

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: May 15, 2003

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and sections 114 and 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by David Doull and the Lake Wabamun Enhancement and Protection Association, with respect to *Environmental Protection and Enhancement Act* Approval No. 18528-00-03 issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment, and with respect to *Water Act* Licence Amendment No. 00037698-00-02, issued by the Director, Central Region, Regional Services, Alberta Environment, both to TransAlta Utilities Corporation.

Cite as: Preliminary Motions: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (15 May 2003), Appeal Nos. 01-082, 01-084, 02-002 and 02-003 – ID4 (A.E.A.B.).

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* and a Licence under the *Water Act* to TransAlta Utilities Corporation with respect to their Water Treatment Plant at Wabamun Lake, west of Edmonton, Alberta. The purpose of the plant is to mitigate the effects of TransAlta's other operations on the Lake.

The Board received a total of eight appeals. By the time these appeals were heard, four of the appeals had been either dismissed or withdrawn. The remaining appeals were by Mr. David Doull and the Lake Wabamun Environmental Protection Association (LWEPA) – each appealed both the Approval and the Licence.

The Board had determined four issues to be heard at the Hearing. Prior to the initial hearing date, LWEPA filed a motion to expand the issues to be heard. The Board denied the motion, but granted an adjournment to allow Alberta Environment to continue with the studies being done regarding the fish kills and heavy metals in the Lake and to file the resulting information. Following the adjournment, the Board permitted the parties to file any further motions regarding issues to be heard at the Hearing. Mr. Doull filed a motion to expand the issues to include water quality of the Lake in general and to adjourn the Hearing until such time that all relevant information was available. TransAlta filed a motion that three of the four issues initially identified by the Board were now moot. No motion was received from LWEPA.

After receiving and reviewing submissions on these motions, the Board determined: (1) that the issues should not be expanded to include water quality generally as no connection was demonstrated between the fish kills and heavy metals and the Water Treatment Plant; and (2) the issues set by the Board are not moot. The Board directed that the Hearing proceed and that the original four issues, as determined by the Board, would be the issues that would be heard. The Board has subsequently concluded the Hearing, issued its Report and Recommendations, and the Minister has accepted the Board's recommendations.* These reasons completes the Board file in this matter.

* See: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (18 November 2002), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-R (A.E.A.B.).

BEFORE:

William A. Tilleman, Q.C., Chair;
Dr. Steve E. Hrudehy, Board Member; and
Dr. Frederick C. Fisher, Board Member.

APPEARANCES:

Appellants: Mr. David Doull; and the Lake Wabamun Enhancement and Protection Association, represented by Ms. Linda Duncan and Mr. Locke Boros.

Directors: Mr. Daryl Seehagel, Director, Northern East Slopes Region, Regional Services, Alberta Environment, and Mr. Larry Williams, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ronald M. Kruhlak and Mr. Corbin Devlin, McLennan Ross.

Intervenor: Mr. C.G.P. Spilsted.

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I. BACKGROUND

[1] On July 30, 2001, the Director, Northern East Slopes Region, Regional Services, Alberta Environment (the “Directors”¹) issued Approval No. 18528-00-03 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12² (“EPEA”) to TransAlta Utilities Corporation (the “Approval Holder”), repealing and replacing Approval No. 18528-00-01 and Amending Approval No. 18528-00-02, for the construction, operation, and reclamation of a Class III potable water treatment plant (the “Water Treatment Plant”) at the N 20-52-4-W5M and SE 29-52-4-W5M at Wabamun Lake, west of Edmonton, Alberta. On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued Licence Amendment No. 00037698-00-02 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3,³ to the Approval Holder with respect to the same facility.

[2] The Environmental Appeal Board (the “Board”) received Notices of Appeal on August 30, 2001, from Mr. Blair Carmichael and Mr. David Doull, on August 31, 2001, from the Lake Wabamun Enhancement and Protection Association (“LWEPA”), and on September 4, 2001, from Mr. Nick Zon. The Board also received a Notice of Appeal from Enron Canada Power Corporation (“Enron”) on August 30, 2001. These Notices of Appeal were with respect to the Approval issued under EPEA. The Notices of Appeal filed by Mr. Carmichael, Mr. Zon, and Enron were either withdrawn or dismissed and, as a result, the only remaining appellants for the purposes of this Report and Recommendations are Mr. Doull and LWEPA (collectively the “Appellants”).⁴

¹ As the appeals are in respect to both the Approval, issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment (designated a Director under EPEA) and the Licence Amendment, issued by the Director, Central Region, Regional Services, Alberta Environment (designated a Director under the *Water Act*) reference will be made to the “Directors” in this Decision.

² As of January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, has replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

³ As of January 1, 2002, the *Water Act*, R.S.A. 2000, c. W-3, has replaced the *Water Act*, S.A. 1996, c. W-3.5.

⁴ Mr. Carmichael withdrew his appeals on June 10, 2002, after reaching an agreement with the Approval Holder in regard to the issue of reporting information. See: *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (13 June 2002), Appeal Nos. 01-080 and 01-134-DOP (A.E.A.B.). The Board dismissed Mr. Nick Zon’s appeal. See: *Zon v. Director, Northern East Slopes Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (31 May 2002), Appeal No. 01-085-D (A.E.A.B.). The Board also dismissed the appeal filed by Enron on March

[3] The Board acknowledged the Notices of Appeal, and requested that the Approval Holder and the Directors respond to Mr. Carmichael's request that the appeal under EPEA be held in abeyance until the Licence under the *Water Act* had been issued. In this same letter, the Board requested that the Directors provide a copy of all correspondence, documents, and materials relevant to these appeals (the "Record").⁵

[4] The Directors and the Approval Holder wrote to the Board concurring with the requests to hold the appeals in abeyance pending the finalization of the *Water Act* Licence. On September 7, 2001, the Board notified the Parties⁶ that it would hold the appeals in abeyance pending the issuance of the *Water Act* Licence.

[5] On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued the Licence under the *Water Act* to the Approval Holder. The Board received Notices of Appeal with respect to the Licence on March 28, 2002, from Mr. Carmichael, on April 3, 2002, from LWEPa, and on April 8, 2002, from Mr. Doull.⁷ The Directors and Approval Holder were notified of the appeals, and the Board requested the Directors forward a copy of all the documents related to these appeals (the "Water Record") to the Board.⁸

[6] On April 4, 2002, the Board confirmed that it would deal with the *Water Act* Licence appeals in conjunction with the EPEA Approval appeals.

[7] The Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board, regarding both the EPEA appeals and the *Water Act* appeals, asking

14, 2002. See: *Enron Canada Power Corporation v. Director, Northern East Slopes Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (26 June 2002) Appeal No. 01-081-D (A.E.A.B.).

