
ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – April 17, 2001

IN THE MATTER OF Sections 84, 85, 86, and 87 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3

-and-

IN THE MATTER OF appeals filed by Mr. K.F. Bailey Q.C. on behalf of Ms. Gwen Bailey, Mr. Nick Zon, Mr. Blair Carmichael, Mr. D.R. Thomas Q.C. on behalf of Ms. Donna Thomas and the Summer Village of Kapasiwin, Mr. I. Samuel Kravinchuk on behalf of Mr. James Paron, His Worship Mayor William F. Purdy on behalf of the Village of Wabamun, Mr. David Doull, and Mr. F. Locke Boros on behalf of the Lake Wabamun Enhancement and Protection Association with respect to Approval 10323-02-00 issued on November 30, 2000 to TransAlta Utilities Corporation by the Director, Northern East Slopes Region, Environmental Service, Alberta Environment.

Cite as: Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*.

**PRELIMINARY MEETING
BY WRITTEN SUBMISSION
ONLY BEFORE**

Dr. William A. Tilleman, Chair

SUBMISSIONS

Appellants: Mr. Nick Zon; Mr. Blair Carmichael; Mr. James Paron, represented by Mr. I. Samuel Kravinchuk; the Village of Wabamun, represented by Mr. Barry Sjolie, Brownlee Fryett; Mr. David Doull; and the Lake Wabamun Enhancement and Protection Association, represented by Mr. Brian O’Ferrall, Q.C., Bennett Jones.

Director: Mr. Rick Ostertag, Director, Northern East Slopes Region, Environmental Service, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ron Kruhlak, McLennan Ross and Mr. Alan Harvie, McLeod Dixon.

No Submissions: Ms. Gwen Bailey, represented by Mr. K.F. Bailey, Q.C.; and Ms. Donna Thomas and the Summer Village of Kapasiwin, represented by Mr. D.R. Thomas, Q.C.

TABLE OF CONTENTS

I.	BACKGROUND	1
A.	Notices of Appeal.....	1
B.	Procedural Background.....	2
C.	Preliminary Meeting	3
D.	Mediation Meeting/Settlement Conference	5
E.	Hearing Date	5
F.	Preliminary Motions	6
G.	Additional Submissions	6
II.	RECONSIDERATION REQUESTS.....	7
A.	The Reconsideration Requests	7
B.	Submissions on Reconsideration Requests	8
1.	Mr. James Paron – Initial Submission	8
2.	Mr. Charmichael – Initial Submission	8
3.	Mr. Zon – Initial Submission.....	8
4.	Mr. Zon – Supplement to Initial Submission.....	9
5.	Mr. Doull – Initial Submission	9
6.	Village of Wabamun – Initial Submission.....	9
7.	LWEPA – Initial Submission	9
8.	Mr. Doull – Supplement to Initial Submission	10
9.	Director – Response Submission	10
10.	TransAlta – Response Submission.....	12
11.	Mr. Zon – Rebuttal Submissions	13
12.	Mr. Doull – Rebuttal Submissions.....	14
C.	Analysis – Reconsideration Requests	15
III.	ADJOURNMENT REQUEST.....	18
A.	The Adjournment Request	18
B.	Submissions on the Adjournment Request.....	18
1.	Mr. Carmichael.....	18
2.	Village of Wabamun.....	19
3.	LWEPA	19
4.	Mr. Zon.....	19
5.	TransAlta	20
6.	The Director.....	21
7.	Mr. Zon.....	21

C.	Analysis – Adjournment Request.....	22
1.	Lawyers, Experts and Costs.....	23
2.	Some Issues Not Included.....	24
3.	More Information.....	25
4.	Site Visit.....	27
5.	Other Property Owners.....	27
6.	Time to Exhibit Good Faith.....	28
7.	General Dissatisfaction with the Public Participation Process.....	28
8.	Complete and Accurate Evidence.....	28
IV.	COSTS REQUEST.....	29
A.	The Costs Requests.....	29
B.	Submissions on the Interim Costs Requests.....	29
1.	Mr. Carmichael – Application for Interim Costs.....	29
2.	Mr. Zon – Application for Interim Costs.....	30
3.	Village of Wabamun – Response to Applications for Interim Costs.....	30
4.	Mr. Doull.....	30
5.	LWEPA – Application for Interim Costs.....	31
6.	The Director – Response to Applications for Interim Costs.....	32
7.	TransAlta – Response to Applications for Interim Costs.....	33
8.	Mr. Zon – Rebuttal.....	34
9.	Mr. Doull – Rebuttal.....	35
C.	Analysis – Costs Requests.....	35
1.	Mr. Zon.....	36
2.	Mr. Charmichael.....	38
3.	LWEPA.....	38
V.	DECISION.....	39

I. BACKGROUND

[1] This decision deals with a series of preliminary motions – specifically, a number of reconsideration requests, an adjournment request, and a number of interim costs requests.

A. Notices of Appeal

[2] On November 30, 2000, the Director, Northern East Slopes Region, Environmental Service, Alberta Environment (the “Director”) issued Approval 10323-02-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the “Act”) to TransAlta Utilities Corporation (the “Approval Holder” or “TransAlta”) for the operation and reclamation of the Wabamun Thermal Electric Power Plant (the “Wabamun Power Plant”), in the Village of Wabamun, in the Province of Alberta.

[3] On December 13, 2000, the Environmental Appeal Board (the “Board”) received a letter from Mr. Nick Zon advising that he was “... contemplating an appeal of the approval...” and asking for interim costs. The Board wrote back to Mr. Zon on December 18, 2000, advising that his letter did not contain the necessary information to file an appeal. Mr. Zon was further advised “... that until you file an appeal and your appeal is accepted, the Board can not consider your claim for costs.”

[4] On December 28, 2000, and January 2, 3, 4, and 10, 2001, the Board received Notices of Appeal from the following parties (collectively the “Appellants”):

1. Ms. Gwen Bailey and the Summer Village of Point Alison;
2. Enmax Energy Corporation (“Enmax”);
3. Mr. Nick Zon;
4. Mr. Blair Carmichael;
5. Ms. Donna Thomas and the Summer Village of Kapasiwin;
6. Mr. James Paron;
7. the Village of Wabamun;
8. Mr. David Doull;
9. the Lake Wabamun Enhancement and Protection Association (“LWEPA”);
and

10. the Summer Village of Point Alison.¹

B. Procedural Background

[5] The Board acknowledged receipt of each of the Notices of Appeal and requested that the Director provide a copy of the records (the “Records”) related to this matter. The Board also advised the Approval Holder of the appeals and provided the Approval Holder and the Director with copies of the Notices of Appeal. The Board subsequently received the Records from the Director and provided a copy of the Records to each of the other parties to these appeals.

[6] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB” or “EUB”) asking whether this matter has been the subject of a hearing or review under their respective legislation. The NRCB replied in the negative.

[7] With respect to the AEUB’s jurisdiction, the Board was advised that TransAlta currently holds AEUB Approval No. HE 8109 with respect to the Wabamun Power Plant. The Board was provided with a copy of AEUB Decision Report 81-6 that formed the basis for that approval.²

[8] On January 19, 2001, the Approval Holder requested that the Board expedite the appeal and set a March date for a hearing. The Board also received a letter from LWEPa, dated January 23, 2001, supporting the Approval Holder’s request for an expedited hearing.

[9] On January 25, 2001, the Board wrote to the Appellants, the Approval Holder and the Director advising that it would proceed to an oral preliminary meeting. The Board advised that at the preliminary meeting it would consider the status of the appeal filed by Enmax and determine which of the issues included in the Notices of Appeal will be included in the hearing of the appeals.

[10] On January 31, 2001, the Board wrote to Mr. Zon to follow up with respect to his letter of December 13, 2000 letter asking for costs. The Board advised Mr. Zon that “... if you wish the Board to consider a request for interim costs, you must file a new request for interim costs at the appropriate point in the Board’s process.”

[11] The Board advised all parties on February 16, 2001, that it would hold an oral preliminary meeting on March 1, 2001, at the Board's offices in Edmonton. This letter also indicated that "... the Board will soon set the date for a hearing ... [and that the] ... hearing will probably take place in April 2001." On February 19, 2001, and February 20, 2001, respectively, Mr. Carmichael and Mr. Zon responded to the Board's letter advising that they had concerns about the expedited nature of the preliminary meeting.

[12] On February 20, 2001, Mr. Doull requested that the Board provide him with all records relating to Approvals 18528-00-00 and 18528-00-01 that were previously issued to TransAlta for the Wabamun Power Plant. The Board forwarded this request to the Director, asking that these records be provided directly to Mr. Doull and indicating that these records would not be included in the Board's file. Mr. Doull also expressed concern about the expedited nature of the preliminary meeting.

C. Preliminary Meeting

[13] On March 1, 2001, following the receipt of written submissions, the Board convened an oral preliminary meeting to consider the status of the appeal by Enmax and determine which of the issues included in the Notice of Appeal were properly before the Board.

