

ALBERTA ENVIRONMENTAL APPEALS BOARD

BOARD FILE NUMBER 16-024

APPELLANT NORMTEK RADIATION SERVICES LTD.

RESPONDENTS SECURE ENERGY SERVICES INC. and DIRECTOR OF ALBERTA ENVIRONMENT AND PARKS

DOCUMENT **LEGAL ARGUMENT OF THE APPELLANT**

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I. Introduction

1. The following abbreviations are used in this Argument:
 - a. Amending Approval - Amending Approval No. 48516-01-04 dated July 14, 2016 issued by the Director under EPEA to authorize Secure Energy to receive and dispose of NORM waste at the Pembina Area Landfill, a Class 1 Hazardous Waste Landfill owned and operated by Secure Energy near the town of Drayton Valley, Alberta
 - b. Board - Alberta Environmental Appeals Board
 - c. Directly Affected Statement of Normtek – Written submission of the Appellant dated March 5, 2021 outlining how it may be directly affected by the Amending Approval, and filed with the Board concurrently with this Argument
 - d. Director - Director, Red Deer North Saskatchewan Region, Alberta Environment and Parks
 - e. EPEA - *Environmental Protection and Enhancement Act*, RSA 2000, c E-12
 - f. Minister - the Minister assigned responsibility for EPEA under the *Government Organization Act*, RSA 2000, c G-10
 - g. NORM - Naturally occurring radioactive materials including Uranium 238, Radium 226, Radium 228, Thorium 232, Thorium 230, Thorium 228, Radon 222, Lead 210, and Polonium 210
 - h. *Normtek* - *Normtek Radiation Services Ltd. v Alberta Environmental Appeals Board*, 2020 ABCA 456
 - i. Secure Energy - Secure Energy Services Inc.
 - j. Standing Decision - Decision of the Board dated October 13, 2016 together with the reasons provided by the Board on March 2, 2018 in *Normtek Radiation*

Services Ltd. v Director, Red Deer North Saskatchewan Region, Alberta Environment and Parks, re: Secure Energy Services Inc. (2 March 2018), Appeal No. 16-024-D (A.E.A.B.)

2. Normtek Radiation Services Ltd. [**the Appellant**] is an Alberta-based corporation which is a recognized expert in the management and disposal of NORM, including the environmental and human health impacts associated with the disposal of NORM. The Appellant is in the business of removing NORM from oilfield waste and disposing of NORM in an environmentally safe manner.
3. NORM are an environmental health and safety risk, and are considered hazardous to human health when exposure exceeds certain thresholds.
4. The Appellant operates a NORM decontamination facility in Fort St. John, British Columbia that decontaminates NORM impacted equipment. The Appellant specializes in providing consulting services regarding radioactive material best practices and equipment decontamination services. Specific services provided by the Appellant include:
 - a. radiation assessments, surveys and monitoring;
 - b. onsite radiation safety services for well workovers, turnarounds and other maintenance activities;
 - c. NORM waste classification, decontamination, transport and assistance with disposal;
 - d. sample analysis, dose monitoring, radon gas testing, and Low Level Radioactive Dust monitoring, provided using a mobile laboratory;
 - e. radiation protection training, radiation safety program development, and regulatory compliance consulting.
5. The Appellant's business is based around meeting environmental and safety standards for the decontamination and treatment of NORM and NORM impacted waste.
6. Cody Cuthill is the Chief Executive Officer of the Appellant. He is a recognized expert in the management and disposal of NORM. A summary of his NORM expertise is as follows:

