

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 26, 2009

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

-and-

IN THE MATTER OF appeals filed by Inez Stone and Sally Ulfsten, with respect to Amending Approval No. 73534-00-06 issued to Imperial Oil Resources Limited, Amending Approval Nos. 68492-00-10 and 68023-00-04 issued to EnCana Corporation, Amending Approval No. 11115-03-02 issued to Canadian Natural Resources Limited, Amending Approval No. 147753-00-02 issued to Husky Oil Operations Limited, and Amending Approval No. 78161-00-01 issued to Blackrock Ventures Inc. (now Shell Canada Ltd.) under the *Environmental Protection and Enhancement Act*, by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Intervenor Decision: *Stone and Ulfsten v. Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (26 February 2009), Appeal Nos. 07-010-021-ID2 (A.E.A.B.).

BEFORE:

Mr. Eric O. McAvity, Q.C., Board Member and Panel Chair.

SUBMISSIONS BY:

Appellants: Ms. Inez Stone and Ms. Sally Ulfsten.

Director: Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. Darin Stepaniuk, Alberta Justice.

Approval Holders: Imperial Oil Resources Limited, represented by Mr. Peter Miller; EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.), represented by Mr. Shawn Munro and Mr. Blake Williams, Bennett Jones LLP.

Intervenor Applicants: Mr. George and Ms. Nadia Elchuk; and the Cold Lake First Nations, represented by Mr. Garry Appelt, Witten LLP.

EXECUTIVE SUMMARY

Alberta Environment issued amending approvals to Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Operations Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.) for the construction, operation, and reclamation of enhanced recovery in-situ oil sands or heavy oil processing facilities and oil production sites near Cold Lake, Alberta. The Amending Approvals are required to allow for a regional air monitoring plan being implemented by the Lakeland Industry and Community Association (LICA).

The Board received written submissions on a number of preliminary motions, including standing, and determined Ms. Inez Stone and Ms. Sally Ulfsten were directly affected and the Board would hear their appeals.

In response to the Board's Notice of Hearing published in local newspapers, the Board received intervenor requests from the Cold Lake First Nations and Mr. George and Mrs. Nadia Elchuk.

After reviewing the written submissions from the parties and the intervenor requests, the Board granted intervenor standing to the Cold Lake First Nations and Mr. George and Mrs. Nadia Elchuk. They will be required to provide written submissions, will be allotted time at the start of the Hearing to speak to their submissions, and will be allotted time to make closing submissions. The Approval Holders and Alberta Environment will be allowed to cross examine the intervenors at the Hearing.

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I. BACKGROUND

[1] On April 30, 2007, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued the following Amending Approvals under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”):

- Amending Approval No. 73534-00-06 issued to Imperial Oil Resources Limited (“Imperial Oil”) authorizing the construction, operation, and reclamation of the Cold Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.
- Amending Approval No. 68492-00-10 issued to EnCana Corporation (“EnCana”) authorizing the construction, operation, and reclamation of the Foster Creek enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.
- Amending Approval No. 68023-00-04 issued to EnCana authorizing the construction, operation, and reclamation of the Foster Creek enhanced recovery in situ heavy oil plant near Cold Lake, Alberta.
- Amending Approval No. 11115-03-02 issued to Canadian Natural Resources Limited (“CNRL”) authorizing the construction, operation, and reclamation of the Primrose and Wolf Lake enhanced recovery in-situ oil sands and heavy oil processing plant and oil production site near Cold Lake, Alberta.
- Amending Approval No. 147753-00-02 issued to Husky Oil Operations Limited (“Husky Oil”) authorizing the construction, operation, and reclamation of the Tucker enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Cold Lake, Alberta.
- Amending Approval No. 78161-00-01 issued to Blackrock Ventures Inc. (now Shell Canada Ltd.) (“Shell”) authorizing the construction, operation, and reclamation of the Hilda Lake enhanced recovery in-situ oil sands or heavy oil processing plant and oil production site near Hilda Lake, Alberta.¹

[2] The Amending Approvals incorporated the Lakeland Industry and Community Association Air Quality Monitoring Program network (“LICA”) to monitor air quality in the area.

¹ The various amending approvals will be referred to collectively as the “Amending Approvals,” and Imperial Oil, EnCana, CNRL, Husky Oil, and Shell will be referred to collectively as the “Approval Holders.” EnCana, CNRL, Husky Oil, and Shell provided joint submissions and will be referred to as the “Operators.”

[3] Between May 29, 2007, and June 8, 2007, the Environmental Appeals Board (the “Board”) received appeals from 15 individuals and two groups appealing each of the Amending Approvals. Many of the appellants withdrew, and of those remaining, the Board granted standing to Ms. Inez Stone and Ms. Sally Ulfsten (the “Appellants”).