⁵ The Director provided a copy of the Record on September 21, 2001, and copies were forwarded to the other parties to these appeals.

⁶ For the purpose of this decision, the "Parties" to these appeals are: Mr. David Doull, LWEPa, the Approval Holder and the Directors.

⁷ Mr. Nick Zon did not file an appeal of the *Water Act* Licence. Mr. Blair Carmichael withdrew his appeals on June 10, 2002, after reaching an agreement with the Approval Holder in regard to the issue of reporting information. See: *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (13 June 2002), Appeal Nos. 01-080 and 01-134-DOP (A.E.A.B.).

⁸ The Board received a copy of the Water Record on April 10, 2002, and copies were forwarded to the other parties to these appeals.

whether these matters had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.⁹

[8] A Preliminary Meeting was held on April 17, 2002, to determine the issues to be dealt with at the Hearing scheduled for May 15 and 16, 2002. The Board notified the Parties on April 19, 2002, that the issues to be heard at the Hearing were:

- Issue 1: the adequacy of the water balance model and the factors (e.g. surface runoff) that it relies upon as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
- Issue 2: the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;
- Issue 3: the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the License to the quality required by the Approval; and
- Issue 4: the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.¹⁰

[9] On May 8, 2002, in preparation for the Hearing, the Board received submissions on the above issues from the Directors and the Approval Holder. Mr. David Doull and LWEPa filed their submissions for the Hearing on May 9, 2002.¹¹

[10] The Board received an intervenor request from Mr. C.G.P. Spilsted on April 25, 2002. Upon reviewing the request and the Parties' submissions, the Board decided that Mr. C.G.P. Spilsted would be given limited intervenor status at the Hearing.

⁹ See: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (18 November 2002), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-R (A.E.A.B.).

¹⁰ See: *Issues Decision: Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

¹¹ No submissions were received from Mr. Carmichael or Mr. Zon.

[11] On May 9, 2002, the Board received a letter from LWEPA regarding "...water quality concerns with respect to recent developments at Lake Wabamun, made public May 8, 2002." LWEPA continued:

"We respectfully submit that [it] is incumbent on the Board to broaden the scope of the hearing to include water quality in general. By doing so, the Board will ensure it receives sufficient and full disclosure in matters related to water quality. We therefore request that in the matters before the Board at the hearing scheduled for May 15 and 16, 2002, that [the] hearing be expanded to [include] water quality in general and not limited to the narrow scope of water quality of the Sundance cooling pond."¹²

[12] The Board asked the Parties to respond to the following three questions in relation to the motion made by LWEPA:

- “1. Does the Board currently have sufficient information regarding the issues surrounding heavy metals and the fish mortality to determine whether to ‘...broaden the scope of the hearing...’?”
2. If the Board does not have sufficient information regarding these issues, should the Board adjourn the May 15 and 16 hearing, until such time that it has enough information to make this determination?
3. If the Board adjourns the hearing, what effect would an adjournment have on the parties to these appeals?”¹³

[13] The Board received oral submissions from the Parties on these questions at the commencement of the Hearing on May 15, 2002. Based on the information presented, the Board determined there was insufficient information to justify broadening the scope of the issues to be heard. However, the Board decided that an adjournment was required in order for the Directors to continue gathering information on the fish kill and heavy metals, and when the information was available, the Board would, *if a motion was put forth*, ultimately determine if the issues to be

¹² See: Letter from LWEPA, dated May 8, 2002. The motion by LWEPA was apparently triggered by media reports that there had been fish mortality and heavy metals found at Lake Wabamun. See: "Officials probe fish kill, heavy metals near plant" *Globe & Mail* (National Edition) (10 May 2002) A7, which stated:

"Alberta Environment has confirmed it is investigating dead fish and heavy metals in the water near a TransAlta Utilities power plant on Wabamun Lake.

Three types of heavy metals were found in the lake bottom near the plant's intake canal and 2,000 dead fish floated to the surface in the past six months, department spokesman Kim Hunt said.

Concentrations of arsenic and chromium three times greater than federal guidelines were found in lake mud and aluminum levels exceeded Alberta's limits, she said."

¹³ See: Board's Letter, dated May 10, 2002 and May 14, 2002.

heard would be broadened. The Board determined that none of the Parties would be significantly adversely affected by the adjournment.¹⁴ The Board stated:

“Therefore, ... the Directors are required to provide all relevant documents regarding their investigation of the issues of fish mortality and heavy metals to this Board and the other Parties to these appeals by noon on August 16, 2002, or sooner if it becomes available more quickly.

Then, if any of the Appellants decide, as a result of the new information, to make a motion regarding the addition of issues, the Board must receive the motion by noon on August 30, 2002. Any rebuttals would be due by noon on September 9, 2002. The Board would then consider the submissions and make a determination on whether to add the issue of water quality to the hearing. Based on this timeline, the hearing is expected to reconvene in late September or early October.

...

We therefore adjourn the hearing for 90 days or until such time as all relevant documents and results of the current investigation regarding fish mortality and heavy metals in Lake Wabamun are made available. The Directors are required to provide copies of the results and all relevant documents to all of the Parties to these appeals and to the Board according to the above schedule and subject to section 35(9) of EPEA. Following the 90 days, if a motion is received from a Party, the Board will determine if water quality will be added as an issue at the hearing.”¹⁵

[14] On August 15, 2002, the Directors provided the Board and the other Parties with copies of the information regarding the investigation into the fish mortality and heavy metals. They also attached reporting and monitoring information they had received from the Approval Holder.¹⁶ On August 16, 2002, the Board wrote to the Parties confirming that any motions in relation to the information provided by the Directors should be filed with the Board by August 30, 2002, with rebuttal submissions due by September 9, 2002.

[15] On August 23, 2002, the Board received a letter from LWEPA requesting a one-month extension to the August 30, 2002 deadline for filing motions, asking that the Hearing be

¹⁴ See: Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.).

¹⁵ Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.).

¹⁶ See: Alberta Environment, *The Lake Wabamun Water Quality and Sediment Survey* (Edmonton: Alberta Environment, 2002) (the “Alberta Environment Report”). Alberta Environment released this document as a preliminary report. It stated: “Final conclusions regarding water quality and specific sediment make-up in Wabamun Lake should not be drawn until AENV has completed its work and issues a final report in early 2003.”

adjourned, and requesting interim costs. LWEPA indicated that it had acquired the services of an expert to review the various reports provided by the Directors.

[16] On August 26, 2002, the Board wrote to the Parties and asked for submissions on LWEPA's request for a one-month extension to the August 30, 2002 deadline for filing a motion and on their request to adjourn the Hearing. After reviewing the submission, the Board extended the deadline for filing motions to September 13, 2002.