- a. Cody Cuthill has been working actively in the decontamination of radioactive materials for approximately 25 years;
 - b. Cody Cuthill has advised federal and provincial government officials on the proper disposal and management of NORM;
 - c. Cody Cuthill is a member of Health Canada's NORM Working Group, a working group of professional experts with a mandate to advance the development and harmonization of practices and standards for radiation protection within Canadian jurisdictions. The NORM Working Group is charged with developing and reviewing the Canadian Guidelines for the Management of NORM, and includes affected industries in the petroleum production, fertilizer manufacturing, and metal recycling industry sectors;
 - d. Cody Cuthill has been involved in the licensing of decontamination facilities and hazardous waste landfills in Western Canada;
 - e. Cody Cuthill has served as a keynote speaker at national and international conferences on NORM including the Canadian Radiation Protection Association, and he has been the only representative from Western Canada to attend the NORM symposiums hosted by the International Atomic Energy Agency to report on and discuss progress made in identifying, quantifying, and managing the radiological risks associated with industrial processes involving NORM.
7. On August 24, 2014 the Appellant filed a statement of concern with the Director under EPEA concerning the application by Secure Energy for the Amending Approval. The statement of concern set out 57 issues and recommendations with respect to the Secure Energy application, including concerns that the operations plan filed by Secure Energy:
- a. was incomplete and missing portions of the radiological assessment necessary for landfills accepting radioactive waste;
 - b. contained insufficient details to determine if the Pembina Area Landfill could safely accept NORM waste;

- c. was insufficient to monitor the radioactivity of NORM waste proposed for disposal in the landfill;
 - d. would allow the Pembina Area Landfill to accept NORM waste for surface disposal with a level of radioactivity which exceeds the threshold level considered safe by Canadian and international standards;
 - e. failed to meet generally accepted principles and practices of radioactive waste management.
8. On September 26, 2014 the Director sent a letter asking the Appellant to explain how it was directly affected by the proposed Amending Approval.
 9. On October 26, 2014, the Appellant provided its response to the Director explaining how the Appellant was directly affected by the proposed Amending Approval. This letter includes information pertaining to the Appellant's commercial and financial interests, as well as its technical expertise on NORM waste as it relates to the application for the Amending Approval and how the Amending Approval would impact the NORM management industry in Canada.
 10. On November 25, 2014 the Director rejected the Appellant's statement of concern on the basis that the Appellant did not reside within the vicinity of the Pembina Landfill.
 11. On November 27, 2014 the Director advised the Appellant that the levels of NORM waste permitted to be disposed in a landfill was of concern to Alberta Environment but that a decision on allowable levels of radioactive activity had not been made and that the application by Secure Energy was being reviewed against the previous work on NORM waste management undertaken by Alberta Environment as well as federal and international policy to ensure the terms of the Amending Approval would ensure environmentally sound management and be scientifically and technically valid.
 12. On April 28, 2015 the Director provided a letter to Secure Energy with a list of questions for Secure Energy to answer regarding its application for the Amending Approval. In this letter, the Director indicated the application was being compared to the Canadian NORM guidelines, which recommend that persons exposed to NORM should be subject to the same

standards as persons exposed to materials regulated by the Canadian Nuclear Safety Commission (CNSC) and that the CNSC requirements would apply to this application. Some of the questions set out by the Director concerning the Secure Energy application were on the list provided to the Director by the Appellant in its statement of concern filed in August 2014.

13. On May 11, 2015 the Director informed Cody Cuthill that the Director was reviewing waste control regulations and that Cody Cuthill would be included in stakeholder consultations concerning these regulations during early 2016.
14. On June 30, 2015 Secure Energy replied to the Director's list of questions set out in the April 28, 2015 letter.
15. On August 31, 2015 the Appellant filed a letter with the Director outlining its concerns with the responses given by Secure Energy to the questions set out by the Director in his letter of April 28, 2015. These concerns included submissions that:
 - a. the radiological assessment filed by Secure Energy was inaccurate with respect to matters such as (1) the long lived isotopes required in a radiological assessment for the landfill (2) safe activity limits and (3) mixing of waste;
 - b. the Secure Energy application did not meet radiation best practices such as monitoring for levels of radioactive waste contained in incoming loads for disposal in the landfill;
 - c. the Secure Energy application did not comply with the requirements set out in the Canadian NORM guidelines;
 - d. the Secure Energy application failed to address radioactive dose assessment for workers;
 - e. the Secure Energy application incorrectly classified NORM waste as non-hazardous which is not consistent with the laws or policy of any other jurisdiction in Canada, the Canadian NORM guidelines, the directives of the Alberta Energy Regulator or internationally.