[4] The Board acknowledged receipt of the appeals and notified the Appellants, the Approval Holders, and the Director (collectively, the “Parties”) of the appeals. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to the Amending Approvals, and that the Parties provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received by the Board on July 9, 2007, and copies were provided to the Appellants and Approval Holders on July 12, 2007. An update of the Record was provided on November 7, 2008, and a further update is due by the end of February 2009.

[5] On November 27, 2007, the Board confirmed that a mediation meeting would be held on February 5, 2008.

[6] On January 18, 2008, The Board wrote to the Parties, asking whether the mediation meeting should be postponed until after the release of the network review report prepared by RWDI. The Parties responded, agreeing to postpone the mediation meeting. The Board was provided with a copy of the network review report entitled, *Review of the LICA Ambient Air Quality Monitoring Network* (the “RWDI Report”) on March 4, 2008. The Board confirmed with LICA that all of the Parties received a copy of the RWDI Report.

[7] The mediation meeting was held on April 11, 2008, in Cold Lake, Alberta. All of the Parties signed the Participants’ Agreement to Mediate that laid out the confidentiality terms of the mediation meeting and the ground rules. Even though productive discussions ensued, the Parties were unable to come to a resolution.

[8] On April 16, 2008, the Board requested the Parties provide any preliminary motions they wanted to raise. On May 27, 2008, the Board provided a schedule to receive submissions on the preliminary motions. The Board received submissions from the Parties.

[9] On October 16, 2008, the Board notified the Parties that Ms. Inez Stone and Ms. Sally Ulfsten would have standing at the Hearing, and although the appeals of the Cold Lake

Fibromyalgia Support Group and the Ethel Lake Interveners were dismissed, the Board would hear the broader concerns of these groups as raised in Ms. Inez Stone's appeal.² The Board also identified the issues that would be heard at the Hearing.³

[10] In the same October 16, 2008 letter, the Board notified the Parties that the appeals would be held in abeyance pending the completion of the review of the LICA air shed monitoring program, including the RWDI Report. The Board noted the Approval Holders were required to submit plans to address items raised in the review to the Director by December 31, 2008. The Board asked for available dates for a Hearing between March 16, 2009 and April 30, 2009. After reviewing the dates provided, the Hearing has been scheduled for April 27 and 28, 2009, in Cold Lake, Alberta.

[11] On December 23, 2008, the Board wrote to counsel for the Deputy Minister of Alberta Environment, requesting any policy documents or other relevant information that may impact these appeals. He responded on January 15, 2009, stating the Deputy Minister will make any information on the context of the Hearing available through the Director's witness panel and the Record.

[12] On January 6, 2009, the Operators provided the Board with a copy of the LICA Implementation Plan that was filed with the Director on December 31, 2008, and which contained the proposed action plans in response to the RWDI Report.

² See: *Cold Lake Fibromyalgia Support Group et al. v. Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (22 January 2009), Appeal Nos. 07-004-021, 028-033, 040-075, 100-105, 112-117-ID1 (A.E.A.B.).

³ The issues for the Hearing are:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?
2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?
3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?
4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

[13] The Board published a Notice of Hearing in the Bonnyville Nouvelle, Elk Point Review, St. Paul Journal, and the Cold Lake Sun, and the notice was provided to the Cold Lake First Nations (“CLFN”), County of St. Paul, Municipal District of Bonnyville No. 87, and Cold Lake Public Library. In response to the Board’s Notice of Hearing, the Board received intervenor requests from Mr. George and Ms. Nadia Elchuk and the CLFN on January 23, 2009.

[14] On February 3, 2009, the Operators contacted the Board requesting clarification on whether the CLFN supported or opposed the appeals. The Board wrote to the CLFN seeking clarification, and on February 9, 2009, the CLFN responded, stating they supported the Amending Approvals, but as a result of the review of the reports filed with the Director, the CLFN had a number of new concerns. On February 9, 2009, the Board acknowledged the letter from the CLFN, and noted that because the CFLN had a number of concerns with the Amending Approvals, if allowed to participate, the CFLN would be requesting the Board to vary the Amending Approvals to address these concerns.

[15] Because clarification was required, the Board extended the deadline to receive comments from all of the Parties on the intervenor applications. The Board received the submissions from the Director and Imperial Oil on February 9, 2009, Ms. Stone’s and the Operators’ submissions on February 12, 2009, and Ms. Ulfsten’s provided a voice message of her submission on February 12, 2009, followed up with her written response that was received on February 13, 2009.