[17] On August 28, 2002 (and again on September 12, 2002), the Board received a motion from Mr. Doull to expand the issues of the Hearing to allow the "...water quality issue to include the entire lake..." and to adjourn the Hearing until such time that all the reports, including the final report from the Directors, become available and the Appellants have had the opportunity to assess the information.

[18] On August 29, 2002, the Board received a formal request for interim costs from LWEPA. The Board notified the Parties of LWEPA's application for interim costs and requested their comments by September 5, 2002. After reviewing the submissions, the Board notified the Parties on September 10, 2002, that it was denying the costs application.¹⁷

[19] On September 6, 2002, the Board received a reconsideration request from the Approval Holder, arguing that because the Water Treatment Plant has been operational since May 2002, three of the four identified issues were now moot.¹⁸

[20] On September 13, 2002, LWEPA wrote to the Board advising that they would not be filing a further motion. According to LWEPA, the principle reasons for not filing a further submission were an inability to meet with Alberta Environment and the decision by the Board to deny the request for interim funding. A further letter was received from LWEPA on September 20, 2002, which stated that it was of the understanding that the motion it had submitted to the Board on May 8, 2002, remained validly before the Board.

[21] The Board established a deadline to receive responses to Mr. Doull's motion to expand the scope of the Hearing to include water quality generally, Mr. Doull's request to

¹⁷ Costs Decision re: *TransAlta Utilities Corporation* (13 February 2003), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-CD (A.E.A.B.).

¹⁸ See: Approval Holder's Letter, dated September 6, 2002.

adjourn the Hearing until all information was available, TransAlta's request to reconsider the issues to be heard at the Hearing because three of the four issues were moot, and LWEPA's letter indicating that its motion of May 8, 2002, was still before the Board.

[22] On September 26, 2002, the Board notified the Parties that it denied the motions filed by the Approval Holder and Mr. Doull. After addressing a motion regarding the increased participation of Mr. Spilsted at the Hearing (the first motion), the Board stated:

“The second motion is that filed by Mr. Devlin on behalf of Trans Alta Utilities to eliminate issues 2, 3, and 4 that were set in the Board's Decision of June 25, 2002. Mr. Devlin's motion is denied and the Board will be providing a decision outlining the reasons for its decision. The issues to be included in the hearing of these appeals will be as stated in the Board's Decision of June 25, 2002.

The third motion is that filed by Mr. Doull to expand the scope of the hearing to include 'general water quality of Wabamun Lake in its entirety.' (See Mr. Doull's letter of September 12, 2002.) This is a follow up motion to the motions originally addressed on May 15, 2002. Mr. Doull's motion is denied and reasons for the Board's decision will be provided. The issue of 'water quality generally' will not be included in the hearing of these appeals.

The Board notes the September 20, 2002 letter from LWEPA advising that they were of the understanding that their motion addressed on May 15, 2002 was still before the Board. The Board will address LWEPA's letter more directly in its reasons, but wants to make it clear to the parties that in deciding not to include 'water quality generally' as an issue in these appeals, the Board has taken LWEPA's comments into account.

In reviewing our file, it appears to the Board that all of the preliminary motions advanced by the parties have been addressed. As a result, the Board confirms that it will proceed to a hearing of these appeals on October 17 and 18, 2002. The Board will be providing a letter outlining the procedure that will be followed at the hearing shortly.” (Emphasis removed.)

These are Board's reasons respecting these various motions.

[23] On October 17, 2002, the Board convened the Hearing and it continued on October 18, 2002. At the Hearing, the Board dealt with a number of additional preliminary motions, including Mr. Doull's request for the Board to reconsider its decision not to include “water quality generally” as an issue in the Hearing. (Mr. Doull's reconsideration motion was denied.)

[24] On November 18, 2002, the Board issued its Report and Recommendations and provided it to the Minister. The Minister accepted the Board's recommendations.¹⁹

II. SUBMISSIONS – EXPANDING ISSUES AND ADJOURNING

A. Mr. Doull

[25] On August 28, 2002, and again on September 12, 2002, Mr. David Doull submitted a request to the Board to add issues to the appeals and postpone the Hearing until the final version of the reports from the Directors and LWEPA were available. Mr. Doull submitted that all Parties should be given "...sufficient time to review and try to understand all relevant data prior to the continuation of a hearing on the above matter." He requested the expansion of the issues to include the "... *'General Water Quality of Wabamun Lake in its entirety'*." (Emphasis in the original.) He stated that all of the Appellants had agreed at the May 2002, proceedings that the water quality issue should be expanded. Mr. Doull made reference to the reports provided by the Directors and stated "...it also indicates some interesting results at various test locations (eg. Wabamun Lake Water Treatment Plant Outlet)." He stated that the Hearing should be adjourned until the final reports are ready and the study commissioned by LWEPA is provided to all the Parties.

[26] Mr. Doull concluded by stating:

"...I definitely want the scope of any pending hearings expanded to include the general water quality of the entire lake given the results of AENV's [(Alberta Environment)] preliminary findings on the heavy metals fish kill issue. I am totally supportive of adjourning the pending hearings until all relevant information has been received for a proper review prior to the start of any new hearings. If this issue is not dealt with now, it never will be. Past experience has clearly shown that once a door closes on any issue at Wabamun Lake, it remains closed."²⁰

[27] Mr. Doull provided a response to the Directors' and the Approval Holder's submissions on September 23, 2002. He repeated his position that the Hearing should be

¹⁹ See: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (18 November 2002), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-R (A.E.A.B.).

²⁰ See: Mr. David Doull's Submission, dated September 13, 2002.

adjourned until all remaining information is available to the Parties based on three grounds. First, the results of Alberta Environment's reports were inconclusive and more extensive testing is required. Second, LWEPA intends to submit its report as evidence. Third, he stated that the Appellants' concerns should be addressed after all the information is received and reviewed.

[28] Specifically, Mr. Doull further argued that alum is used in the flocculation process at the Water Treatment Plant and this could be the source of the aluminum in the Lake. Therefore, he argued that the water quality issue should be expended to include the entire Lake.

[29] Mr. Doull stated that perhaps a general inquiry on all the issues at Wabamun Lake would be required and that that call for such inquiry would be supported by the public.

B. LWEPA

[30] With respect to the matter of adding water quality as an issue in the Hearing, LWEPA advised that it was unable to submit comments on the new information provided by the Directors and the Approval Holder. It stated that it was unable to receive a technical briefing by the Directors on the reports that were submitted to the Board. According to LWEPA, the available dates provided by the Directors and the Approval Holder to meet with LWEPA to review the contents of the report were beyond the deadline for submissions.