[14] In a written decision,³ (the "March 13, 2001 Decision") the Board dismissed the Notice of Appeal of Enmax (E.A.B. Appeal No. 00-075) and held that "... the remaining Appellants are directly affected by the Wabamun Power Plant and, as a result, have standing with respect to these appeals."⁴

[15] The Board also determined that it would deal with only the following issues at the hearing of these appeals:

- public safety, solely as it relates to TransAlta's operations and the impact on winter ice;
- harvesting weeds, but solely on the matter of alternate technologies - chemical, physical, or other such technologies - to enhance TransAlta's current weed control program;
- sediment deposition at Point Alison;
- the definitions of decommissioning and cooling water in the Approval;

- the watershed management plan; and
- sections 4.1.2 and 4.3.27 of the Approval, regarding timing and duration only, but including the length (the term) of the Approval.”⁵

[16] In coming to this decision, the Board looked at the issues that it had dealt with previously in the 1997 appeals regarding the Wabamun Power Plant.⁶ In its March 13, 2001 Decision, the Board held:

“[57] Many of the Appellants advanced the argument that the Board should revisit the issues it decided in the previous decisions on TransAlta on the basis that the decision of the Board had not been ‘implemented.’ This argument was put forward, in response to the questions the Board posed about issue estoppel, stating that issue estoppel could not apply because the decision was not ‘final.’ What it really means is that some of the Appellants were not satisfied with the results.

[58] The Appellants do not question that the issues identified in the previous decision were decided. They were merely unhappy with the results of the decision. The Board is of the view that this reasoning does not form the foundation for revisiting the issues that formed the basis of its previous decision.

[59] Specifically, in the previous proceeding dealing with TransAlta, the Board identified and limited the following issues before the Board:

- water quality (with respect to thermal input, chemistry and effects on fish),
- weeds,
- air quality (limited to fallout of black substance from air emissions),
- lake level (as it related to the nexus between the operations of the power plant and other environmental changes in the lake – not including historical levels of the lake or what the lake should be), and
- winter ice.

[60] These matters have already been adequately dealt with in its previous decision. The Board further believes that there are no significant changes in circumstances that warrants the Board to consider these matters again, with the exception of the issues discussed below. Accordingly, the Board *will not* revisit previous hearings or issues except as stated below.”

[17] After the oral preliminary meeting on March 1, 2001, the Board received a March 6, 2001 letter from Mr. Zon providing a list of “... outstanding requests [for information from the Director].” The Board forwarded the letter to the Director on March 9, 2001, asking the Director

to respond directly to Mr. Zon, and indicated that the information provided to Mr. Zon would not form part of the Board's appeal file.

[18] On March 22, 2001, the Director responded to the Board's letter of March 9, 2001, advising that Mr. Zon's "...request for information that was attached to his March 6th letter does not address any of the issues contained within his appeal of the current Wabamun Approval and accordingly, Alberta Environment [the Director] will not be providing Mr. Zon with further information related to this attachment." TransAlta supported the Director's position on this issue with a letter, dated March 28, 2001, where TransAlta advised "... the majority of this information [requested by Mr. Zon] has been provided to him on earlier occasions ... [and] it would appear that a number of his requests are beyond the scope of the issues the Board has identified for this hearing."

D. Mediation Meeting/Settlement Conference

[19] The Board held mediation meeting/settlement conferences on March 13, 14 and 19, 2001. The mediations were unsuccessful. At the end of the last mediation, it was indicated to the parties that the Board planned to hold a hearing on April 18 and 19, 2001.

[20] On March 19, 2001, the Board received a letter from His Worship Mayor Gordon Wilson advising:

"Please be advised that the Summer Village of Point Alison is withdrawing its appeal [E.A.B. Appeal No. 00-011]. ... We are pleased to advise that we have entered into a partnership agreement with TransAlta Utilities to rectify and remediate our concerns. We look forward to once again working with TransAlta."

[21] On March 26, 2001, the Board discontinued its proceedings with respect to EAB Appeal No. 00-011.

E. Hearing Date

[22] On March 20, 2001, the Board advised the parties that it would hold a hearing into this matter on April 18 and 19, 2001 at its offices in Edmonton. As noted above, the Board previously advised the parties on February 16, 2001 of its plan to hold a hearing in April.

F. Preliminary Motions

[23] Following the setting of the hearing date, the Board received the following preliminary motions:

1. Reconsideration Request (lake levels) by Mr. Zon dated March 15, 2001;
2. Reconsideration Request (lake levels) by Mr. Doull dated March 15, 2001;
3. Adjournment Request by Mr. Zon dated March 19, 2001;
4. Interim Costs Request by Mr. Zon dated March 19, 2001;
5. Reconsideration Request (AEUB licence and priority number) by Mr. Zon dated March 22, 2001;
6. Interim Costs Request by Mr. Carmichael dated March 23, 2001;
7. Reconsideration Request (delta T) by Mr. Zon dated March 26, 2001; and
8. Interim Costs Request by LWEPA dated March 26, 2001.

[24] On April 6, 2001 the Board wrote to the parties and advised that all of the preliminary motions had been denied. The Board indicated that it would be providing reasons with respect to these decisions. These are the reasons.

G. Additional Submissions

[25] During the course of obtaining submissions on these various preliminary motions, the Board received a number of submissions from some of the Appellants that it had not anticipated receiving – these submissions were in addition to the submissions contemplated in the directions from the Board. While it is under no obligation to accept these submissions, the Board decided not to return these submissions in order to give the Appellants every opportunity to state their case. The Board wishes to make it clear that this approach should not be viewed as a precedent and the Board would normally not consider such additional submissions. In fact, sending in additional submissions contravenes the Board's directions and is unfair to the other parties who did not have the same opportunity.

II. Reconsideration Requests

A. The Reconsideration Requests

[26] On March 15, 2001 the Board received a letter – a request for reconsideration - from Mr. Zon advising that he had “... grave concerns that the main problem affecting Lake Wabamun has been omitted from the issues from the hearing.” Mr. Zon went on to say that he is “... referring to water levels and how water levels are associated with the Wabamun power plant.” Mr. Zon asked the Board to “... reconsider and include the topic of lake levels for the new hearing.”

[27] On March 15, 2001 the Board also received a letter – a request for reconsideration – from Mr. Doull stating that his “... letter is to be treated as a ‘Letter of Concern’ about the Boards [sic] March 13, 2001 Decision....” Mr. Doull reiterates paragraph [61] of the Board’s March 13, 2001 Decision which states that “... the Board is mindful that it has the ability to rehear or reconsider matters found in section 92.1 of the Act. However, the Board does not have an application for reconsideration before it and, as a result, section 92.1 has not been engaged.” Mr. Doull goes on to indicate that he has “... no idea what Section 92.1 of the Act is about, but it appears to me that it is a mechanism of revisiting the issue of lake levels.” Mr. Doull states that he “... would like the Board to consider this statement/letter as a formal request to revisit the issue of lake levels for this approval, according to Section 92.1 of the Act.”⁷

[28] The Board responded on March 20, 2001 establishing a process to receive submissions from the parties on these reconsideration requests. Specifically, the Board asked the parties to provide submissions on the question: “Should the Board reconsider its Decision of March 13, 2001 having regard to the letters of Mr. Doull and Mr. Zon both dated March 15, 2001?”

[29] On March 22, 2001 the Board received a further letter from Mr. Zon requesting that the Board also reconsider its March 13, 2001 Decision respecting: “... (1) EUB Licence [, and] (2) Priority No. 1994-04-29-01....” The Board responded on March 23, 2001 and advised the parties that these two issues would be added to the reconsideration submission process already established by the Board. On March 26, 2001 the Board extended the deadline for the

filing of the initial submission in this regard and advise the parties that if there were any other reconsideration requests regarding the March 13, 2001 Decision, such requests should be submitted by Tuesday March 27, 2001. The Board advised that it would not accept any further reconsideration requests regarding the March 13, 2001 decision after this date.

[30] On March 26, 2001, Mr. Zon provided a submission that indicated that he would also like the issue of the “delta T” reconsidered.⁸ No other reconsideration requests were received.

B. Submissions on Reconsideration Requests

1. Mr. James Paron – Initial Submission

[31] On March 22, 2001 the Board received a submission respecting the reconsideration request from Mr. James Paron. Mr. Paron argues that the Board should reconsider its March 13, 2001 Decision on the basis that: new evidence is available relating to lake level; the Board has the right and obligation to consider new evidence; and further investigations of lake level would be of assistance to the Appellants.

2. Mr. Charmichael – Initial Submission

[32] On March 23, 2001 Mr. Charmichael advised the Board that he supported the reconsideration requests by Mr. Zon and Mr. Doull with respect to lake level. He provides no additional information or argument.

3. Mr. Zon – Initial Submission

[33] The Board then received Mr. Zon’s initial submission dated March 23, 2001. He indicated that in his view lake level is the “... main issue at Lake Wabamun.” He indicated that he had the opportunity to tour the Wabamun Power Plant after the 1997 appeal hearing and that in 1998 and 1999 the outlet and inlet canals were monitored for both temperature and water

level. Mr. Zon indicates that in his view this "... may require more research and study." He then reviewed a list of factors that demonstrate an association between the Wabamun Power Plant and lake levels. He then lists information that he obtained during the 1998 plant tour. Finally, he argues that the Board's jurisdiction is *de novo* and all topics should be heard.

4. Mr. Zon – Supplement to Initial Submission

[34] Mr. Zon supplemented his initial submission on March 26, 2001. He requested that the issue of the "delta T" issue also be reconsidered. With respect to the "delta T" issue, Mr. Zon states that there "... appears to be little or no effort to achieve the 'new benchmark' set by the Board."

5. Mr. Doull – Initial Submission

[35] Mr. Doull provided an initial submission on the issue of reconsideration dated March 26, 2001. Mr. Doull stated that:

1. the Wabamun Power Plant has "... a definite impact on lake levels at Wabamun Lake...";
2. Mr. Doull would like to inform the Board about the Wabamun Lake Water Treatment Plant and why it should remain part of the Approval;
3. lake level is associated with many of the problems at the lake;
4. Mr. Zon has made "... a legitimate request for information ...";
5. Mr. Zon has introduced new information which pertains to lake levels; and
6. Mr. Doull would like to bring to the Board's attention the letter from Alberta Environment that confirms that TransAlta has "... a direct effect on lake levels at Wabamun Lake."