16. Between September 2015 and June 2016, the Appellant made additional submissions to the Director to substantiate its concerns with the Secure Energy application, however the Director did not respond to any of these further submissions by the Appellant.
17. During this time period between September 2015 and June 2016, Normtek was advised that a Mr. Rick Berkenbosch had provided recommended limits on landfill disposal of NORM waste for the purpose of considering the Secure Energy application for the Amending Approval. On January 27, 2016 Normtek sent a letter to the Director asking if the recommendations of Mr. Berkenbosch could be disclosed. On February 1, 2016 the Director replied, stating nothing further could be shared with the public until a decision was made.
18. On July 14, 2016 the Director issued the Amending Approval under EPEA to allow for the surface disposal of waste contaminated with NORM at the Pembina Area Landfill.
19. On July 28, 2016 the Appellant submitted a notice of appeal to the Board concerning the Amending Approval, setting out concerns regarding the environmental and human health and safety impacts associated with the surface disposal of NORM.
20. On August 11, 2016 the Board confirmed written submissions would be accepted from the Appellant and Secure Energy on whether the Appellant was directly affected by the Amending Approval.
21. On August 26, 2016 the Appellant filed written submissions with the Board setting out how the Appellant is directly affected by the Amending Approval, its expertise on the management and disposal of NORM, and concerns regarding the environmental and human health impacts associated with the surface disposal of NORM, including submissions that the Amending Approval:
 - a. allows most of the equipment the Appellant previously received contracts to decontaminate to be disposed directly into the Pembina Landfill;
 - b. adversely affects the value of the Appellant's custom proprietary decontamination equipment because of the availability for direct disposal at the Pembina Landfill;
 - c. renders the Appellant's consulting services unnecessary for most projects;

- d. results in an adverse environmental impact by allowing for surface disposal of long lived radioactive waste with harmful health and safety impacts for those working in an around the landfill, as well as future generations;
 - e. does not comply with the requirements set out in the Canadian NORM guidelines or international guidelines on radiation best practices;
 - f. fails to address the longevity of the radioactive material being approved for landfill disposal.
22. Secure Energy and the Director replied by asserting the Appellant is not directly affected by the Amending Approval.
23. On September 19, 2016, the Appellant provided the Board with a written reply to the submissions of Secure Energy filed with the Board and a written reply to the submissions of the Director filed with the Board. On September 20, 2016, Normtek submitted a further e-mail as a rebuttal submission.
24. On October 13, 2016 the Board dismissed the Appellant's notice of appeal on the basis that the Appellant is not directly affected by the Amending Approval. The Board provided no additional reasons in this letter decision.
25. On March 2, 2018, the Board provided reasons in its Standing Decision to support its finding that the Appellant is not directly affected by the Amending Approval.
26. In its Standing Decision the Board dismissed the Appellant's notice of appeal concerning the Amending Approval on the basis that the Appellant is not directly affected by the Amending Approval and thus has no standing to proceed with the appeal.
27. The Board gave the following explanation in its Standing Decision for why the Appellant is not directly affected by the Amending Approval:
- a. The Appellant failed to establish how the Amending Approval will harm a natural resource used by the Appellant, or the Appellant's actual use of a natural resource;

- b. Any economic impact that may occur to the Appellant's NORM decontamination business as a result of adding a landfill disposal alternative for NORM waste is conjecture, speculation, and insufficiently connected to an environmental concern.
- 28. In *Normtek*, the Alberta Court of Appeal quashed the Standing Decision, remitting the matter of the Appellant's directly affected status back to the Board.
- 29. The Appellant has filed a Directly Affected Statement of Normtek concurrently with this Argument, which identifies and elaborates as to how the Amending Approval, and the activity authorized by it, may directly affect the Appellant's business, namely because the terms and conditions of the Amending Approval fail to accord with national and international science-based standards for NORM management and thereby impair the integrity of a regulatory system which is intended to protect human health, the environment, and future generations from the hazards of NORM waste, a regulatory system upon which the Appellant depends and which is significantly undermined by the Amending Approval because it allows a competitor in such a small industry to adhere to lower standards for the handling of NORM waste, all of which is more particularly set out in the Directly Affected Statement of Normtek under the following categories of concern:
 - a. the terms and conditions of the Amending Approval are inconsistent with Canadian and international guidelines for the handling of NORM waste;
 - b. the Amending Approval improperly classifies NORM waste as non-hazardous;
 - c. the terms and conditions of the Amending Approval establishes a disposal scheme for NORM waste which fails to accord with best safety practices for exposure to radiation;
 - d. the terms and conditions of the Amending Approval establish a standard for detection of NORM which fails to accurately detect and monitor the radioactivity of NORM;
 - e. the Amending Approval allows for the importation of radioactive waste into Alberta for disposal, in the absence of regulations;

- f. the Director has failed to demonstrate the application of requisite expertise necessary to fully and properly assessment the impacts to human health, the environment, and future generations, of the activity authorized by the Amending Approval.