II. Submissions

A. Intervenors’ Applications

[16] The Elchuks explained they are farmers who have worked the land in the area for the past 60 years. They stated Mr. Elchuk has participated in LICA and was an air shed committee member. They stated their concerns include the proper design and plan of the air monitoring program in relation to human and animal health and the environment. The Elchuks explained this includes substances monitored, how they are monitored, and the location and equipment used for monitoring. The Elchuks stated they will focus on the facts relevant to their

health, because they are concerned, as cancer survivors, that all carcinogenic substances are properly monitored.

[17] The CLFN requested to make representations at the Hearing, but added they were also receptive to discussing their concerns with industry directly. The CLFN explained the industrial projects to which the Amending Approvals apply are situated on CLFN traditional territory, and many of the CLFN membership live downwind of the facilities. The CLFN stated they have concerns related to the quantity and quality of the air monitoring data gathered by LICA historically and possibly into the future. They stated that inadequate or inaccurate air monitoring data could mean inaccurate conclusions about the quality of the air in the region and about the impacts of air pollutants emitted or resulting from the area industrial operations. The CLFN argued this could impact their membership directly, the Reserve ecosystems, or their traditional lands in ways they are not aware of today. The CLFN stated that opportunities to take corrective action before impacts occur would be lost if the information collected is inadequate or inaccurate. The CLFN stated their concerns relate directly to the issues outlined for the Hearing.

B. Appellants' Submission

[18] Ms. Stone stated that allowing the Elchuks and the CLFN to have full intervenor standing will uphold the spirit of EPEA and due process, because no other opportunities will be available to address the issues with the new evidence that has come to light. Ms. Stone referred to section 2 EPEA, in particular sections 2(f) and (g).⁴ She stated that full participation includes the right to have counsel, lead evidence, cross examine, present witnesses and expert testimony, and present final arguments. Ms. Stone noted the Board has the jurisdiction to revise the Hearing schedule to accommodate the democratic process and better serve the public interest.

⁴ Sections 2(f) and (g) of EPEA provide:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment....”

[19] Ms. Ulfsten stated the Elchuks and the CLFN should be accepted as full intervenors in the Hearing process. She requested the intervenors be given equal time to that currently scheduled for the Parties.

C. Operators' Submission

[20] The Operators took no position regarding intervenor standing for the Elchuks and the CLFN. The Operators requested that, if standing is granted, that the intervenors' participation should be limited to written submissions only and that the submissions be limited to the issues set by the Board. The Operators argued these requests are in accordance with previous Board decisions regarding intervenors and Rule 14 of the Board's Rules of Practice.

[21] The Operators noted the previous involvement of the Elchuks and the CLFN in the approval and appeal process. The Operators stated the Notice of Appeal filed by Mr. Elchuk raised the identical concerns as those raised by the Ethel Lake Intervenors. The Operators noted Ms. Stone will be addressing the concerns of the Ethel Lake Intervenors at the Hearing. The Operators submitted that there is a likelihood of duplication of the evidence and that to prevent delay at the Hearing, a written submission is suitable and appropriate.

[22] The Operators explained the CLFN filed a Statement of Concern in which they identified four areas of concern, but the CLFN also stated the overall plan appeared acceptable. The Operators stated these concerns were resolved through discussions between the CLFN and LICA, and as a result, the CLFN withdrew their Statement of Concern. The Operators submitted that written submissions would be suitable and appropriate for any further concerns of the CLFN, within the issues set by the Board, which may have subsequently arisen.

D. Imperial Oil's Submission

[23] Imperial Oil supported the Director's submission and shared his concerns. Imperial Oil did not want the appeal process to be turned into a public inquiry, and it did not want to see a new set of issues and concerns raised by the intervenors. Imperial Oil stated it supports an intervenor's right to attend the Hearing, ask questions, and present closing

arguments, but not present witnesses or expert testimony. Imperial Oil questioned the role of legal counsel for an intervenor.

E. Director's Submission

[24] The Director had no fundamental concerns with the intervention request of the Elchuks, provided that it does not repeat or duplicate evidence presented by the other Parties.

[25] The Director also had no fundamental concerns with the intervention request of the CLFN. The Director requested additional information on the scope of the intervention and the potential effect on the length and complexity of the Hearing process. The Director noted that the CLFN had filed a Statement of Concern but it was withdrawn.

III. Discussion

A. Legislation

[26] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[27] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Section 9(2) and (3) of the Regulation provides:

“(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.

- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[28] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

B. Application

1. George and Nadia Elchuk

[29] The Elchuks had filed a Notice of Appeal regarding the Amending Approvals, but they were not granted standing because they had not filed a Statement of Concern, a prerequisite to filing a Notice of Appeal.⁵

[30] The Elchuks want to ensure the air monitoring program monitors the correct substances to protect human and animal health and the environment. The Elchuks live in the air shed monitored by the Amending Approvals. They also want to have confidence in the frequency of the monitoring and the chosen locations to set up the monitoring equipment. These are all concerns raised by the Appellants in their Notices of Appeal. It appears the concerns of the Elchuks are very similar to those of the Appellants.