6. Village of Wabamun – Initial Submission

[36] On March 26, 2001 the Village of Wabamun provided a submission, advising that "... there is no basis for a reconsideration of the Board's March 13, 2001 Decision."

7. LWEPA – Initial Submission

[37] On March 26, 2001 LWEPA provided a submission that supports

“... the request by Mr. Zon that the Board amend its decision to include consideration of any additional evidence or intervention supportive of any potential further amendments to ... [the Approval] which would have the result of strengthening obligations to enhance restoration and protection of water levels at Lake Wabamun.”

[38] The remainder of LWEPA’s submission reiterates their support of Mr. Zon’s reconsideration request, but does not provide any independent argument to support that position.

8. Mr. Doull – Supplement to Initial Submission

[39] Mr. Doull provided a further initial submission, dated March 27, 2001 wherein he:

1. provides the letter from Alberta Environment confirming that TransAlta has an affect of lake levels;
2. raises concerns with the public advisory group as it relates to lake levels;
3. raises concerns with enforcement by the Director generally and specifically with regards to surface water quality guidelines;
4. raises concerns about the water treatment plant; and
5. reiterates the request for an adjournment until the Appellants can obtain experts.

9. Director – Response Submission

[40] On March 29, 2001 the Director provided his response submission opposing Mr. Zon’s and Mr. Doull’s reconsideration requests. The Director identified that the Appellants “... brought forward issues ... that had been previously raised and argued with respect to the previous Approval and had been raised during the hearing in 1997.” The Director cites the Board’s March 13, 2001 Decision that:

“[57] Many of the Appellants advanced the argument that the Board should revisit the issues it decided in the previous decisions on TransAlta on the basis that the decision of the Board had not been ‘implemented.’ ... What it really means is that some of the Appellants were not satisfied with the results.

[58] The Appellants do not question that the issues identified in the previous decision were decided. They were merely unhappy with the results of the decision. The Board is of the view that this reasoning does not form the foundation for revisiting the issues that formed the basis of its previous decision.

...

[60] These matters have already been adequately dealt with in its previous decision. The Board further believes that there are no significant changes in circumstances that warrants the Board to consider these matters again, with the exception of the issues discussed below. Accordingly, the Board *will not* revisit previous hearings or issues except as stated below.”

[41] The Director then turns to examine the test for reconsideration. He cites the Board’s decision in *Whitefish Lake First Nation*⁹ where the Board, discussing reconsideration, stated:

“[6] ... While much can be said about the circumstances where it may be appropriate to exercise this power, it is sufficient for this case to focus on two factors.

[7] First, the power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider. The reconsideration powers is *an exception to the general rule that decisions are intended to be final. It is no to be used just to reargue the same issues a second time.* Second, a substantive error of law may be sufficient ground for reconsideration....” [Emphasis added.]

[42] The Director further cites the Board’s decision in *Laidlaw Environmental Services*¹⁰ where the Board states:

“[9] ... However, there is a common underlying question governing all of the Board’s reconsideration decisions, which is whether granting reconsideration will promote the ‘public interest’. The Board is not opposed to granting reconsideration requests, but there must be exceptional, compelling circumstances to warrant reconsideration.”

[43] The Director then points to the *Laidlaw Environmental Services* decision as standing for the proposition that “... new information ... [is] in and of itself not sufficient reason to reconsider a decision.” The Director then argues that “... each of the issues raised for reconsideration had been included within the statements of concern, notices of appeal, submission for preliminary meeting; moreover they were raised at the preliminary meeting. The evidence is not new. The Appellants are simply dissatisfied with the Board’s decision.”

[44] The Director then examines the reconsideration power of other tribunals. The Director points to a similar view in other tribunals that new evidence does not in and of itself warrant a reconsideration.

[45] The Director finally turns to the reconsideration requests with respect to the Board's March 13, 2001 Decision currently before the Board. The Director highlights that the information that Mr. Zon is presenting is not new, he had the information and presented it at the preliminary meeting. The Director argues that as the Board had this information before it at the preliminary meeting, it would be inappropriate to reconsider it.

[46] With respect to Mr. Doull's request, the Director explains that the reference in the Board's March 13, 2001 Decision of the Board's reconsideration power was not applicable because there was no decision to reconsider at that time. The Director points out that a request to reconsider the Board's 1997 Report and Recommendations¹¹ would be moot.

[47] Finally, the Director summarizes that no arguments have been presented that would warrant a reconsideration. The Director argues that simply because Mr. Zon and Mr. Doull are dissatisfied with the Board's March 13, 2001 Decision does not provide "... sufficient grounds for an application for reconsideration...."

10. TransAlta – Response Submission

[48] On April 2, 2001 TransAlta provided its response submission and also opposes Mr. Zon's and Mr. Doull's reconsideration requests.

[49] In its submission, TransAlta examines the Board's power to reconsider and points to previous decisions of the Board which require "... exceptional, compelling circumstances..."¹² before the Board will invoke its reconsideration power. TransAlta notes that the onus is on the applicant for the reconsideration to demonstrate these "... exceptional, compelling circumstances..." and provides a list of factors the Board has previously considered with respect to reconsideration applications. According to TransAlta, the Board has previously considered the following factors in deciding to reconsider: the public interest; delays; need for finality; any substantive error of law; and new evidence (evidence not readily available at the time of the prior decision).

[50] In TransAlta's view, the reconsideration requests are "... relying only upon the suggestion that there is new evidence for the Board to consider." TransAlta argues that Mr. Zon and Mr. Doull "... have not presented new evidence, let alone evidence which was not readily

available at the March 1, 2001 hearing [preliminary meeting] which the Board is asked to reconsider.” The issue being presented for reconsideration “... were specifically addressed and discussed before the Environmental Appeal Board at its March 1st, 2001 hearing [preliminary meeting].”

[51] TransAlta argues that “... Mr. Zon specifically raised the concerns he had with respect to the EUB licence and lake levels...” TransAlta points to pages 84 to 90 of the Preliminary Meeting Transcript in support of this position. TransAlta also points to the priority for the water licence being outside the jurisdiction of Director, and presumably the Board, in these appeals.

[52] TransAlta points to Mr. Doull’s letter of March 15, 2001 where he states: “I certainly recall myself and other Appellants having definite dialogue with the Board about how lake levels are the key to all the problems at Lake Wabamun.”

[53] TransAlta concludes that the “... Appellants are not suggesting that the Board erred or that there was new information that was not provided to the Board; rather, the real basis for this request is they don’t agree with the Board’s decision or perhaps with the legislation.” Further, TransAlta argues that the Board’s exercise of discretion to limit the issues to be dealt with at the hearing “... was appropriate given the circumstances of this approval and the fact that certain issues now being raised were the subject of in-depth consideration by this Board just four years ago.” Finally, TransAlta argues that the “... Appellants have not presented any such evidence [new evidence not reasonably available at the preliminary meeting]; they are simply seeking to reargue the March 13, 2001 decision.”

11. Mr. Zon – Rebuttal Submissions

[54] On April 4, 2001 Mr. Zon provided his rebuttal submission to the Board. In response to the Director’s response submission, Mr. Zon confirms that he spelled out his concerns in his February 22, 2001 submission for the preliminary meeting and that his March 15, 2001 submission details the new information that should be considered with respect to lake levels.

[55] Mr. Zon restates his concern about the fact that the Wabamun Power Plant uses the lake as a cooling pond and that he is unhappy with the lack of progress in reducing the thermal pollution. He reiterates that lake levels and thermal pollution are the main issues at the lake. He again discusses the breach of the weir, the vandalism that occurred, and the “18 inches” of water that TransAlta owes the lake. In summary, Mr. Zon states he has “... grave difficulty understanding why anyone would want to eliminate the main concerns, such as lake levels or thermal pollution, from a hearing.”

[56] In response to TransAlta’s response submission, Mr. Zon again advises that his issues were set out in his February 22, 2001 submission for the preliminary meeting. Mr. Zon expresses concern about what was taken into account at the preliminary meeting. Mr. Zon advises:

“... I asked the Board if he had an opportunity to read my submission. He said he did. Rather than read my submission I chose to spend my time on other items. As a result the contents of my submission will not be found in the preliminary hearing [meeting] transcript.”

[57] Mr. Zon then goes on to state:

“All the issues that I am asking to reconsider are included in the Feb 22. Submission.

The flaws in the EUB licence were discovered about 2 years ago.

The Priority No. 1994-04-29-01 amendment was noticed about 1 year ago. It was found by accident through Freedom of Information Service.

Lake levels were discussed at the last hearing. There are many factors that affect lake levels. The factor of lake levels that I wish the Board to hear was discovered during a plant tour after the last hearing. The plant tour was not allowed until after the last hearing was concluded.

Delta T needs to be discussed in relation to what the Board recommended at the last hearing, and how TransAlta handled the Boards views and recommendation.

All of the above items are new since the last hearing, and affect the public interest.”

[58] Mr. Doull provided his rebuttal submission in two letters – dated April 5 and 6, 2001. In his letter of April 5, 2001 Mr. Doull states that he “... can not make it any simpler terms ‘lake level is the whole issue at the lake’”

[59] In his letter of April 6, 2001 Mr. Doull argues that lake levels should be included because they are in the public interest. Finally, Mr. Doull states that TransAlta and Alberta Environment “... claim issues were resolved previously, I would like to see the results.”