II. LEGAL ARGUMENT ON THE INTERPRETATION OF “DIRECTLY AFFECTED” IN EPEA

A. General Context and a Purposive Interpretation of EPEA

30. Public participation became a key component of resources and environmental decision-making in the 1960s and the subject has since received significant attention from policy-makers and scholars worldwide.
31. The concept of public participation is essentially concerned with persons having an opportunity to influence the exercise of statutory power held by government officials.
32. The 1990s saw the right to public participation in resources and environmental decision-making referenced and implemented by international law. The 1992 United Nations Rio Declaration expressly endorses public participation in environmental issues. Similarly, Article 6 of the Aarhus Convention calls for states to establish a legal right to public participation in resources and environmental decision-making. This right to participate is to extend to any person with an interest in the decision.
33. In Alberta, several major project controversies in the 1980s, including disputes over the Oldman River dam and the Alpac pulp mill, brought these international developments to the provincial scale, and ultimately led Alberta to commission a taskforce in 1990 to recommend reforms to Alberta legislation governing environmental and resource project decision-making.
34. One of the taskforce recommendations was for Alberta to enhance and systematize public participation in environmental and resource development decision-making. As described above, calls for an enhanced public voice in project decision-making and a more systematic and transparent decision-making process were taking place at this time both across Canada and internationally. These developments, together with local project controversies, had

significant influence on public policy deliberations in Alberta in the early 1990s. This culminated with the enactment of *EPEA* on September 1, 1993.

35. The Minister of Environment captured the essence of the purposes underlying *EPEA* during its first reading in the Legislature as Bill 23 in May 1992, including in particular, an enhanced and transparent process for public participation in environmental and resource project decision-making:

Mr. Speaker, this is a great honour for me as this comprehensive legislation is the culmination of more than 28 months of consultation with Albertans who literally helped write this Bill. Highlights of this legislation include a one-window approval approach for business, a clarified environmental impact assessment process, increased public consultation and participation in all aspects of environmental protection and enhancement, provision for market-based approaches to achieve environmental protection goals, provisions to address cleanup of contaminated sites, and an enhanced enforcement regime. Bill 23 consolidates nine separate environmental Acts and provides for the protection, improvement, and wise use of our environment now and into the future.

...

The seventh principle is the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. In other words, Mr. Speaker, this Act, Bill 23, is not just a set of laws; it really is an environmental agenda. It's an environmental agenda that will be amended and probably changed through the course of time but only through the input of the citizens of Alberta. Basically this principle allows the facilitation of public access and service by providing a single-window approach to Alberta Environment making for more streamlined administrative procedures. It includes an access to information section, a requirement for state-of-the-environment reporting, increased public consultation and participation in all aspects of environmental protection and enhancement activities, provisions supporting studies on the environment, a library, education materials, public consultation in the development of guidelines, objectives, and regulations, public consultation in the environmental impact assessment process and the approvals process, opportunities for appeals for parties directly affected by decisions through the creation of an environmental appeal board. This board will provide an independent review of the decisions made by directors and other people within the department to provide a system of checks and balances on

those decisions. This principle also provides for allowing for requests by citizens for investigations and contraventions.

Alberta, Legislative Assembly, *Hansard* 22nd Leg, 4th Sess
(11 May 1992 and 4 June 1992) at 805, 1184 (Ralph Klein)

36. EPEA is now Alberta's primary environmental statute.
37. Section 2 of *EPEA* codifies the purposes of the legislation, two of which explicitly reference public participation in environmental decision-making:

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

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (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;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act.

38. Other entitlements under EPEA to public participation in environmental decision-making include the following:

- a. input to an advisory committee established by the Minister;
- b. consultation on the development of ambient environmental quality objectives;
- c. comments on draft terms of reference for an environmental impact assessment;
- d. consultation on proposed regulations pertaining to the release of substances.