[31] LWEPA confirmed that it had commissioned its own independent report and that the report would be provided to the other Parties. It also stated that it did not intend to table the report with the Board, but would provide the Board with a copy for its own reference.²¹

[32] LWEPA, in its submission dated September 13, 2002, stated that it "...requests the continuance of the hearing of the above appeals and wishes the opportunity to present its May 8, 2002 submission, and to direct questions and to provide closing remarks." The Board understands this to mean that LWEPA did not support an adjournment.

²¹ See: LWEPA Submission, dated September 13, 2002.

C. Mr. Spilsted

[33] In his September 18, 2002, submission, Mr. Spilsted stated that the Hearing must be expanded. Mr. Spilsted also stated that any new information from the Directors or other sources should also be presented at the Hearing. He did not specifically comment on the matter of an adjournment except that each "... day of delay this fragile system comes closer to the point of non-recovery, if it has not passed it already."

D. Directors

[34] In response to the motion that the Hearing be adjourned, the Directors submitted that the appeals should proceed and not be indefinitely adjourned. They also submitted that the request to add the issue of general water quality of the entire Lake is beyond the scope of these appeals. The Directors submitted that the request to expand the issue of water quality:

"...is going beyond the review of the Directors' decision and is asking for a general review of water quality within Lake Wabamun. This request is clearly beyond the decision of the Directors and would be outside the provisions of the *Environmental Protection and Enhancement Act*, upon which the Board finds its jurisdiction."²²

[35] With respect to the report commissioned by LWEPA, the Directors argued that the Board should not receive it, as it was not part of the evidence that would be presented by LWEPA.

[36] The Directors concluded by stating that it is their position "... that neither Appellant has raised any new issue that is reasonable and necessary to be included in the hearing of the current appeals."²³

E. Approval Holder

[37] In response to Mr. Doull's request to add another issue to the Hearing, the Approval Holder submitted that "...the application does not meet the established tests for

²² See: Directors' Submission, dated September 18, 2002.

²³ See: Directors' Submission, dated September 18, 2002.

reconsideration. We also note that the proposed issue is too broad and vague to permit reasonable preparation or consideration in the time allotted.”²⁴

[38] The Approval Holder argued that Mr. Doull did not indicate “...how in any way the proposed issue is tied to the Water Treatment Plant...” The Approval Holder further argued that the information gathered to date does not indicate that the water quality issues being investigated are the result of the operation of the Water Treatment Plant.

[39] The Approval Holder concluded by stating that “...Mr. Doull’s adoptive motion and request for an adjournment should be dismissed.”

III. SUBMISSIONS – RECONSIDERATION REQUEST

A. Approval Holder

[40] In the Approval Holder’s letter ofn September 6, 2002, it requested the Board reconsider whether issues 2, 3, and 4 (as identified in the Issues Decision)²⁵ should be included in the Hearing. The Approval Holder stated that the issue of whether the Water Treatment Plant has the capability to deliver the required amount of water is moot because the facility has been built, the production requirements are set out in the Approval, and the facility has been in operation since May 2002. The Approval Holder provided production records since the Water Treatment Plant began operation and submitted that the data, according to the Approval Holder, proves the capability of the facility. The Approval Holder considered these data sufficient to satisfy the other Parties and the Board that the Water Treatment Plant was capable of delivering the water, and thus, there was no justification or need to hear issues 2 and 3.

[41] The Approval Holder further argued that issue 4 is moot as the Approval Holder is already required to provide the requested data to the Directors under the Licence. The Approval Holder stated that the provision of these data has been occurring since the Hearing in May. This included:

²⁴ See: Approval Holder’s Submission, dated September 18, 2002.

²⁵ Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

- “(a) the following data has been made available on TransAlta’s website and will be regularly updated: lake level reports, monthly water production reports, monthly water production versus licence requirements, and progress against historical debt;
- (b) the same data will regularly be sent by mail in hard copy to the following individuals as requested by Mr. Carmichael: Locke Boros (LWEPA), Blair Camichael [*sic*], L.A. (Lou) Cusano (ENMAX), Derek Davies (ENRON), David Doull, Bob Eakin, Gary Gylytiuk, Sam Kravinchuk (for James Paron), Nick Mariniuk, R.W. Mould, Jennifer Nichols (Trans Canada Energy Ltd.), Michael Roth and Linda Baziuk, Verne Schneider and Nick Zon;
- (c) Mr. Spilsted asked to be added to the foregoing mailing list and this was agreed by TransAlta....”²⁶

[42] The Approval Holder concluded by stating that it “...has addressed all the Appellants’ concerns with respect to Issue 4....”

B. LWEPA

[43] LWEPA argued that, contrary to the Approval Holder’s assertions, the issues were not moot. LWEPA submitted that:

“The issues raised in our appeal relate to the long term capability of the system to restore waters of appropriate quantity and quality to Lake Wabamun, consistent with the full extent of the obligations now legally imposed on TransAlta or any other owners or operators of facilities in the watershed. It is respectfully submitted that this is a matter more complex than an initial report of return of water over a several month time period.”²⁷

[44] LWEPA, in reference to issue 4, stated that even though some progress has been made, there are still problems related to the method of reporting water levels and water quality, including the failure to provide actual data.

C. Mr. Doull

[45] Mr. Doull was “...totally against the idea of the Board even considering the idea of dropping any of the four issues....” He argued that even though the Water Treatment Plant has run well for three months does not mean that it will continue for the next three months. He

²⁶ See: Approval Holder’s Submission, dated September 6, 2002.

²⁷ See: LWEPA’s Submission, dated September 13, 2002.

also raised concerns with the source of water and the data that indicate a “downward trend” in the water chart. Mr. Doull further submitted that performance conditions should be included in the approvals to ensure public concerns are addressed.

D. Mr. Splisted

[46] Mr. Splisted stated that the reconsideration request of the Approval Holder be refused.²⁸

E. Directors

[47] The Directors had no objection to the Approval Holder’s request that issues 2, 3, and 4 be eliminated from the Hearing of these appeals.

IV. DISCUSSION AND ANALYSIS

[48] As identified in the Board’s letter of September 26 2002, the Board has four matters before it that it must address: Mr. Doull’s request to expand the issues to include “water quality in the Lake generally”, Mr. Doull’s associated adjournment request, the Approval Holder’s request to eliminate issues 2, 3, and 4 on the basis that they are moot, and LWEPA’s comments that they were of the understanding that their original motion to expand the scope of the Hearing was before the Board.

[49] With their respective motions to expand the issues (Mr. Doull) and to eliminate issues on the basis that they are moot (TransAlta), in effect Mr. Doull and TransAlta have both asked for a reconsideration of the issues that the Board previously determined.²⁹ The Board will therefore, briefly look at its ability to reconsider issues. Then, the Board will consider Mr. Doull’s motion to expand the scope of the Hearing and his request for an adjournment. These two requests are linked because the basis of the adjournment request is effectively that in order to deal with the additional issue of “water quality in the Lake generally” we need to adjourn and get

²⁸ See: Mr. Splisted’s Submission, received September 11, 2002.