C. Analysis – Reconsideration Requests

[60] The Board has been asked to reconsider its March 13, 2001 Decision and to add the issues of lake level, the AEUB licence, the Priority No.1994-04-29-01, and the delta T to the issues to be considered at the hearing of these appeals. The decision that the Board is being asked to reconsider is its March 13, 2001 Decision where it identified the issues that are properly before the Board for the purposes of the hearing of the appeal, as set out in paragraphs [15] and [16] above.

[61] The Board’s ability to reconsider a previous decision is found in section 92.1 of the Act which provides:

“Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendations or ruling made by it.”

[62] As stated by the Board in *Whitefish Lake First Nation* “... the power to reconsider is an *extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.*”¹³ [Emphasis added.] The onus is on the party requesting the reconsideration to convince the Board that there are exceptional and compelling reasons. The reason that exceptional and compelling reasons are required, as noted by the Board in *Whitefish Lake First Nation*, is that the “... reconsideration power is an exception to the general rule that decisions are intended to be final ... [and it] is not to be used just to reargue the same issues the second time.”¹⁴

[63] As stated by TransAlta, the factors that the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that

would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.

[64] In the reconsideration requests before the Board, Mr. Zon and Mr. Doull are arguing that the Board should reconsider its March 13, 2001 Decision essentially, they argue, because new information is now available and because they feel that the issues of lake level, the AEUB licence, the Priority Number, and the delta T should be considered in the context of this delta T. This appears to be the sole ground upon which the parties have requested the reconsideration – they have not, for example, pointed to an error of law or other ground upon which to base their reconsideration.

[65] Turning first to the issue of new information, it is important to understand that in the context of this reconsideration there are two types of new information. The first type of new information is the type that Mr. Zon is speaking of – information that is new since the Board's decision in 1997. The Board has no doubt that there is new information since the 1997 decision. Mr. Zon made it very clear at the March 1, 2001 preliminary meeting that he had new information such as the plant tour. This information was available well before the date of the preliminary meeting.

[66] The second type of new information – the type of new information that is relevant for the purposes of a reconsideration – is information that was not available at the time the decision being reconsidered was made. In the context of this case that means information that was not available at the time the March 1, 2001 preliminary meeting was held. None of the parties have pointed to any information that they did not previously present at the March 1, 2001 preliminary meeting, much less any information that was *not available* at the March 1, 2001 preliminary meeting.

[67] In fact, all of the evidence and arguments presented by the Appellants in these reconsideration requests was presented to the Board at the preliminary meeting on March 1, 2001. As a result, what is really happening is that the parties are attempting to reargue their case a second time. This is the exact concern that the test for a reconsideration is designed to avoid. There are no exceptional and compelling reasons.

[68] In his rebuttal submission, Mr. Zon has expressed a concern that he did not have an opportunity to speak to some of his issues during the preliminary meeting on March 1, 2001 and points to the fact that the issues he wants the Board to reconsider were included in his written submissions prepared for that meeting. Mr. Zon is quite correct. All of the issues that he wishes the Board to reconsider were in his written submission of February 22, 2001 that he provided for the purposes of the preliminary meeting. The Board wishes to assure Mr. Zon that it reviewed his February 22, 2001 written submission in detail. This makes it clear that Mr. Zon is simply attempting to reargue the case that he presented at the March 1, 2001 preliminary meeting. As stated by Mr. Zon in his Rebuttal Submission:

“All the issues that I am asking to reconsider are included in the Feb 22. Submission.

The flaws in the EUB licence were discovered about 2 years ago.

The Priority No. 1994-04-29-01 amendment was noticed about 1 year ago. It was found by accident through Freedom of Information Service.

Lake levels were discussed at the last hearing. There are many factors that affect lake levels. The factor of lake levels that I wish the Board to hear was discovered during a plant tour after the last hearing. The plant tour was not allowed until after the last hearing was concluded.

Delta T needs to be discussed in relation to what the Board recommended at the last hearing, and how TransAlta handled the Boards views and recommendation.

All of the above items are new since the last hearing, and affect the public interest.”

Mr. Zon’s own submission makes it clear that there is no new information in the reconsideration context, and as a result, a reconsideration is not warranted. Mr. Zon continues to go back to the AEUB licence and does so, in the Board’s opinion, contrary to the limits section of 87(5)(b)(i)¹⁵ of the Act.

[69] Mr. Doull states in his April 5, 2001 submission that he “... can not make it any simpler terms ‘lake level is the whole issue at the lake’...” and in his March 15, 2001 letter he states “... I certainly recall myself and other Appellants having a definite dialogue with the Board about how lake levels are the key to all the problems at Lake Wabamun.” Again, Mr.

Doull's submissions make it clear that there is no new information in the reconsideration context, and as a result, reconsideration is not warranted.

[70] The submissions indicate that the reason that Mr. Zon and Mr. Doull are making the reconsideration requests is because they are unhappy with the Board's March 13, 2001 Decision. Mr. Zon and Mr. Doull have not discharged the onus of presenting any exceptional and compelling reason to reconsider. There is no basis for the Board to reconsider its decision.

III. Adjournment Request

A. The Adjournment Request

[71] On March 19, 2001, the Board received a letter from Mr. Zon requesting "... that the hearing date of April 19, be adjourned."¹⁶ Mr. Zon cited four reasons for his adjournment request:

1. The term of the Approval is 10 years and the Board's decision must be based on complete and accurate evidence.
2. Mr. Zon estimates it will take him 60 to 90 days to have experts reports prepared and it will take him time to get a lawyer up to speed.
3. Many of Mr. Zon's issues were "... not included in the list of items to be heard at the hearing, because of my ignorance of Sec. 92.1 [of the *Environmental Protection and Enhancement Act* (the Board's reconsideration power)]."
4. Mr. Zon will be making a costs request to hire a lawyer and experts.

[72] The Board responded in a letter of March 22, 2001 requesting that the *other parties* provide their comments respecting Mr. Zon's adjournment request by March 27, 2001.

B. Submissions on the Adjournment Request

1. Mr. Carmichael

[73] Mr. Carmichael responded on March 23, 2001 supporting the adjournment request in order to hire experts and a prepare proper submission. Mr. Charmichael specifically cites the

issue of "... the use of herbicides and other technologies to control both emergent and submergent weeds in shallow areas of the lake."

2. Village of Wabamun

[74] The Village of Wabamun responded on March 26, 2001 opposing the adjournment. It did not provide reasons for its position, but stated that it favoured an expedited hearing.

3. LWEPA

[75] LWEPA also responded on March 26, 2001 and advised that it had "... no objection to this request." The reasons cited for this position "... included a reasonable period of time for the Government of Alberta to compile the requested information, preparation of related reports by expert witnesses and for preparation of his [Mr. Zon's] intervention." The Board relies on LWEPA's earlier agreement with TransAlta that an expedited hearing would be preferable.

4. Mr. Zon

[76] On March 26, 2001, Mr. Zon provided a further submission in support of his adjournment request. The Board had not expected a further submission from Mr. Zon as the Board had only requested further submissions from the *other parties* in response to its letter of March 22, 2001. This submission addressed the following matters:

1. Mr. Zon reiterates that he needs time to hire experts and a lawyer.
2. He repeats his request of March 6, 2001 to the Board for information regarding the operation of power plant.¹⁷ Mr. Zon attached the Director's response to this request that indicated that:

"The request for information that was attached to his [Mr. Zon's] March 6th letter does not address any of the issues contained within his appeal of the current Wabamun approval and accordingly, Alberta Environment [the Director] will not be providing Mr. Zon with further information related to this attachment."

3. Mr. Zon requests that the Board conduct a site visit.

4. Mr. Zon argues that many of the property owners at Lake Wabamun will not return until the May 24th long weekend and may wish to participate.
5. Mr. Zon argues that an adjournment will give TransAlta time to "... exhibit their good faith in handling the emergent weed problems...."

[77] Mr. Zon then goes on to express his dissatisfaction with the current and previous approval processes, his previous dealings with TransAlta, and the Board's previous decision. With respect to Mr. Zon's request for further information from the Director, the Board notes TransAlta's letter of March 28, 2001 where they indicate that the majority of information that Mr. Zon is requesting "... has been provided to him on earlier occasions directly from TransAlta ... [and] it would appear that a number of his requests are beyond the scope of issues the Board has identified for this hearing."

5. TransAlta

[78] TransAlta responded on March 27, 2001 opposing the adjournment request. The Board is unclear as to whether TransAlta had an opportunity to review Mr. Zon's March 26, 2001 submission prior to providing its submission.¹⁸ The Board is of the view, however, that this does not matter given the disposition of Mr. Zon's request. Nevertheless, in its March 27, 2001 submission, TransAlta indicated that:

1. Mr. Zon is an experienced participant in these proceedings. TransAlta cites a statement by Mr. Zon at the preliminary meeting to this effect and points to the on-going litigation between some of the Appellants (including Mr. Zon) and TransAlta.
2. Mr. Zon has been actively involved in this approval process since at least October 1999. (TransAlta provided a chronology of Mr. Zon's involvement in the process.) TransAlta reiterates the comment of the Director at the preliminary meeting that "... the degree of consultation which has taken place between Stakeholders, the Director, and TransAlta with respect to this application has not be surpassed in the Province."
3. That Mr. Zon has been "... aware of the general terms and conditions of the Approval for approximately 5 months ... [and that he] is well versed in the procedures, issues and time frames for this appeal."
4. The Approval in question is not a new approval, but a renewal of an existing approval.
5. TransAlta has requested an expedited appeal on January 19, 2001 and in fact had requested a hearing date in March.