39. The Board is established as a statutory appellate body under Part 4 of EPEA. Section 90(2) provides that the Board shall hear appeals as provided for by EPEA or any other enactment, including appeals from decisions made by the Director to issue an approval or amend an existing approval.

40. In *Normtek*, the Court of Appeal summarized the role of the Board as follows:

The Environmental Appeal Board is not a regulator like some of the Province's energy boards. The Environmental Appeal Board is essentially an independent commission of inquiry reporting to the Minister. Vis-à-vis what are known as specified activity approvals, the Environmental Appeal Board has one function and one function only and that is to hear appeals by parties directly affected by Directors' decisions (s 90(2)). The Board reports to the Minister what it hears and makes non-binding recommendations (s 99(1)). Under the *Environmental Protection and Enhancement Act* the Minister, assisted by his Directors, is the regulator. The Board was established to provide the Minister with independent and expert advice with respect to such regulation by reporting to the Minister a summary of the representations which were made to it and any recommendations it might have as a result of those representations (s 99(1)).

One of the goals of the *Environmental Protection and Enhancement Act*, when it was introduced by then Environment Minister Ralph Klein, was to achieve better environmental decision-making. The Environmental Appeals Board process was set up to help achieve that. By granting standing to those directly affected by Directors' decisions, the Minister receives the benefit of additional scrutiny which, in the case of directly affected industry participants, provides

the Minister with a practical understanding of the effects of conditions of approvals, which industry participants are in a unique position to provide. The integration of environmental protection and economic impacts is one of the *Environmental Protection and Enhancement Act* purposes of the (ss 2(b) and 2(c)) and hearing appeals by those impacted economically helps the Minister achieve that purpose.

Normtek at paras 126-127

41. The Board is to serve as a forum for Albertans with a direct and genuine interest to question decisions made under *EPEA*, on a broad range of grounds as set out in the legislation, including: human health, safety, economic, technology, regulatory, sustainable development, and environmental protection.
42. In the case of an appeal regarding a decision by the Director to issue an approval or amend an existing approval under *EPEA*, sections 91(1)(a)(i) and 95(5)(a) provide that a person who has previously submitted a statement of concern with the Director and is directly affected by the Director's decision, may submit a notice of appeal concerning the Director's decision to the Board:

91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or ...

95(5) The Board

(a) may dismiss a notice of appeal if

(i) ...

(ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the Water Act, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,

....

43. The interpretation and application of the phrase ‘directly affected’ is the crux of determining who has standing to file an appeal with the Board, however the term is not defined in EPEA.
44. In *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, the Supreme Court of Canada ruled that a statutory tribunal cannot interpret its power to grant standing in a way that effectively defeats the scheme of the enabling legislation (*Lukács* at paras 19-20).
45. In *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, the Supreme Court of Canada stated that the proper approach to statutory interpretation involves deciphering the intent of the legislator by reading the words of an enactment in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and purpose of the legislation and the intention of the legislator (*Rizzo Shoes* at para 21).
46. Section 10 of the *Interpretation Act*, RSA 2000, c I-8, provides that an enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.
47. The importance of reading the words of an enactment in a purposive or contextual manner is concisely summarized by Madam Justices Abella and Karakatsanis in *Telus Communications Inc. v Wellman*, 2019 SCC 19 (writing in dissent at para 107) in a recent Supreme Court of Canada decision:

Statutory interpretation is the art of inferring what words mean. Sometimes the meaning is obvious, either because of the clarity of the language or of its relationship to the legislative context. But sometimes interpreting words literally in isolation, undermines the policy objectives of the statutory scheme. The debate between those who are “textualists” and those who are “intentionalists” was resolved in Canada in 1998 when this Court decided that “there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” We do not just look at the words.

