

Environmental Law Centre
(ELC & NGO Stakeholders Presentation)
June 8, 2006, Edmonton, EAB Office

Appearing Before the Environmental Appeals Board
By Dr. Steve Hrudey

1. I would like to welcome all of you today to the offices of the Environmental Appeals Board. My name is Steve Hrudey, Chair of the Board. I just wanted to make a few comments about the Board and the future direction of the Board. I will not cover any details about the Board, but I would encourage you to consult with Board staff about specific questions and with our website for general information.
2. The Environmental Appeals Board has been hearing appeals for over a decade, from less than 10 appeals in the first year to an average of over 100 appeals annually. The Board's jurisdiction comes from the *Environmental Protection and Enhancement Act* (EPEA) under which it was created and the *Water Act*. Not all decisions made by Alberta Environment can be appealed. For example, the decision whether or not an environmental impact assessment is required by Alberta Environment can not be appealed to the Board. However, decisions such as issuing an approval under EPEA, issuing an approval or license under the *Water Act*, and decisions to take enforcement action can be appealed to the Board. In dealing with these appeals, the greatest challenge that the Board has is balancing the issues and interests of all the parties.
3. Because the Board reviews decisions made by Alberta Environment, we operate at arm's length from the Department. The public may misunderstand this arms length relationship because I report to the Minister so they may believe that the Board is part of Alberta Environment. In fact, in the Board's proceedings, Alberta Environment is just like any other party that comes before the Board.
4. The main job of the Board is to make recommendations to the Minister of Environment on matters brought before it, with the Minister making the final decision on whether to confirm, reverse, or vary the Director's decision. On matters relating to standing,

timeliness of filing, stays, costs, requests for confidentiality, administrative penalties, and all preliminary matters, the Board is the final decision-maker. The Board has an obligation to operate in accordance with the principles of natural justice, and the Board's decisions can be, and occasionally are, judicially reviewed by the courts. We note that the Courts have upheld most of our decisions.

5. Board Members are appointed by the Provincial Cabinet and appointments are based on merit, administrative experience, knowledge of environmental issues, and academic, technical, and professional expertise. The Board members understand the issues and the science behind the issues. When a hearing is held, every effort is made to have the Board members with expertise on the issue being appealed sit on the panel. The Court has recognized the strong scientific analyses required in most of the appeals heard by the Board, and the Court has almost always given the Board's decisions deference because of the expertise of its members.
6. The legislators decided when establishing the Board that only those persons directly affected by the decision made by Alberta Environment could file an appeal. The Board did not write this rule; it is clearly stated in the legislation that the appeal right is limited to persons who are "*directly affected*", not any Albertans who may hold valid concerns. The right of appeal automatically includes those to whom the licence or approval was issued, if they do not like the terms and conditions set out, or if the approval or licence was not granted.
7. What the Board has done over the past decade through its various cases, is to develop an approach to assess whether an individual who files an appeal is directly affected. This process has been influenced by some judicial reviews of Board decisions concerning standing. The Board maintains flexibility in the application of the test, as every appeal that comes before it is unique and the circumstances surrounding the appeal are specific to that appeal. Although the Board has developed an approach to enable those filing appeals to understand the basic threshold that must be passed, there cannot be absolute rules that disregard the circumstances of a specific case.

8. Appeals are filed by individuals, companies, and also by groups of individuals. Although the basic principles remain the same, the Board has developed a specific approach in determining who is directly affected when dealing with appeals filed by groups of individuals, instead of individuals on their own. The Board appreciates it when individuals work together on an appeal. This collaboration reduces repetition and increases efficiencies for all concerned. The major hurdle groups face when appealing to the Board is for a group to establish that the group is “*directly affected*”. A group must show the Board that many of its members collectively would have personal standing in their own right. A group is required to identify its members and provide some indication of how the individual members are directly affected by Alberta Environment's decision. What the Board encourages groups to do to clarify the standing determination, is to have individual members of the group file their own Notice of Appeal. As long as one member of the group is found directly affected, the group itself can represent the appellant or apply to the Board to participate as an intervenor. The Board recognizes this does require additional work on the part of the individual. However, EPEA stresses the importance of individual Albertans taking an active role in protecting the environment. One of these roles is to file Notices of Appeal when they are directly affected by the decision made by Alberta Environment.

9. The Board recognizes that appellants (other than approval holders) have to undergo two assessments of directly affected. The first is done by Alberta Environment when a Statement of Concern is filed. Alberta Environment's determination of directly affected status is not binding on the Board, either in accepting or rejecting a Statement of Concern. The Board considers the Statement of Concern process an important opportunity for individuals to have a say in the outcome of an approval or licence. The Board encourages Alberta Environment to be as broad and as inclusive as possible when considering Statements of Concern to be valid. Additional information about an approval and a clear understanding of the concerns of Albertans can only make approvals better. In most cases, the legislation requires that a Statement of Concern is filed as a prerequisite to filing a Notice of Appeal. When the Notice of Appeal is filed, the Board

makes its own determination of whether the Appellant is directly affected for the purposes of an appeal.

10. One of the principle functions of the Environmental Appeals Board is to balance the various purposes outlined in section 2 of both the *Environmental Protection and Enhancement Act* and the *Water Act*, but no single purpose of EPEA or the *Water Act* is held inherently superior to any others. The Board must also balance competing policy objectives and conflicting interests of all the various parties.
11. When a Notice of Appeal is filed with the Board, the Board will determine whether the issues could be resolved through mediation and thereby avoid the potentially formal, lengthy, and costly process of a hearing. Not all appeals are suitable for mediation. For example, if the participants are unwilling or if the issues are of sufficient public interest, the Board may not refer it to mediation. If mediation is unsuccessful or deemed inappropriate, a panel, normally consisting of three Board Members, hears the appeal formally. The Board member who acted as mediator is not part of the panel and does not discuss the file with any other Board members.
12. Over the past 10 years, mediation has become a key tool at the Board. It reduces costs and has allowed the Board to process appeals in an effective and efficient manner. The Board has been very successful with resolving appeals through mediation, and it has a long term average success rate of over 80 percent.
13. Mediation allows the participants to find a resolution that is satisfactory to those involved with the appeal. It is voluntary and is designed to assist participants in reaching a mutually acceptable solution. All participants who attend mediation must do so in good faith and recognize the need for confidentiality. This allows for a more open discussion and exchange of ideas and options. Board members act as mediators to find out what is important to the participants in reaching a solution, and from there, the mediator helps the participants to come up with solutions that meet as many of these identified interests as possible.

14. Given the continued success of the Board's mediation program, it is an area that we will continue to expand and improve. The Board has found it a very effective and efficient way to address the appeals that come before us.
15. Before a mediation takes place, the Board's staff conduct extensive pre-mediation work through written correspondence and telephone conversations. The Board's staff work to educate the parties on mediation and are there to assist all participants throughout the appeal process and are available to answer all of the public's questions.
16. The Board is accountable to the people of Alberta. The legislators recognized the importance of Alberta citizens working together with Alberta Environment to build stronger approvals. The Board's goal is to protect the environment in the best manner possible for Albertans now and in the future, by making the best possible approvals and licenses while bearing in mind the purposes of the acts it operates under.
17. Input from stakeholders, including industry, appellants, and Alberta Environment regarding the Board's processes is important to the Board. This is the main reason that we have joined you here today. By considering input from all parties, the Board can continue to improve its processes to assure fairness for all participants. We would be most pleased to receive your questions and comments, now or later through the Board staff. Thank you for allowing me to speak to you today.