6. The current Approval requires that TransAlta begin to take immediate steps, some of which are currently underway.
7. The adjournment request is deficient in that it "... fails to provide any specifics to substantiate the need for the adjournment." TransAlta highlights that Mr. Zon did not identify any steps that he has taken to prepare for the hearing since the Approval was issued. TransAlta argues that Mr. Zon has had adequate time to retain consultants.
8. Finally, it would be unfair, in the absence of adequate evidence, to consider the adjournment request.

6. The Director

[79] On March 27, 2001 the Director responded to the Board's request. It is clear from the Director's submission that he had the opportunity to address Mr. Zon's March 26, 2001 submission. The Director notes that the majority of Mr. Zon's first submission, which relates primarily to the retaining of experts, is predicated on receiving interim costs. The Director then goes on to address Mr. Zon's March 26, 2001 submission in detail. The Director indicates:

1. With respect to an adjournment to retain legal counsel and experts, the Director points to the decision of the Board in *Haugen*¹⁹ where Board considered such a request and refused to grant an adjournment.
2. In the Board's decision of March 13, 2001, the Board endorsed the idea that "... the purpose of filing of statements of concern, notices of appeal and the Environmental Appeal is to ensure that the best possible approval is drafted." Based on this view, the Director argues that, if Mr. Zon was of the view that more information was required to make a proper decision, such information should have been brought forward at the earliest possible stage. The Director then points to substantial communication with Mr. Zon and objects that Mr. Zon is attempting to use the Environmental Appeal Board process to "perfect" his concerns.
3. The Director reiterates his position with respect to Mr. Zon's document requests, advising that the Director will not provide further documents unless they relate to the issues before the Board.

The Director has other issues with Mr. Zon's reply.²⁰

7. Mr. Zon

[80] Finally, on April 4, 2001 the Board received yet another submission from Mr. Zon. Again, this submission was *not* expected. The submission was principally intended to be

the rebuttal submission in relation to the reconsideration request, however, it also acted as a rebuttal to the adjournment request.

[81] With respect to the Director's submission on the adjournment Mr. Zon advises that the Director "... cites the Haugen case ... [and states that the] ... Hagen case lasted 13 months. The 1997 Appeal lasted 9 months." Mr. Zon continues that the Director "... has not given any reason why this appeal should be rushed, other than to get it over with."

[82] With respect to TransAlta's submission on the adjournment Mr. Zon expresses the view that TransAlta has overstated his previous involvement in this matter and disagrees with the view by TransAlta that they have substantially responded to his information requests. Mr. Zon goes on to state that the level of consultation that was undertaken with regards to this Approval, has not resulted in an "... accomplishment..." with which Mr. Zon is satisfied. Mr. Zon details his previous experience with the appeal process. He states that he has "... been at this for 18 years, and I'm not satisfied." He continues to express concern that no independent studies have been conducted.

[83] Mr. Zon expresses concern that he did not have see Mr. Kruhlak's letter of January 19, 2001, as he was away until February 19, 2001, and did not have input into the hearing dates. With respect to this issue, the Board notes it provided a copy of Mr. Kruhlak's letter of January 19, 2001 to Mr. Zon. Further, the Board notes that it sent a letter dated February 16, 2001 indicating that the hearing would be held in April 2001. Further, the Board is not aware of any information on the Board's file that has not be been provided to Mr. Zon.

[84] Further, Mr. Zon states that he does not see any reason why the on-going work by TransAlta – the emergent weed study – will be impacted by an adjournment of the hearing; that TransAlta has not provided any evidence as to what damage would occur if the hearing was delayed; and he reiterates that cottage owners should be provided with a further opportunity to participate.

C. Analysis – Adjournment Request

[85] In reviewing the submissions, the Board has identified the following potential issues raised by the Appellants with respect to the adjournment request:

1. Lawyers, Experts and Costs;
2. Some Issues Not Included;
3. More Information;
4. Site Visit;
5. Other Property Owners;
6. Time to Exhibit Good Faith;
7. General Dissatisfaction with the Public Participation Process; and
8. Complete and Accurate Evidence.

The Board will address each of these in turn.

1. Lawyers, Experts and Costs

[86] The main argument that Mr. Zon puts forward in support of his request for an adjournment is that he wants time to retain a lawyer and the advice of this lawyer, hire experts and have reports prepared. Mr. Zon has indicated that he needs between 60 and 90 days after a "... commitment of funding..." from the Board.

[87] In response to this argument, TransAlta points to the fact that Mr. Zon is an experienced participant in these proceedings and that Mr. Zon has been "... aware of the general terms and conditions of the Approval for approximately 5 months...."

[88] The Director responds to this argument by Mr. Zon by advising that if Mr. Zon was of the view that the Director required more information to make a proper decision, then there was an obligation on Mr. Zon to bring that information forward at an earlier stage in the process. The Director objects to the use of the Environmental Appeal Board process as a method to "perfect" an appellant's concern. Finally, the Director states that Mr. Zon had adequate opportunity to retain counsel, hire experts, and obtain the reports that he feels are necessary to present his cases. The Director expresses the view that the real issue is that Mr. Zon "... does not believe that he should finance the information to support his position."

[89] The Board is of the view that an adjournment is not warranted in this case. First, the Board is of the view that Mr. Zon has demonstrated, in several hearings and preliminary meetings, that he is effective and clear in explaining his concerns to the Board.

[90] Second, Mr. Zon's reason for the adjournment request appears to be predicated on receiving interim costs from the Board. As the Board has stated on numerous occasions, the awarding of costs is at the discretion of the Board, which means costs may or may not be awarded.

[91] In the purpose section of the Act, it is made clear that there is a "... shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual action..." When an appellant chooses to file an appeal, he is stepping forward and accepting his responsibility for protecting the environment. As such, an appellant should first be prepared to present his case without receiving interim costs. The Board agrees with the Director that an appellant should not rely upon the Environmental Appeal Board process as a method to "perfect" or reargue concerns that were brought up, appealed or argued previously.

[92] We know Mr. Zon intended to appeal the issuance of this Approval from at least December 13, 2000 when he first contacted the Board. We believe that he likely had the intention to appeal well before this date. As a result, the Board expects that Mr. Zon should have begun arranging for legal representation, experts, and reports as soon as he made the decision to appeal. The fact that he did not begin to prepare as soon as he decided to appeal does not warrant the adjournment.

2. Some Issues Not Included

[93] Second, Mr. Zon argues that he should be granted an adjournment because some of his issues were "... not included in the list of items to be heard at the hearing because of my ignorance of Sec. 92.1 [of the Act]." Section 92.1 of the Act is the Board's reconsideration power and the Board notes that it currently has a number of requests to reconsider its March 13, 2001 Decision before it.

[94] The Board fails to see how Mr. Zon's "... ignorance..." of section 92.1 of the Act warrants an adjournment. The Board notes that section 92.1 was first raised in this matter by the Village of Wabamum before the Board at the March 1, 2001 preliminary meeting.

[95] At the preliminary meeting, the Village of Wabamun argued that in determining the issues to be considered at the hearing of the appeals, the doctrine of issue estoppel is in applicable to the Board because of its ability to reconsider matters under section 92.1. In its March 13, 2001 Decision, the Board rejected this argument because, as stated at paragraph [61], that:

“The Board is mindful that it has the ability to rehear or reconsider matters, found in section 92.1 of the Act. However, the Board does not have an application for reconsideration before it, and as a result, section 92.1 has not been engaged.”

It would appear that this would be the source of Mr. Zon’s confusion. In order to reconsider a matter, the Board must have already made a decision and then someone must request that the Board reconsider that decision. When the Board set up the preliminary meeting, the Board had not yet made any decisions with respect to limiting or expanding these appeals. As a result, there was no decision to reconsider and section 92.1 was, therefore, inapplicable at the time.

[96] Once the March 13, 2001 Decision was issued the Board received a number of reconsideration requests. In response to these reconsideration requests, the Board established a procedure to receive submissions from the parties. The last of these submissions were due on April 5, 2001. The Board also advised that no further reconsideration requests would be accepted, in relation to the March 13, 2001 Decision, after March 27, 2001. Given that this reconsideration process is complete, the Board fails to see how granting an adjournment would deal with Mr. Zon’s apparent concern. As a result, an adjournment is not warranted.

3. More Information

[97] The next argument that Mr. Zon puts forward in support of his adjournment request is the decision by the Director not to provide a further response to Mr. Zon’s information request. It is the Board’s understanding that Mr. Zon has been making a number of requests for information to the Director and to TransAlta. However, the specific request to which he is referring was provided to the Board on March 6, 2001. In this request Mr. Zon asked for the Board’s assistance in obtaining certain information from the Director. Mr. Zon did not attempt to indicate in his letter how the information would be relevant to the issues before the Board.

[98] Specifically, Mr. Zon has requested information regarding:

1. condensers and the date of replacement;
2. iron sediment;
3. additives to cooling water;
4. construction and erosion of canal walls;
5. instructions and lab reports relating to fish studies;
6. water charts relating the Wabamun Lake, Lac St. Anne, Pigeon Lake, and Jack Fish Lake from 1950 until the present;
7. vandalism of the weir; and
8. mistake in the survey.

[99] The Board responded, in a letter of March 9, 2001, according to standard practice when it receives such requests for information, and forwarded the request to the Director, asking the Director to respond directly to Mr. Zon.

[100] On March 22, 2001, the Director responded and advised that:

“The request for information that was attached to his [Mr. Zon’s] March 6th letter does not address any of the issues contained within his appeal of the current Wabamun approval and accordingly, Alberta Environment [the Director] will not be providing Mr. Zon with further information related to this attachment.”