⁵ See: *Cold Lake Fibromyalgia Support Group et al. v. Director, Northern Region, Regional Services, Alberta Environment*, re: *Imperial Oil Resources Limited, EnCana Corporation, Canadian Natural Resources Limited, Husky Oil Limited, and Blackrock Ventures Inc. (now Shell Canada Ltd.)* (22 January 2009), Appeal Nos. 07-004-021, 028-033, 040-075, 100-105, 112-117-ID1 (A.E.A.B.).

[31] When a person is granted standing as an intervenor, the Board does not want the same evidence and arguments repeated as what will be provided by the Parties. However, the Elchuks did raise personal health concerns which may provide further insight into the first issue identified by the Board, specifically the substances being monitored. There are concerns that relate directly to the Elchuks, so their evidence should not be repetitious of the Appellants' evidence.

[32] Therefore, the Board will allow the Elchuks to participate in the Hearing as intervenors. They will be required to provide their written submission to the Board and will be allotted 15 minutes at the start of the Hearing to speak to their submission. The Operators, Imperial Oil, and the Director will be allotted 10 minutes each to cross examine the Elchuks. The Board may also ask questions. The Elchuks will also be allowed five minutes to provide closing comments before the Parties give their closing comments. As intervenors, the Elchuks will not be allowed to cross examine the Parties or provide rebuttal evidence. They may seek legal counsel if they wish and have experts represent their interests. However, they are reminded that time is limited to present their oral submissions.

2. Cold Lake First Nations

[33] The CLFN filed a Statement of Concern with the Director. However, after discussions with LICA, the CLFN withdrew their Statement of Concern.

[34] The conditions of the Amending Approvals required the Approval Holders to provide the Director with further reports, including the RWDI Report. After reviewing these reports, the CLFN had further concerns which they could not have been aware of at the time the Statement of Concern was withdrawn.

[35] The CLFN live in the air shed and use the area for traditional purposes. The CLFN can present a different perspective of the possible effects the Amending Approvals may have on the area. Because they can present this alternative view, the Board will allow the CLFN to participate in the Hearing process. The CLFN will be required to provide a written submission, and they will be given 15 minutes at the start of the Hearing to speak to their submission. Although the CLFN stated they supported the Amending Approvals in principle,

they also had concerns that could result in variations to the Amending Approvals. Therefore, only the Operators, Imperial Oil, and the Director will be allotted 10 minutes each to cross examine the CLFN. The Board may also ask questions. The CLFN will also be allowed five minutes to provide closing comments before the Parties give their closing comments. As intervenors, the CLFN will not be allowed to cross examine the Parties or provide rebuttal evidence, and they may have experts represent their interests. However, they are reminded that time is limited to present their oral submissions.

3. Summary

[36] The Elchuks and the CLFN will be given standing as intervenors in the hearing process. They will only be allowed to provide submissions that are relevant to the four issues identified by the Board, specifically:

1. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed to monitor ambient air quality in relation to human health and environmental safety, including substances monitored, monitoring locations, and monitoring equipment?
2. Is the monitoring program, and any associated conditions or reporting activities required by the Amending Approvals, properly designed having regard to the potential for facility upset conditions?
3. Does the LICA Air Quality Monitoring Network have an appropriate, adequate, and fully documented audit, quality assurance, and quality control program?
4. Do personnel responsible for the operation of the LICA Air Quality Monitoring Network have appropriate training, qualifications, and accountability?

[37] Submissions that relate to other concerns will not be considered by the Board. Because the time allotted to the Elchuks and the CLFN to provide their oral presentations is limited, the Board recommends they use the time wisely and focus on the issues as stated above. They should not duplicate the evidence of the Parties or raise concerns that are not relevant to the above issues. They will not be allowed to cross examine the Parties or provide rebuttal evidence. The Elchuks and the CLFN will be given five minutes to provide closing comments prior to the Parties providing their closing comments, and the comments must relate to the four issues stated above.

IV. DECISION

[38] Based on the submissions provided, the Board will allow Mr. George and Ms. Nadia Elchuk and the Cold Lake First Nations to participate as intervenors in the Hearing. They will be required to submit their written submissions to the Board by April 1, 2009, and the Elchuks and the CLFN will be allowed 15 minutes each at the start of the Hearing to speak to their submission and five minutes for closing comments. They will be subject to cross examination by the Approval Holders and the Director. The Elchuks and the CLFN will not be allowed to cross examine the Parties.

[39] The Hearing will be held in Cold Lake on April 27 and 28, 2009.

Dated on February 26, 2009, at Edmonton, Alberta.

“original signed by”

Eric O. McAvity, Q.C.
Board Member and Panel Chair