²⁹ See: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

more information in the form of the final reports from the Directors and the Approval Holder. Because of this linkage, if Mr. Doull's request to expand the issues to be included in the Hearing fails (and, as is discussed below, we have determined that it has), then there is no basis on which to request an adjournment. Next, the Board will consider TransAlta's request to eliminate issues 2, 3, and 4 on the basis that they are moot. Finally, the Board has a number of comments regarding LWEPA's apparent misunderstanding regarding the procedure the Board established for bringing a further motion regarding expanding the issues before the Board.

A. Legislation – Issues and Reconsideration

[50] Pursuant to sections 95(2), (3), and (4) of EPEA, the Board may, prior to a Hearing, determine the issues to be heard.³⁰ The Board requested submissions from the Parties and held a Preliminary Meeting on April 17, 2002, to assist it in determining what issues should be heard at the Hearing. Pursuant to section 95(4), once the Board determines which issues will be heard at the hearing the parties cannot make representations on matters that the Board has not included.

³⁰ Sections 95(2), (3), and (4) of EPEA state:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of an appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
- (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act (Canada)*;
- (c) whether the Director has complied with section 68(4)(a);
- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

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

[51] Section 101 of EPEA states:

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

The Board does not invoke this power lightly. As the Board stated in *Whitefish Lake First Nation*,³¹ “... the power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.” The Board noted that exceptional and compelling reasons are required: “...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.”³² In *Bailey*,³³ the Board confirmed that the factors it 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 in law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.³⁴ Therefore, in order for either Mr. Doull to be successful in adding an issue or for TranAlta to be successful in eliminating issues 2, 3, and 4, there has to be an exceptional and compelling reason. In both cases, the reason that Mr. Doull and TransAlta point to in order to support their respective applications is that there is new evidence that was not reasonably available at the time of the Board’s Issues Decision.³⁵ This is discussed next.

³¹ Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation Request for Reconsideration: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri-Link Resources Ltd.*) Appeal No. 99-009 at paragraph 7 (A.E.A.B.).

³² Re: *Whitefish Lake First Nation* (2000), 35 C.E.L.R. (N.S.) 296, (*sub nom. Whitefish Lake First Nation Request for Reconsideration: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri-Link Resources Ltd.*) Appeal No. 99-009 at paragraph 7 (A.E.A.B.).

³³ Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 94, (*sub nom. Bailey v. Director, Northeast Boreal Region, Environmental Service, Alberta Environment*) Appeal Nos. 00-074, 077, 078 and 01-001-005-ID (A.E.A.B.).

³⁴ Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 94, (*sub nom. Bailey v. Director, Northeast Boreal Region, Environmental Service, Alberta Environment*) Appeal Nos. 00-074, 077, 078 and 01-001-005-ID at paragraph 63 (A.E.A.B.).

³⁵ Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

A. Mr. Doull – Expand Issues and Adjournment

[52] The foundation for Mr. Doull’s request to expand the scope of the Hearing to include “water quality in the Lake generally” and his request to adjourn the hearing originated as a result of a newspaper article that reported fish kills and heavy metals in Lake Wabamun.³⁶ The Board received submissions as a result of this article, and was advised that Alberta Environment had been investigating incidents of approximately 2000 fish that died near the Wabamun Power Plant over a period of six months. The article advised of a presence of three heavy metals, two with concentrations that were three times the federal guidelines and one that exceeded Alberta’s guidelines, in lake sediment.

[53] As the Board discussed in its Adjournment Decision,³⁷ the Board considered the issues being investigated by Alberta Environment to be *serious* and of particular interest to the public. In its Adjournment Decision, the Board discussed the possibility that the information relating to these fish kills and heavy metals may be relevant to the appeals before the Board, but concluded, that at that time, there was insufficient information before the Board to warrant expanding the scope of the Hearing. However, the Board decided that given the nature of the concerns expressed by the Appellants and in accordance with the principles of natural justice, it would adjourn the Hearing in order to obtain additional information regarding these incidents and then, based on this additional information, give the Appellants an opportunity to bring new motions to expand the scope of the Hearing if they so wished.³⁸

³⁶ See: “Officials probe fish kill, heavy metals near plant” *Globe & Mail* (National Edition) (10 May 2002) A7.

³⁷ Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.).

³⁸ Specifically, the Board stated:

“New information is forthcoming regarding the issue of metals in Wabamun Lake that could be helpful to the Board’s final analysis and it is certainly relevant to our jurisdiction We can not prejudge it, but we will await the investigation.

This was confirmed in the hearing when the witnesses presented by the Directors were questioned about the present investigation. The Board asked Mr. Neil Scott if data were being collected. Mr. Scott confirmed that people who report to him were at the Lake taking samples the day of the hearing at the south end of the Lake near the Sundance plant. When asked if the data being collected could ultimately be information that might have a bearing on what the Board was trying to decide, Mr. Scott stated that he suspected that it would. Specifically, the discussion was as follows:

[54] In response to the Board's direction, the Directors filed additional information, the Parties had an opportunity to review this information, and as contemplated by the Board's Adjournment Decision, Mr. Doull filed a motion to expand the scope of the Hearing to include "water quality in the Lake generally." Mr. Doull also requested an adjournment on the basis that the reports, included in the additional information of the Directors, were preliminary in nature and indicated that more work was required to fully discuss the fish kills and heavy metal issues at the Lake.

[55] With respect, Mr. Doull's motion (in his letters dated August 28, 2002 and September 12, 2002) does not form a valid basis for expanding the scope of the Hearing to include "water quality of the Lake generally." The motion is principally a collection of criticisms of the additional information provided by the Directors and of the Board's processes.

Dr. Hrudehy: You are continuing to collect data and you are collecting data today on the south side of the lake?

Mr. Scott: That is correct.

Dr. Hrudehy: Next to the Sundance Plant?

Mr. Scott: Yes, that is correct.

Dr. Hrudehy: And that ultimately would be information that might have a bearing on what we are trying to decide?

Mr. Scott: I suspect it would.' [Hearing Tape, May 15, 2002.]

The Board finds it significant that the Director charged with investigating the fish mortality and heavy metals is of the view that the information he is collecting may have a bearing on the issues this Board is trying to decide. ...