In a letter dated March 29, 2001, TransAlta also commented on Mr. Zon’s information request advising that the majority of information that Mr. Zon is requesting “... has been provided to him on earlier occasions directly from TransAlta ... [and] it would appear that a number of his requests are beyond the scope of issues the Board has identified for this hearing.” Further, in his submissions, Mr. Zon did not provide any arguments as to why he thinks this information would be of assistance in addressing the issues identified by the Board in its March 13, 2001 Decision.

[101] The Board notes that on February 7, 2001 the Director provide the Board with “... the Return of the Director containing the records relevant to the[se] above appeals.” The Record entailed a total of six volumes of documents. There is no information before the Board to indicate, nor does the Board have any reason to believe, that the Record is incomplete. Therefore, the Board finds that there are no arguments or evidence before the Board with respect to the need for more information that would warrant the granting of an adjournment. The Board believes there is sufficient information in the Director’s Record.²¹

[102] In any event, if it became apparent to the Board during the course of the hearing that more information was required on the specific issues outlined in the Board's March 13, 2001 Decision, the Board could grant an adjournment and reconvene the hearing as necessary.

4. Site Visit

[103] The next argument that Mr. Zon puts forward as the basis for his adjournment request is that he is of the view that a site visit would be useful for the Board. The Board has already made a decision with respect to a site visit and that decision was "no". The Board provided its reasons in a letter dated March 22, 2001. The Board has not been provided with any arguments that would cause it to change its decision with respect to a site visit.

5. Other Property Owners

[104] Mr. Zon also argues that an adjournment should be granted in order to permit other cottage owners, or "snowbirds" as he calls them, on the lake to participate in this process. Mr. Zon advises that many of the cottage owners do not return to the lake until after the May long weekend.

[105] TransAlta and the Director both point to the extensive public consultation program that has been undertaken with respect to this approval process. The Board notes further that on March 21, 2001 it forwarded a news release announcing the April 18 and 19, 2001 hearing to the Public Affairs Bureau. On that date, the news release was also placed on the Government of Alberta website and distributed to 95 daily newspapers, radio stations and television stations within Alberta. The Board also placed a Notice of Public Hearing Ad regarding the April 18 and 19, 2001 hearing in the Edmonton Journal on March 23, 2001 and the Wabamun Community Voice on March 27, 2001. The advertisement provided information regarding the date, time and location of the hearing and asked that if any person, other than the parties, wished to make representations to the Board, they were to advise the Board by April 2, 2001. As a result, the Board is of the view that adequate notice has been provided to the other cottage owners. An adjournment to provide an additional opportunity for them to participate is not warranted.

6. Time to Exhibit Good Faith

[106] Mr. Zon's next argument, to support his adjournment request, is that TransAlta should be given an opportunity to demonstrate its good faith in dealing with the various issues at the lake and in complying with the Approval. In dealing with this question, the Board wishes to make it clear that it is in no way making any judgement on whether or not TransAlta has or needs to provide the demonstration of good faith that Mr. Zon is seeking within their *own* relationship.

[107] The issues before the Board, identified in the March 13, 2001 Decision, focus mainly on the wording of the Approval itself. The job of the Board is to make a Report and Recommendations to the Minister on these issues. The Board has the ability, under section 92(1)(a) of the Act to recommend that the Minister "... confirm, reverse or vary..." the terms of the Approval. The Board fails to see how obtaining the demonstration of good faith from TransAlta that Mr. Zon seeks will assist the Board in making its decision to "... confirm, reverse or vary..." the items in the Approval in the context of a hearing. As a result, there is no purpose nor is there evidence to support granting an adjournment on the basis of good or bad faith.

7. General Dissatisfaction with the Public Participation Process

[108] Throughout his submission, Mr. Zon expresses a general dissatisfaction with the public participation process. He identifies a list of longstanding disputes that he has had with TransAlta and the Director. He has also expressed dissatisfaction with the previous Board decisions in this matter. In the Board's view, and having regard to the interests of all of the parties before us. Mr. Zon's dissatisfaction does not support an adjournment.

8. Complete and Accurate Evidence

[109] The final argument that Mr. Zon puts forward to support his request for an adjournment is the need for the Board to base its decision on complete and accurate evidence. The Board agrees with Mr. Zon that it is important to make a decision based on complete and accurate evidence and to be as procedurally fair as possible to the competing interests concerned. However, there is no evidence or information that has been presented to the Board that would

lead it to believe that it will not have complete and accurate evidence at the hearing. On the contrary, it would appear to the Board that there has been more than an adequate opportunity for parties such as Mr. Zon to prepare for this hearing. As highlighted by TransAlta and the Director, the Approval before the Board has undergone an extensive public consultation process. Mr. Zon and the other parties have had, already for several months, the expectation that the matter would proceed to a preliminary meeting and then an oral public hearing.

[110] In any event, if it became apparent to the Board during the course of the hearing that more information was required on the specific issues outlined in the Board's March 13, 2001 Decision, the Board could grant an adjournment and reconvene the hearing as necessary.

IV. Costs Request

A. The Costs Requests

[111] In Mr. Zon's March 19, 2001 letter, he also requested interim costs. He stated "... I am requesting a commitment for funding, from the Board...."

[112] In the Board's letter of March 22, 2001, the Board established a procedure for receiving interim costs applications from the parties. Specifically, the Board requested that that any party who wished interim costs was "... to make their request in writing to Board no later than 4:30 p.m. on Tuesday, March 27, 2001." The Board advised that the parties may "... provide comments in response to these costs requests no later than noon on Monday April 2, 2001." The detailed factors that the Board can consider in making an interim costs decision are specifically referenced section 18 and 19 of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the "Regulation").²²

B. Submissions on the Interim Costs Requests

1. Mr. Carmichael – Application for Interim Costs

[113] In his March 23, 2001 submission, Mr. Charmichael advised that he supported Mr. Zon's adjournment request in order to retain experts and stated that "... I would like to apply for funding from the Board to enable the research to go forward on an 'independent basis' and

experts with no vested interest to be retained.” Mr. Charmichael provided no further information to support his costs request.

2. Mr. Zon – Application for Interim Costs

[114] On March 26, 2001 Mr. Zon provided the Board with his application for interim costs. He states that he believes that “... for a proper decision to be made the decision making body must consider all the evidence.” Mr. Zon then discusses the role of competing experts.

[115] Mr. Zon then discusses “[o]ne of the conditions of the previous Approval...”, the Board’s previous ruling respecting this condition, and how this has not been implemented. He states:

“This one point, in my view, must be examined very closely by a lawyer, because it appears that the direction of the Board has not been adhered to.

It would be my proposal to speak to Richard Secord to see if he is interested in the process. It would be his call as to which experts would be hired. It would be my suggestion that staff from the University be approached to assist.”

3. Village of Wabamun – Response to Applications for Interim Costs

[116] On March 26, 2001, the Village of Wabamun’s response to the interim costs applications. They advise “... it is the Village’s position that this matter would more properly be dealt with at the conclusion of the hearing, once the Board has had an opportunity to fully assess the submissions of all parties.”

4. Mr. Doull

[117] The Board notes that in Mr. Doull’s March 26, 2001 submission regarding the reconsideration request, Mr. Doull asks the Board to “... provide in writing the process one has to go through to get funding for independent experts and legal counsel to help resolve issues relating to this approval.” However, the Board did not note this request until March 28, 2001 when it wrote to Mr. Doull and advised that:

“Interim costs applications were due on March 27, 2001 as outlined in the Board’s letter of March 22, 2001 (attached). ... While it is too late for you to submit an

application for interim costs, you may still apply for final costs provided you indicate your intention during the hearing scheduled April 18 and 19, 2001”

5. LWEPA – Application for Interim Costs

[118] On March 26, 2001 the Board received a letter from LWEPA requesting an extension to the filing date for the interim costs application. LWEPA, however, filed their interim costs application in time and as a result, no extension was required. The Board confirmed that no extension was required in a letter date March 28, 2001.

[119] On March 26, 2001 LWEPA submitted its interim costs application. One of the statements in the interim costs application created some confusion, and at the request of the Board, LWEPA filed an amended interim costs application (also dated March 26, 2001) on April 3, 2001.

[120] LWEPA’s amended interim costs application advised:

1. LWEPA has been held to be directly affected;
2. The costs are reasonable and directly and primarily incurred in relation to the matters to be considered at the preliminary meeting;
3. The costs relate to the preparation and presentation of LWEPA’s preliminary meeting submission;
4. The intervention raised matters of the public interest, including the interpretation of the law;
5. The information and legal argument presented by LWEPA was not otherwise presented to the Board;
6. The Board relied on the information and legal arguments presented by LWEPA; and
7. LWEPA has endeavored to cooperate with the other parties.

[121] LWEPA then went on to detail the amount of time and effort that their members have contributed to the approval process. They indicate that they have raised funds to support their effort through membership fees and donations. They also indicate that they are involved in a number of other regulatory processes in the area. They indicate that the current assets of the association is less than one thousand dollars.

[122] LWEPA provided a list of costs incurred in the form of an “invoice” along with supporting documents. Specifically, the costs claimed are \$5000.00 in legal fees (\$4,293.59 in

fees and \$706.41 in disbursements), \$45.15 for photocopying, \$23.40 in courier services, and \$10.70 for corporate searches. The legal fees and disbursements related to the preparation for and presentation at the preliminary meeting on March 1, 2001. LWEPA requests that the "... costs incurred be reimbursed now rather than at the close of the hearing as suggested by some of the parties."

