexatious.

[55] The Board considered whether the appeal is without merit by examining the following three factors:

- (a) the Appellant's claim regarding the validity of the Approval;
- (b) the Appellant's claim that the Approval is open-ended, unenforceable and vague; and
- (c) issue estoppel, or in other words, whether the issues raised by Appellant are materially the same as those decided by the Board in the *Shapka* hearing.

[56] The Board finds the Approval is a renewal based on many of the same provisions as the Original Approval. The Board conducted a thorough hearing of the Original Approval, which was heard in January 2010 and confirmed by the Minister in March 2010. In addition, the Approval includes the provisions of Ministerial Order 03/2010, which strengthens the Approval and makes it more protective of groundwater. Also, the Director's Decision noted the Appellant's concerns were considered in AEP's review of the application for the Approval.

[57] The Appellant claims that the Landfill application that AEP approved was incomplete. In the Board's view, this is unsupported. In the Board's view and experience, AEP has well-established disposition application procedures. Had the application been incomplete, AEP Approvals area would not have accepted the application for the renewal, and it would not have approved an incomplete application.

[58] The Board finds the Appellant has not provided the Board with sufficient evidence on a *prima facie* basis to challenge the legal validity of the Approval.

[59] The Appellant claims that the Approval is null and void because section 2.1 of the

Standards for Landfills<sup>13</sup> has not been fulfilled, and in particular, section 2.1(b)(ii). The Board notes that section 2 of the Standards for Landfill pertains to Landfill Development and Siting and that section 2.1 pertains to the “Natural Environment Separation,” which is related to new landfills or landfill applications for laterally expanding footprints. This includes, for example, setbacks from areas of slope failure, man-made or natural water bodies, and ensuring sufficiently low hydraulic conductivity of underlying deposits to protect groundwater. The Board finds this Approval is a renewal of a previous approval; it is neither an application for a new landfill nor an application for an expanded footprint. The Appellant has not provided any evidence to substantiate his allegation of any concerns by AEP or AEP’s Compliance Division regarding the Landfill’s operations over the past ten years.

[60] The Appellant has not provided information or explanation of any new factors, or circumstances, that have arisen since the *Shapka* hearing that materially changed the Landfill and its operations. Therefore, the Board finds no evidence that section 2.1 of the Standards for Landfills has not been met and rejects the Appellant’s assertion that the Approval is null and void.

[61] In the Appellant’s Notice of Appeal he claimed the Approval was open-ended, unenforceable and vague because it included terms such as “... unless authorized in writing by the Director.” In the Board’s view, the inclusion of terms such as “... unless authorized in writing by the Director” is a pragmatic and effective means of allowing an approval holder to operate appropriately and maintain compliance with its approval in the event of unusual, unexpected, or unforeseen circumstances. Requiring evaluation and authorization by the Director of such a situation and the approval holder’s plan for resolution or mitigative strategies, for example, ensures that the Director is aware of the situation and that the matter is addressed in accordance with the regulatory requirements. Legislation and requirements cannot be written so prescriptively as to anticipate every eventuality, and a provision such as this allows the Director

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<sup>13</sup> Director’s Record, at Tab 6.1.

to evaluate unforeseen scenarios and thereby make a decision to ensure the intent of the regulatory requirements and the applicable legislation have been met. There are clear stipulations in the Approval for the requirement of further written authorizations that are enforceable.

[62] The Appellant's Notice of Appeal referenced the Board's decision in *Shapka*, which the Board interprets as forming the basis for the current appeal. In the Appellant's response submission, he stated that the *Shapka* appeal "raised numerous unanswered questions," and he is revisiting aspects covered by that appeal and decided at that hearing.

[63] The Appellant was an intervenor at the *Shapka* hearing and had an opportunity to bring evidence and make submissions, which he did. In the Appellant's response submissions, he indicated he was not satisfied with the amount of time he was allotted at the *Shapka* hearing, and he now desires the opportunity to revisit the same issues. In the Appellant's June 26, 2020, response submission the Appellant stated he can "argue these same arguments through other concerns." Also, the Appellant stated in his initial submission that he would take a "different approach" to explaining the evidence than was presented in *Shapka*.

[64] Some of the Appellant's concerns appear to pertain to groundwater protection, which was covered at length in the *Shapka* hearing. The Appellant raised what he claimed to be new evidence regarding the Landfill's proximity to additional users of surface water, and referenced a map which was presented at the *Shapka* hearing. This is but one example of the Appellant's attempt to revisit matters covered in the previous hearing. The Board finds the Appellant has not demonstrated a material change has occurred that warrants revisiting this issue.

[65] The Board finds no evidence that circumstances regarding the Landfill have changed significantly enough for the Board to reconsider matters decided in the *Shapka* hearing. Further, the Board finds there is no new issue in the Appellant's Notice of Appeal that would warrant the Board to undertake the hearing of this appeal.

[66] Based on the above reasons, the Board finds the Notice of Appeal is frivolous and without merit. Consequently, the Board dismisses the Notice of Appeal pursuant to section 95(5)(a)(i) of EPEA.<sup>14</sup>

## **VII. DECISION**

[67] The Board has determined the Appellant's Notice of Appeal is frivolous and without merit.

[68] The Board dismisses the Appellant's Notice of Appeal pursuant to section 95(5)(a)(i) of EPEA on the basis that it is frivolous and without merit.<sup>15</sup>

Dated on July 22, 2022, at Edmonton, Alberta.

"original signed by"

Meg Barker  
Acting Board Chair

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<sup>14</sup> Section 95(5)(a)(i) of EPEA provides:  
"The Board  
(a) may dismiss a notice of appeal if  
(i) it considers the notice of appeal to be frivolous or vexatious or without merit..."

<sup>15</sup> Section 95(5)(a)(i) of EPEA provides:  
"The Board  
(a) may dismiss a notice of appeal if  
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