[The] Board finds that there is not sufficient information for the Board to justify broadening the scope of the issues. Based on the information we do have, and without making a final ruling on the issue, we do not see the connection between the fish kill and the heavy metals. [In the testimony of Mr. Neil Scott and Mr. Daryl Seehagel, it was stated that there has been no link established between the fish kills and the heavy metals in the preliminary findings. Tests done on the fish to this point have been unable to detect heavy metals in the flesh of the fish, but further tests were under way. An outside expert was doubtful that the heavy metals and the fish mortality were connected.] We also do not see, based on the information available to date, a reason why the hearing issues should be expanded. ... [However, the] Board has decided the hearing should be adjourned for a short time. We do not know all of the answers on heavy metal and fish, but we believe it is better to adjourn for 90 days, allow the Directors to complete their investigations, and then make an informed decision in proceeding with the hearing. The adjournment is consistent with principles of natural justice and procedural fairness, because there was some confusion as to who has seen certain reports and who has not. The Board notes that both witnesses for the Directors stated unequivocally that there was no connection between the fish kill and heavy metals and the treatment plant, but yet, data were still being collected; the witnesses' statements that there is absolutely no link appears to be premature."

Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeals No. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID at paragraphs 46 to 49 (A.E.A.B.).

Mr. Doull indicates that due to the technical nature of the information, reviewing it will require consulting with experts and that the reports should be prepared by an “independent” party instead of Alberta Environment. He suggests that more sampling sites should be required and that there should be more intensive water quality and sediment sampling. Mr. Doull indicated that a report is being prepared by LWEPA and that it should be made available to the other Parties. He also indicated that the Approval Holder is also preparing a report. Mr. Doull believes that the scope of the Hearing should be expanded merely because “all of the appellants asked for it to be expanded,” and he complains that the reports are only preliminary in nature and more work needs to be done. Mr. Doull’s rebuttal submission, dated September 20, 2002, substantially repeats these concerns. None of these statements attempt to draw a connection between the additional information provided by the Directors and the Approval and Licence for the Water Treatment Plant that are before the Board, and they certainly do not form any type of exceptional and compelling reason why the Board should reconsider its decision respecting the issues to be heard at the Hearing.

[56] In the Board’s view, what Mr. Doull is effectively attempting to request in his motion to expand the scope to the Hearing is, as was suggested by Mr. Spilsted, to turn the Hearing into some type of public inquiry into all of the environmental concerns at the Lake. This is *not* the jurisdiction of the Board in this appeal. While the Board appreciates the concerns that both Mr. Doull and Mr. Spilsted have for the Lake and their fervent desire to see it protected, the Board does not hold broad sweeping public inquiries into overall environmental concerns. We are an *appeal* body.

[57] The appeals that are before the Board – and therefore the Board’s jurisdiction - are in relation to the EPEA Approval and Water Licence issued by the Directors for the operation of the Wabamun Lake Water Treatment Plant. The only remedy that the Board is empowered to recommend is to confirm, reverse or vary the decisions appealed.³⁹ The Board can not examine

³⁹ Section 98(2) of EPEA provides:

“In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision.”

broad, general issues like "...the general water quality of Wabamun Lake in its entirety...." Such statements provide the Board with no distinct path on which to determine issues. As stated by the Board in its previous decision, *Lafarge*:

"What the Board requires is some information that will define the issues. Broad, general statements that can encompass a myriad of issues do not provide the Board, or the other parties, with the specific information required to delineate the issues."⁴⁰

[58] With respect, Mr. Doull has failed to provide evidence of the connection between the heavy metals and fish mortality and the Water Treatment Plant. Mr. Doull, and LWEPA for that matter, had four months to provide the Board with some explanation (based on the additional information provided by the Directors or any other information that they wished to bring) as to the link between the fish kills and heavy metals found in the Lake and the Water Treatment Plant that was before this Board. No evidence of such a link has been provided.

[59] The only observation of some merit in Mr. Doull's submission is that he makes reference to the high levels of aluminum found outside the water outlet of the Water Treatment Plant and the "interesting test results" located at other locations in the lake. He attempts to provide a link to the Water Treatment Plant by stating that aluminum is used in the water treatment process as a flocculant. However, he has not provided any indication or plausible theory of how, or if, these results are directly associated with the Water Treatment Plant – the facility that is before the Board. In fact, in Mr. Doull's own submission, he identifies that aluminum is found in many places in the Lake, but suggests that the source of the aluminum is the Water Treatment Plant and is being dispersed throughout the Lake by prevailing winds. The Board does not accept Mr. Doull's analysis, and is of the view that his observations suggest that there is no direct connection between the Water Treatment Plant and the aluminum found in the Lake. Lastly, Mr. Doull's suggestion in this regard does not meet the exceptional and compelling test that is contemplated for reconsideration.

[60] Beyond the arguments presented by Mr. Doull, the Board has reviewed the additional information provided by the Directors.⁴¹ In summary, these documents provided

⁴⁰ *Court v. Director, Bow Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc.* (22 April 2002), Appeal No. 01-096-ID (A.E.A.B.) at paragraph 30.

⁴¹ This additional information was provided to the Board by the Directors on August 15, 2002 in accordance

monitoring and reporting information provided by the Approval Holder, information relating to the investigation into fish mortality and heavy metals, and additional documents prepared by Alberta Environment relating to issues identified by the Board.⁴²

[61] Further, the documents provided by the Directors also included the preliminary reports of the Lake Wabamun Water Quality and Sediment Survey. These surveys were undertaken in response to public concerns regarding “murky water” in Lake Wabamun.⁴³ Finally, the documents provided by the Directors included a copy of the Wabamun Lake Water Balance 1982-2001 Report. A comparison was made between simulated water levels and actual monitoring data. It was determined that there was a “very good agreement” between the data.

with the Board’s direction in: Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment, re TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.).

⁴² The reporting and monitoring information included data on daily hours of operation, continuous monitoring, potable water, monthly tests, monitoring instrument calibration, and maintenance summaries. This information was submitted for the months of July, August, and December 2001, and January to June 2002. In these reports, it indicated that the total and methyl mercury levels were very low. These documents also included the 2001 Water Work Report for the Wabamun Lake Water Treatment Plant. This report included additional documents prepared by consulting firms regarding the status of monitoring surveys, aquatic macrophytes, system disinfection efficiency assessment, fish monitoring, and the proposal for groundwater monitoring. The fish monitoring study indicated a significant decrease in total tissue mercury in northern pike, but significant increase in tissue mercury in lake whitefish in 2001 compared to 1996. It was indicated in the report that further testing was required prior to making conclusions regarding trends in mercury concentrations in fish. It also recommended further sampling be completed in 2006 instead of annually.

The study of the macrophytes at Wabamun Lake indicated an increase in the percent cover in the canal as well as the control area since the baseline study was completed in 1997. There was a general increase in certain species since 1997. It further stated that a “...trend of increasing growth after only three years of operation is insufficient evidence to suggest that the input of treated water had any affect on macrophyte growth in Wabamun Lake.” (AMEC Earth & Environmental Limited, “Aquatic Macrophyte composition, Distribution and Abundance in the Vicinity of the Wabamun Lake Water Treatment Plant Outlet Canal” (March 2002) at page 17.)