6. The Director – Response to Applications for Interim Costs

[123] On March 27, 2001 the Director provided his response to the various interim costs applications. The Director reviewed the criteria for awarding interim costs. The Director points to section 88 of the Act which gives "... the EAB discretion to award costs of and incidental to proceedings before it on an interim or final basis." The Director goes on to highlight section 19(2) of the Regulation which "... requires that the application [for interim costs] provide enough information to demonstrate the necessity of the costs to assist the party to effectively prepare and present its submission." The Director also points to section 19(3) of the Regulation which "... sets out the discretionary factors the Board may consider in making a decision on an interim costs ... [application which includes] the contribution the submission will make to the appeal, the clarity of the proposal, and the need for the funding." Finally, the Director points to the Board's Rules of Practice which state that a "... party may make an application for all costs that are reasonable and are directly and primarily related to the matters contained in the notice of appeal in the preparation and presentation of the party's submission."

[124] The Director points to the *Ash*²³ case as outlining the requirements for an interim costs application:

1. The applicant must provide a general outline of the merits of their case, describe how the costs sought will enable the applicant to prove the case, and why the applicant could not fill that role through other means.
2. The applicant must show that they made reasonable efforts to identify and make use of other means or resources.
3. The applicant must show that the desired services or materials are consistent with the market rate for those services or materials.

4. The applicant must submit a simple budget to show how the costs sought would be likely to accomplish the desired task. If the amount sought is not sufficient, then the applicant must address its intentions for obtaining the remaining funds. The Board expressed that it does not want to be in a position where it feels compelled to keep granting unexpected costs application to ensure the work is completed.

[125] Further, the Director notes that the Board in *Ash* denied interim costs because:

1. the request contained only a cursory statement need for an expert report and for costs;
2. the request did not address many of the factors discussed above;
3. the request did not indicate the amount of costs sought; and
4. the applicant did not establish her own lack of resources.

[126] The Director discussed each of the costs applications before the Board. With respect to Mr. Zon, the Director notes that "... Mr. Zon's application has not met the burden of proving entitlement to costs ... [and that Mr. Zon] provides only general statements of conclusion without any support or explanation." The Director states that "Mr. Zon appears to hope that something will arise from the proposed work that will be of assistance at the hearing ... [and that none] of the requirements cited in the *Ash* case have been addressed, nor have the factors under s.19(3)..."

[127] With respect to Mr. Charmichael, the Director notes that no supplementary information has been provided.

[128] Finally, with respect to LWEPA, the Director notes that LWEPA "... is seeking reimbursement for costs already incurred in their counsel's preparation for, and attendance at, the March 1, 2001 preliminary meeting." The Director notes that the Regulation provides that "... the application should be prospective, to address the costs that would be incurred in the preparation for, and attendance at, the upcoming hearing."

7. TransAlta – Response to Applications for Interim Costs

[129] TransAlta provided the Board with its response to the interim costs applications on April 2, 2001. With respect to Mr. Zon's and Mr. Carmichael's costs applications, TransAlta argues that none of the costs requested are "... directly and primarily related to the matters in issue in this appeal ... [and they] fail to identify how the costs would be used to prepare for the

appeal.” TransAlta goes on to point out that Mr. Zon “... has not yet even consulted any lawyer or experts.” Further, TransAlta argues that “... the evidence that he [Mr. Zon] proposed to elicit from such experts is irrelevant given the scope of this appeal.”

[130] With respect to Mr. Charmichael, TransAlta points out that Mr. Charmichael did not provide any particulars with respect to his costs request.

[131] TransAlta also points to the *Ash* case in support of their position. In this regard, “TransAlta submits that the costs submissions of Mr. Zon and Mr. Carmichael fall far short of the requirements under the regulations and case law for interim.”

[132] With respect to LWEPA’s interim costs application, TransAlta argues that the costs should be borne by Enmax in that LWEPA was motivated to appeal because of Enmax’s appeal. TransAlta argues that in the alternative, LWEPA’s costs request should be deferred to the conclusion of the hearing.

8. Mr. Zon – Rebuttal

[133] Mr. Zon again provided an unexpected rebuttal with respect to the interim costs application in two letters – the first dated April 2, 2001 and the second dated April 5, 2001.

[134] In his letter April 2, 2001, he requests that the Board delay its decision regarding interim funding until he is able to provide his rebuttal submission with respect to the Reconsideration Requests. The Board responded in a letter dated April 3, 2001 stating:

“A process with respect to interim costs was struck in the Board’s letter of March 22, 2001 advising that interim cost applications were to be filed with the Board by March 27, 2001 and responses to the costs applications were to be filed by April 2, 2001. As all parties were given equal opportunity to present their applications and provide a reply, the Board is unclear what you intend to add to the process.”

Further in this letter, Mr. Zon states that his “... request for interim funding was initiated in order to provide the Board another view to consider.” Further, Mr. Zon advises that “... Richard Secord has not been fully paid for his services for the last hearing.”

[135] In his letter of April 5, 2001, Mr. Zon advises that once he hires a lawyer it “... would be the lawyer’s call as to how to proceed.” Mr. Zon indicates that he has talked to a professor at the University of Alberta who “... thought it would be a very interesting assignment

that may have an unbelievable conclusion that TransAlta might not be too fond off [sic].” Mr. Zon repeats that “... Richard Secord has not been paid in full for his services ... [and that Mr. Zon is not in a] position to go into debt.” Mr. Zon indicates that Mr. Secord charges the going rate and that the University of Alberta charges lower than the going rate. Finally, Mr. Zon suggests that “... funds be capped at ½ of what TransAlta is spending on lawyers and experts for this approval.”

9. Mr. Doull – Rebuttal

[136] Mr. Doull also provided an unexpected rebuttal with respect to the interim costs applications in a letter dated April 5, 2001. Mr. Doull advises that he supports Mr. Zon and Mr. Charmichael in their costs applications. He notes that the Board has stated that “... you do not have to be a lawyer to participate in this process.” He states that the “... decision of costs should be based solely on a Board decision; there should be no outside decision from government, which may influence the Boards decision.”

C. Analysis – Costs Requests

[137] The Board has three interim costs applications before it. The first is Mr. Zon’s. The second is Mr. Charmichael’s. And the third is LWEPAs.

[138] The Board has the authority to award interim costs pursuant to section 88 of the Act and sections 18 and 19 of the Regulation. Section 88 of the Act provides:

“The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.”

[139] The Regulation provides:

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

- (a) the matters contained in the notice of appeal, and
- (b) the preparation and presentation of the party's submission.

19(1) An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board has determined all parties to the appeal.

(2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission.

(3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:

- (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
- (b) whether the party has a clear proposal for the interim costs;
- (c) whether the party has demonstrated a need for the interim costs;
- (d) whether the party has made an adequate attempt to use other funding sources;
- (e) whether the party has attempted to consolidate common issues or resources with other parties;
- (f) any further criteria the Board considers appropriate.

(4) In an award of interim costs the Board may order the costs to be paid by either or both of

- (a) any other party to the appeal that the Board may direct;
- (b) the Board.

(5) An award of interim costs is subject to redetermination in an award of final costs under section 20.”

[140] The Board’s Rules of Practice provide:

“... A party may make an application for all costs that are reasonable and are directly and primarily related to the matters contained in the notice of appeal in the preparation and presentation of the party’s submission.

An application for an award of interim costs can be made by a party at any time prior to the close of a hearing of the appeal but after the Board has determined all parties to the appeal.

An application for interim costs shall contain sufficient information to demonstrate to the Board that interim costs are necessary in order to assist the party in effectively preparing its submission at a hearing or mediation.”

1. Mr. Zon

[141] Read in the most positive light, Mr. Zon’s costs application occurred in a number of parts. He first attempted to file an interim costs request on December 13, 2000. In that letter,

he indicated that he wanted to hire a lawyer and a number of experts, including among others an appraiser to evaluate his property values and a researcher to examine the AEUB Licence, for a total of a \$30,000. The Board wrote back on December 18, 2000 and advised that the Board could not accept his costs application because he had yet to file a Notice of Appeal. The Board followed up with a letter on January 31, 2001, after Mr. Zon filed his Notice of Appeal, and advised that "... if you wish the Board to consider a request for interim costs, you must file a new request for interim costs at the appropriate point in the Board's process."

[142] On March 19, 2001 the Board received his letter indicating that he would like to apply for interim costs. The Board responded and asked for submissions, detailing the provisions of sections 18 and 19 of the Regulation. The application that the Board received from Mr. Zon did not address the issues identified in sections 18 and 19 of the Regulation. Instead, it was a speculative request for costs. It did not specify the type of experts that he wished to retain, nor did it identify what information he was seeking to present to the Board by way of these experts. It identified that he planned to speak to Mr. Richard Secord, and leave it to Mr. Secord to determine who to hire. The letter did not include an amount of funding requested beyond suggesting that he would be "... satisfied if the funding committed was half or even a little less than what TransAlta is spending for their experts and lawyer."

[143] In his April 2, 2001 rebuttal, Mr. Zon provides a bit more detail, indicating that he has talked to a professor at the University of Alberta who "... thought it would be a very interesting assignment that may have an unbelievable conclusion that TransAlta might not be too fond off [sic]." Mr. Zon indicates that Mr. Secord charges the going rate and that the University of Alberta charges lower than the going rate.

[144] Mr. Zon's interim costs application does not:

1. provide a specific list of experts that he intends to hire;
2. clearly identify how much money he requests for interim costs;
3. identify how, specifically, he intends to spend an interim costs award;
4. demonstrate how his submission will contribute to the hearing of the appeal;
5. give a clear proposal for interim costs;

6. demonstrate whether he made an adequate attempt to use other funding sources;
7. indicate how he has attempted to consolidate common issues or resources with other parties; and
8. provide sufficient information to demonstrate to the Board that interim costs are necessary in order to assist him in effectively preparing his submission at a hearing.

