

**Environmental Law Centre Reception
September 21, 2006
Westin, Calgary**

**Appearing Before the Environmental Appeals Board: A Stakeholders Dialogue
By
Dr. Steve E. Hrudehy, Chair
Environmental Appeals Board**

1. Good evening ladies and gentlemen. I would like to welcome all of you today and thank the Environmental Law Centre for giving me an opportunity to briefly speak this evening about the Environmental Appeals Board. My name is Steve Hrudehy, Chair of the Board. The Board welcomes opportunities such as this to meet with stakeholders and we hope there will be additional opportunities such as this.
2. The importance and challenges of protecting the environment becomes clearer and clearer every day. This is particularly true in Southern Alberta where the Government has taken steps to effectively close the South Saskatchewan River Basin from any further water allocations. This has brought home the reality that water is a finite resource – there is only so much water available. The Government and the citizens of Alberta must now work together to ensure that we make the best use of the available water supply. The Board expects to take an active role in protecting this resource.
3. 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* under which it was created and the *Water Act*. It is important to recognize that not all decisions made by Alberta Environment can be appealed. An example of an issue that cannot be appealed is the decision whether or not an environmental impact assessment is required. Further, if the issues raised in the Notice of Appeal were adequately dealt with by the Alberta Energy and Utilities Board or the Natural Resources Conservation Board, the Board loses jurisdiction to hear the matter.

4. Because the Board reviews decisions made by Alberta Environment, we operate at arm's length from the Department of Environment. We frequently encounter misunderstandings among members of the public about this arm's length relation. They often believe that because I report to the Minister, they believe that the Board is part of Alberta Environment. The Board and Board staff work hard to avoid or reduce this misunderstanding. The Board makes 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 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 a fundamental 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. Failure to be fair to all parties to an appeal in compliance with natural justice, will almost certainly assure that a judicial review will find fault with our process.
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. 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 relevant expertise on the issue being appealed sit on the panel. The Courts have recognized the strong scientific analyses required in most of the appeals heard by the Board, and the Courts have almost always given the Board's decisions deference because of the expertise of its members.
6. One of the challenging issues that the Board deals with is the directly affected test for determining standing before the Board. 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 the rules; it is clearly stated in the legislation that the appeal right is limited to persons who are "*directly affected*", not just any Albertan 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 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 somewhat different approach in determining who is directly affected when dealing with appeals filed by groups for individuals, instead of individuals on their own. The concept of a group itself being directly affected is more complex. The Board appreciates it when individuals work together on an appeal. Such cooperation reduces repetition and increases efficiencies for all concerned. The major hurdle that groups face when appealing to the Board is for a group to establish that the group, as a legal “person”, is “*directly affected*”. In addition to proving all of the aspects of directly affected as determined for an individual, a group must also show the Board that 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 affected by Alberta Environment's decision. To demonstrate that a group is directly affected, the Board will generally require a considerable amount of information about the group and its members relative to the appeal filed. What the Board encourages groups to do is to have individual members of the group file their own individual Notices 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 may require additional work on the part of the individuals. 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 the Director of Alberta Environment when a Statement of Concern is filed. The Director's determination is not binding on the Board, either in accepting or rejecting a Statement of Concern as being from someone directly affected. The Board considers the Statement of Concern process an excellent opportunity for Albertans to have a say in the outcome of an approval or licence. The Board encourages the Director to be as broad and as inclusive as possible when considering Statements of Concern to be valid. Additional information 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 principal functions of the 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 is held superior to any others. The Board must also balance competing policy objectives and conflicting interests of 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 avoiding the formal, potentially lengthy, and costly process of a hearing. Not all appeals are suitable for mediation. For example, if the participants are unwilling or if the issue is of sufficient public interest, the Board may not refer it to mediation. If mediation is unsuccessful or deemed inappropriate, a panel, normally consisting of one to three Board Members, hears the appeal formally. The Board member who acted as mediator is excluded from participating on 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 efficient and effective manner. The Board has been very successful with resolving appeals through mediation, and it has a success rate of over 84 percent. Very few appeals actually proceed to a hearing.

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. It is important that all participants who attend mediation 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 most of 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 inform the parties about mediation and are there to assist all participants throughout the appeal process and are available to answer 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 to the best possible degree for Albertans now and in the future, by making the best possible approvals and licences while keeping in mind the purposes of the acts it operates under.
17. The Board continuously takes notice of input and feedback from stakeholders, including industry, appellants, and Alberta Environment regarding the Board's processes. By considering input from all parties, the Board can continue to improve its processes to assure fairness for all participants.
18. Thank you for the opportunity to speak to you this evening. I would encourage you to speak to the Board staff that are in attendance and visit the Board's website if you would like more information about the Board. I will now take questions.