The monitoring programs identified in the monitoring surveys report are: monthly water quality monitoring of the treated water; weekly zooplankton survey of the treated water; annual temperature survey of the treated water plume entering the lake during open water and ice cover conditions; annual aquatic macrophyte survey in the Lake are receiving the treated water; annual ice thickness survey; annual fish parasite survey for northern pike; and a fish tissue survey for northern pike and lake whitefish to be conducted after five years of the operations of the Water Treatment Plant.

⁴³ As a result of the preliminary data collected Alberta Environment concluded, “... more work is needed to confirm the results and findings that have been obtained to dated.” (Alberta Environment, “Lake Wabamun Water Quality and Sediment Survey” (August 7, 2002).) The preliminary results show high levels of aluminum in some areas of the Lake, but more work is required to determine the significance of the levels measured. Based on the results from the ongoing monitoring of the groundwater and drinking water in the area, there was no indication of metal contamination. It also concluded that the fish mortality was not a result of the concentrations of metals found in the water. Alberta Environment listed the next steps the Approval Holder will be directed to take. Alberta Environment also stated it would conduct further sampling to determine how typical water and sediment samples that have been taken compare to samples from other parts of the Lake and from other lakes in Alberta.

[62] As was the case when the Board initially considered this matter in the preliminary motions heard on May 15, 2002, and having regard for the additional information provided by the Directors, we do not see the connection between the fish kills and heavy metals and the matters that are before the Board – specifically the EPEA Approval and *Water Act* Licence for the Water Treatment Plant. Again, the additional information that has been presented also does not meet the exceptional and compelling test that is contemplated for reconsideration. The Board finds there is insufficient information before it to justify expanding the issues to be heard to include “water quality in the Lake generally”, and therefore Mr. Doull’s motion is denied.

[63] Mr. Doull had also requested that the Board adjourn the Hearing until the preliminary reports provided by the Directors could be finalized. In that Mr. Doull has failed to present the Board with an explanation of the connections between these reports and the Water Treatment Plant, the Board is of the view that there is no basis for an adjournment. As the Board discussed in its Adjournment Decision, the Board must balance two competing interests – to hold a hearing as quickly as possible versus having the best information available to the Parties. In this case, the Board believes the Parties now have the best information possible in relation to the matters before the Board.⁴⁴ Given that this additional information has been provided to the Parties and there still does not appear to be a connection between the fish kills and heavy metals at the Lake and matters before the Board, there would be no merit in an adjournment.

[64] Finally, the Board notes that although the final reports from the Directors will not be available until 2003, there is nothing to suggest that the information that will be forthcoming will be relevant to the Approval and Licence that are being appealed. The Board believes that if issues do arise from these various reports, the Directors will take the appropriate steps. If, based on these reports, the Directors amend the Approval or Licence further, the terms and conditions amended may be appealable. As a result, the Board is of the view that balancing all of the various competing interests, Mr. Doull’s request for an adjournment must be denied.

⁴⁴ Ensuring the parties have the best possible information was the reason that the Board granted the adjournment on May 15, 2002.

B. TransAlta Utilities – Reconsider Issues as Moot

[65] In the Adjournment Decision, the Board contemplated that the Appellants would be given the opportunity to present similar motions to those that they brought on May 15, 2002. As noted by TransAlta, the Board had not anticipated that TransAlta would also bring a motion to reconsider the issues that the Board had determined in its Issues Decision,⁴⁵ however, they are certainly within their right to do so.

[66] The Approval Holder argued that it has provided additional information since the Water Treatment Plant started operation and, as a result of this information, issues 2, 3, and 4 are now moot. The Board does not agree. In the Board’s view, issues 2, 3, and 4 are not moot.

[67] The Board has considered whether a matter is moot in a number of previous cases.⁴⁶ In the *Butte Action Committee*,⁴⁷ the Board stated that:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”⁴⁸

In *Kadutski*,⁴⁹ the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board can not possibly grant because it is impossible, not practical, or would have no real effect.”⁵⁰

[68] The Appellants argue that issues 2 and 3, which relate to the ability of the Water Treatment Plant to deliver the required quantity and quality of water are moot, because during the adjournment that the Board granted, construction of the Water Treatment Plant had been

⁴⁵ Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

⁴⁶ See also: *McNabb v. Director, Bow Region, Natural Resources Service, Alberta Environment* re: *Axel Steinmann* (10 May 2002), Appeal 01-091-D (A.E.A.B.).

⁴⁷ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

⁴⁸ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D at paragraph 28 (A.E.A.B.).

⁴⁹ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

⁵⁰ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re:

completed and the plant was operational. In support of their contention that these issues are moot, the Appellants have filed information they contend demonstrated the ability of the Water Treatment Plant to deliver the quantity and quality of water required.

[69] With respect, and to the Approval Holder's credit, while the Board views this as additional evidence that supports the Approval Holder's position, it does not render issue 2 and 3 moot. If this information shows that the Plant is capable of providing the required amount of water over extended periods of time, the Approval Holder has bolstered its position. This does not prevent the Board from granting a remedy – as is the circumstance if something is moot. The Board would have to make a ruling on this evidence and would determine whether the evidence is sufficient to demonstrate that the Plant is working satisfactorily or if changes are needed to ensure that it meets the required environmental performance.

[70] For example, the Board recognizes that it is apparent that the ability to provide specific water quality and quantity is dependent on the seasons.⁵¹ Therefore, data taken during three months in the summer, although extremely relevant and potentially persuasive, cannot be considered representative of the entire year. Given the fact that there is still an evidentiary matter to be determined, the Board does not consider issues 2 and 3 moot and these issues will remain as stated in the Board's previous decision.

[71] Issue 4 as determined by the Board in its Issues Decision⁵² dealt with the matter of providing reports to interested individuals. Although the Approval Holder does have an obligation to submit reports to the Directors, the intent of this issue as determined by the Board was to assess the most effective method of providing the reports to those other than the Directors in a comprehensible and comprehensive manner, and to determine the appropriate data to include in these public reports. Again, the argument presented by the Approval Holder that there

Ranger Oil Limited (28 August 2001), Appeal No. 00-055-D at paragraph 36 (A.E.A.B.).

⁵¹ See: American Water Works Association, *Water Quality and Treatment – A Handbook of Community Water Supplies*, 4th ed. (New York: McGraw Hill, 1990) at page 420 where it states:

“Seasonal water quality. Sedimentation efficiency varies seasonally in association with seasonal changes in temperature, alkalinity, phosphate concentration, and similar parameters, as well as the nature of color and turbidity being coagulated.”