[145] For the reasons listed in the preceding paragraph, Mr. Zon's application is insufficient to warrant an award of interim costs.

2. Mr. Charmichael

[146] Mr. Charmichael's costs application provides even less information than Mr. Zon's. The request states, in the context of his support for the adjournment, that experts would be useful to support their submission and then states that "...[t]o this end I would like to apply for funding from the Board to enable research to go forward on an 'independent' basis and experts with no vested interest to be retained."

[147] Mr. Charmichael's interim costs application is insufficient to warrant an award of interim costs.

3. LWEPA

[148] LWEPA's costs application provides considerably more information than Mr. Zon's and Mr. Charmichael's. It makes specific arguments respecting its standing, that the costs are reasonable and directly and primarily incurred in relation to the matters before the Board, that LWEPA raised matters of broad public interest and concern, that the Board relied upon the submission it provided, and that LWEPA endeavored to cooperate with other parties. LWEPA also provided clear information regarding the financial situation of the organization and its current obligations.

[149] LWEPA also provided a detailed accounting of money that it has spent, providing a detailed breakdown of its legal expenses, and receipts for its other expenses.

[150] LWPEPA specifically asks that "... these costs incurred be reimbursed now rather than at the close of the hearing..." This statement identifies the problem. The costs application before the Board by LWPEPA is an *interim* costs application. Interim costs are awarded to a party to assist them in preparing to participate in a *future* hearing. Interim costs are prospective in nature – they are not intended to cover past costs. This is clear from section 19(2) of the Regulation which provides:

“An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission.”

[151] The costs that LWPEPA have requested are costs that are associated with the preliminary meeting that has *already* occurred. The costs identified by LWPEPA will *not* be used to prepare for the oral public hearing (April 18 and 19, 2001); LWPEPA’s costs application is more properly characterized as a final costs request and as a result, it should be dealt with at the end of the hearing process. As a result, no interim costs can be awarded to LWPEPA. The Board requests that LWPEPA resubmit their costs application at the end of the hearing process, but prior to the close of the hearing, when it can more properly be considered as a final costs request.

V. Decision

[152] For the reasons provided, the reconsideration requests of Mr. Zon dated March 15 (lake levels), March 22 (AEUB licence and priority number), and March 26, 2001 (delta T) and Mr. Doull dated March 15, 2001 (lake levels) are dismissed. The Board confirms its direction pursuant to section 87(4) that: (1) only the issues that will be considered at the hearing of these appeals are those specified in the Board’s March 13, 2001 Decision; and (2) representations with respect to other matters will not be permitted.

[153] For the reasons provided, the adjournment request of Mr. Zon dated March 19, 2001 is dismissed. The hearing will proceed as scheduled on April 18 and 19, 2001.

[154] For the reasons provided, the interim costs applications of Mr. Zon dated March 19, 2001, Mr. Charmichael dated March 23, 2001 and LWPEPA dated March 26, 2001 are

dismissed. The parties are free to submit applications for final costs prior to the close of the hearing.

Dated on April 17, 2001 at Edmonton, Alberta.

- original signed by -

Dr. William A. Tilleman, Chair

¹ Two separate appeals were filed on behalf of the Summer Village of Point Alison. The first was filed by Mr. K.F. Bailey Q.C. (included in the Notice of Appeal of Ms. Gwen Bailey) and the second filed by His Worship Mayor C. Gordon Wilson. In a letter dated February 15, 2001, Point Alison confirmed that His Worship Mayor C. Gordon Wilson would be representing the Summer Village of Point Alison.

² This information was subsequently confirmed by the AEUB in a letter dated March 12, 2001. Further, with respect to the AEUB's jurisdiction, the Board was advised that on April 27, 1999 Mr. Zon wrote to the AEUB and made a "... formal request to conduct a review hearing." This request for a review was presumably made pursuant to section 42 of the *Energy Resources Conservation Board Act*, R.S.A. 1980, c. E-11. On November 2, 1999 the AEUB wrote to Mr. Zon and advised that his application to review was denied.

³ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID.

⁴ *Ibid.* at paragraph 75.

⁵ *Ibid.* see paragraphs 76 to 80.

⁶ See *Zon et al. v. Director, Air and Water Approvals, Alberta Environmental Protection*, re: *TransAlta Utilities Corporation* (September 26, 1997), E.A.B. Appeal No. 97-005-97-016 and *Zon et al. v. Director, Air and Water Approvals, Alberta Environmental Protection*, re: *TransAlta Utilities Corporation* (December 9, 1997), E.A.B. Appeal No. 97-005-97-015.

⁷ Mr. Doull's letter also included a request for a site visit. In response, the Board advised on March 22, 2001 that it would not be conducting a site visit.

⁸ The "delta T" refers to the difference in temperature between the water being released by the Wabamun Power Plant and the water of Lake Wabamun at the point of release. The 3 °C delta T was recommended by the Board as the benchmark to be included in the previous Approval.

⁹ *Whitefish Lake First Nation Request for Reconsideration: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment* re: *Tri-Link Resources Ltd.* (September 28, 2000), E.A.B. Appeal No. 99-009-RD.

¹⁰ *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration*, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (April 7, 1998), E.A.B. Appeal No. 96-059.

¹¹ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 ID.

¹² See Kozdrowski Request for Reconsideration, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (February 9, 1999), E.A.B. Appeal No. 96-059D; Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (April 7, 1998), E.A.B. Appeal No. 96-059; and Whitefish Lake First Nation Request for Reconsideration: *Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri-Link Resources Ltd.* (September 28, 2000), E.A.B. Appeal No. 99-009-RD.

¹³ Whitefish Lake First Nation Request for Reconsideration: *Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri-Link Resources Ltd.* (September 28, 2000), E.A.B. Appeal No. 99-009-RD at paragraph [7].

¹⁴ *Ibid.*

¹⁵ Section 87(5)(b)(i) of the Act provides:

“The Board ...

(b) shall dismiss a notice of appeal if in the Board's opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the Natural Resources Conservation Board Act or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with”

¹⁶ The Board notes, as per its letter of March 20, 2001, the hearing is scheduled for April 18 and 19, 2001.

¹⁷ As indicated previously, the Board forwarded this request to the Director on March 9, 2001 indicating that the information would not form part of the Board's appeal file.

¹⁸ The Board notes that Mr. Zon's March 26, 2001 was faxed to TransAlta at approximately 1:00 p.m. on March 26, 2001 and that TransAlta's submission was received at approximately 4:00 p.m. on March 27, 2001.

¹⁹ *Haugen et al v. Director, Parkland Region, Alberta Environment re: ADM Agri-Industries Ltd.* (April 26, 2000), EAB Appeal Nos. 99-012-016, 99-019-126, and 00-001-002-DOP.

²⁰ The other issues the Director raised were:

1. The Director notes that the Board has already made a decision with respect to the site visit.
2. With respect to other cottage owners, the Director is of the view that there has been sufficient opportunity for other cottage owners to participate in this process.
3. The Director expresses the view that monitoring TransAlta's "good faith compliance" with the Approval is beyond the jurisdiction of the Board.
4. The Director points to Rule 2 of the Board's Rules of Practice, which indicates that the Board will conduct a "... fair, expeditious and impartial hearing of an appeal...."
5. The Director then goes on to express the view that Mr. Zon has had an adequate opportunity to retain counsel and obtain the information that he feels he needs to present his case, the issue "... appears to be that he does not believe that he should finance the information to support his position." The Director states that the fact that he has made a request for costs does not provide sufficient reason to delay the hearing.
6. Finally, the Director reiterates that there already has been an 18 month long public consultation process and as stated by the Board in the March 13, 2001 Decision, "... there has to be a degree of finality with respect to the public participation process and that there should

not be a punishment for an imperfect public participation mechanism.”

²¹ The Director’s Record contained documents in the following areas:

1. Approval and Notices of Decision
2. Application – dated September 1999
- 2.1 Application Reports and Addenda
 - 2.1.1 Options to reduce or eliminate the impact of thermal input into Wabamun Lake from the Wabamun thermal power plant, dated March 20, 1998
 - 2.1.2 Draft report: Option to address the impact of thermal input into Wabamun Lake from the Wabamun thermal power plant, dated March 30, 1999
 - 2.1.3 Addendum to draft report: Option to address the impact of thermal input into Wabamun Lake from the Wabamun thermal power plant, dated April 30, 1999
 - 2.1.4 Response to AENV’s second information request TransAlta Wabamun plant – application to renew EPEA operating approval Application 007-10323, dated September 26th, 2000
 - 2.1.5 Air quality assessment of proposed changes to air emissions from the Sundance thermal power plant, prepared by Jacques Whitford, dated July 4th, 2000
 - 2.1.6 An assessment of air quality in the Wabamun Lake area, prepared by J. Whitford, dated July 24th, 2000
 - 2.1.7 Wabamun generating plant statistical overview, prepared by Praxis, dated January 27, 2000
 - 2.1.8 Wabamun plant application to renew EPEA approval TransAlta’s response to AENV information requests, dated May 30, 2000
3. Public Notice of Applications
 - 3.1 Newspaper Advertisements
 - 3.2 Statements of Concern
 - 3.3 Other Correspondence Related to Public Notice
4. Review of Application – Correspondence and Discussion with TransAlta Utilities
5. Review of Application – Internal Correspondence and Discussion
6. Correspondence and Discussion with Statement of Concern Filers
 - 6.1 Meeting
 - 6.2 Correspondence with Statement of Concern Filers

²² See *infra.* at paragraph [139].

²³ *Ash v. Director, Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection* (February 5, 1998), E.A.B. Appeal No. 97-032.