⁵² Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

is a condition in the Licence that requires this information to be provided, and that, pursuant to an agreement with Mr. Carmichael, TransAlta has been providing information to members of the public does not make this matter moot. The matter is still capable of determination as the Board could recommend that more information is required. As a result, the Board does not consider issue 4 moot, and the issue will remain as stated in the Board's previous decision.

C. LWEPA

[72] The Board would also like to respond to concerns raised by LWEPA about its opportunity to make a motion to expand the scope of the Hearing. As discussed above, the Board's Adjournment Decision stated:

"Therefore, ... the Directors are required to provide all relevant documents regarding their investigation of the issues of fish mortality and heavy metals to this Board and the other Parties to these appeals by noon on August 16, 2002, or sooner if it becomes available more quickly.

Then, if any of the Appellants decide, as a result of the new information, to make a motion regarding the addition of issues, the Board must receive the motion by noon on August 30, 2002. Any rebuttals would be due by noon on September 9, 2002. The Board would then consider the submissions and make a determination on whether to add the issue of water quality to the hearing. ...

We therefore adjourn the hearing for 90 days or until such time as all relevant documents and results of the current investigation regarding fish mortality and heavy metals in Lake Wabamun are made available. The Directors are required to provide copies of the results and all relevant documents to all of the Parties to these appeals and to the Board according to the above schedule and subject to section 35(9) of EPEA. Following the 90 days, if a motion is received from a Party, the Board will determine if water quality will be added as an issue at the hearing."⁵³

[73] In accordance with the Board's decision, on August 15, 2002, the Directors provided copies of the additional information to the Board and the Parties. On August 16, 2002, the Board wrote to the Parties to confirm that any motions were to be received by August 30, 2002, with rebuttals due on September 9, 2002. On August 23, 2002, the Board received a

⁵³ Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (May 30, 2002), Appeal No. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID (A.E.A.B.).

request from LWEPA for a one month extension to file the motion. In response to this motion, the Board extended the deadline to September 15, 2002.

[74] In its letter of September 13, 2002, to the Board, LWEPA indicated that:

“In regard to our motion to the Board to give consideration to adding the issue of water quality to matter of appeal, specifically due to new information which has come to the attention of the Government of Alberta and TransAlta in the course of official investigations and follow up studies related to significant fish kills and contaminant loading in Lake Wabamun, LWEPA *wishes to advise that it is unable to submit comments at this time.*”

[75] The reasons that LWEPA gave for being unable to file a new motion were that they had been unable to obtain a technical briefing from Alberta Environment and the decision by the Board to deny LWEPA’s application for interim costs.

[76] On September 17, 2002, the Board responded to LWEPA’s letter indicating, “...it appears that LWEPA has chosen not to file a further motion regarding expanding the issues to be considered at the hearing. Therefore the only motion before the Board regarding expanding the issues to be heard at the hearing is that from Mr. Doull.”

[77] On September 20, 2002, LWEPA wrote to the Board and advised:

“...I am writing to clarify an apparent misunderstanding in the matter of the issues presently before the Board in the above matter.

It was our understanding that the motion we submitted to the Board on May 8, 2002 remained validly before the Board until such time as we withdrew it or the Board made a finding. It was our understanding that the Board was seeking clarification of whether there was any additional motions relating to the matter before the Board.”

LWEPA then went on to confirm that water quality remains an important issue to their organization and stated that they supported Mr. Doull’s motion.

[78] The Board wishes to confirm that in its Adjournment Decision, it made a determination regarding LWEPA’s May 8, 2002 motion and that decision was to deny the motion. In its Adjournment Decision, the Board clearly stated that no evidence had been presented at the time to warrant the adding of general lake water quality as an issue. However, in order to comply with the principle of natural justice, the Board did grant an adjournment and gave the Appellants “another chance” to bring a motion before the Board to expand the scope of

the Hearing once the additional information was available. With respect, the Board believes that this was clearly stated in the Adjournment Decision where the Board stated: "...if any of the Appellants decide, as a result of the new information, to make a motion regarding the addition of issues, the Board must receive the motion by noon on August 30, 2002 ..." and further, "... if a motion is received from a Party, the Board will determine if water quality will be added as an issue at the hearing."⁵⁴ The Board also confirmed this approach in the Executive Summary of that decision, where it stated: "At the conclusion of the 90 days [(the adjournment)], and subject to whatever motions are proper at that time, the Board will proceed with the hearing." The Board also notes that it believes that it was clear throughout its correspondence with the Parties that a further motion would be required, including when the Board prompted the Parties in its letter of August 16, 2002, reminding the Appellants that a motion must be submitted by noon on August 30, 2002, if additional issues should be considered.

[79] Therefore, the Board is of the view that LWEPA has not suffered any prejudice as a result of this apparent misunderstanding. As indicated in the Board's letter dated September 26, 2002:

"The Board notes the September 20, 2002 letter from LWEPA advising that they were of the understanding that their motion addressed on May 15, 2002 was still before the Board. The Board will address LWEPA's letter more directly in its reasons, but wants to make it clear to the parties that in deciding not to include 'water quality generally' as an issue in these appeals, the Board has taken LWEPA's comments into account."

As indicated in our discussion regarding Mr. Doull's motion, the Board has reviewed the additional information provided by the Directors and, based on this information, it does not appear that there is a direct link between the fish kills and heavy metals at the Lake and the matters before the Board. Further, in the event that such a link is developed, the Board is satisfied that the Directors will respond appropriately and, where appropriate, make changes to the Approval and Licence, which in accordance with the legislation, may be appealable.

⁵⁴ Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment*, re: *TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID at paragraphs 54 and 56 (A.E.A.B.).

V. DECISION

[80] The Board is of the view that the Parties have been afforded every requirement of the principles of natural justice and procedural fairness. This is evidenced by the Board's initial decision to adjourn the Hearing, the request that additional information collected by the Directors be provided to the Parties, and the opportunity for the Parties to file the additional motions that are addressed in this decision. Each of the Parties has been given every opportunity to provide their input into what issues should be heard at the Hearing of these appeals.

[81] Therefore, pursuant to section 95(2) of EPEA, the Board confirms that the following matters will be included in the Hearing of the appeals:

- Issue 1: the adequacy of the water balance model and the factors (e.g. surface runoff) that it relies upon as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
- Issue 2: the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;
- Issue 3: the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the License to the quality required by the Approval; and
- Issue 4: the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.

Dated on May 15, 2002, at Edmonton, Alberta.

“original signed by”
William A. Tilleman, Q.C.
Chair

“original signed by”
Dr. Steve Hrudehy
Board Member

“original signed by”
Frederick Fisher, Q.C.
Board Member