48. In *Normtek*, the Court of Appeal ruled that a valid interpretation of legislation must be: plausible in that it complies with the legislative text; efficacious in that it promotes the legislative intent; and matches accepted legal norms in that the interpretation is reasonable and just (*Normtek* at para 76).
49. The law clearly requires the Board to interpret the phrase “directly affected” in a purposive and generous manner consistent with the objectives of *EPEA* and its statutory function, to borrow the description provide by the Court of Appeal in *Normtek*, as an “independent commission of inquiry reporting to the Minister”.
50. The Appellant submits a purposive reading of *EPEA* demonstrates the Legislature intended the Board to be a forum where a person with a genuine interest and a particular expertise in an application for approval under *EPEA* can test the findings and conclusions of the Director in a *de novo* hearing conducted by the Board. This is particularly so in the context of *EPEA* which requires decisions made by the Director to be in the public interest, and thus the Board as a statutory appellate body charged with overseeing decisions made by the Director should be able to hear an appeal from persons with expertise and ability to bring forth evidence and argument to challenge the merit of the Director’s decision and result in a Board recommendation to the Minister on whether the Director’s decision should be confirmed, quashed, or varied.

B. Interpretation of ‘directly affected’ in EPEA

51. The Board’s interpretation of ‘directly affected’ was initially provided in *Kostuch v Alberta (Director, Air & Water Approvals Division, Environmental Protection)*, [1995] AEABD No 9, 1995 CarswellAlta 735. In *Kostuch*, the Board held that the use of the word ‘directly’ requires a person to establish a direct personal or private interest (economic, environmental, or otherwise) that will be impacted by the approval in question. At paragraphs 34 and 35 in *Kostuch*, the Board summarized its analysis as follows:

Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' means the person claiming to be 'affected' must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.

52. In *Normtek*, the Court of Appeal reflected favourably on the Board's observations regarding the term 'directly affected' made in its *Kostuch* decision, notably that the Board must eschew a single, rigid approach to applying the term in its standing determinations:

[T]rying to define in advance or limit the circumstances in which an appellant might be found to be directly affected is something the Environmental Appeals Board wisely avoided for at least the first decade of its existence. When one has regard for the many and diverse approvals, environmental protection orders and contaminated site designations which may be appealed by "directly affected" persons, it is apparent that trying to define the way in which a person must be directly affected in order to be accorded standing is impossible.

....

Significantly, in *Bildson*, the Board rejected what it termed a per se rule employed by the Director not unlike that which the Board itself employed in this case:

The Directors per se rules on the types of harms which can and cannot qualify for standing purposes cannot reasonably be supported by the open-ended nature of the plain meaning of "affected".

All we can do is reiterate the Board's caution in *Bildson* against "per se rules" and apply it to the rather narrow or restricted interpretation of the phrase "directly affected" employed by the Board and confirmed by the reviewing justice in the *Normtek* case.

(*Normtek* at paras 78,80,86-89)

53. In *Normtek*, the Court of Appeal reflected critically on how, subsequent to its *Kostuch* decision, the Board has interpreted ‘directly affected’ using a rigid and narrow approach; an approach which was summarized by the Court of Queen’s Bench in *Court v Alberta (Environmental Appeal Board)*, 2003 ABQB 456, and referenced numerous times by the Board.
54. In light of the *Normtek* decision by the Court of Appeal, the *Court* decision is no longer good law on the interpretation of ‘directly affected’ in EPEA.
55. All of the Board’s decisions made since *Kostuch* regarding its interpretation of ‘directly affected’ must be read with caution in light of the Court of Appeal’s ruling in *Normtek*.
56. In *Normtek* the Court of Appeal sets out the following interpretive points concerning ‘directly affected’ which the Board must adhere to:
 - a. ‘affected’ connotes affected in an adverse manner (at para 78);
 - b. generally speaking, ‘directly affected’ means the person seeking an appeal before the Board must demonstrate *potential* to be affected in a ‘direct manner’ by the decision in question; an unbroken connection between the decision and the adverse affect with some temporal measure of ‘immediacy. However, “[i]t is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be (at para 81);
 - c. a ‘direct affect’ is not limited to impacts on a natural resource used by a prospective appellant or that person’s use of a natural resource; nowhere in *EPEA* is standing before the Board inextricably linked to impacts on natural resources or the proximity between an approved activity and one’s use of a natural resource, and the Court of Appeal very clearly and assertively rejects any interpretation of ‘directly affected’ which limits the term to how a decision or activity affects a natural resource or a person’s use of a natural resource, whether within the vicinity of an activity or otherwise; in other words, demonstrating how a decision or an activity will adversely impact a natural resource which a prospective appellant uses or harm to that person’s use of natural resource may

- a relevant consideration in establishing directly affected status, but it is not a necessary prerequisite to establishing standing where other adverse effects are alleged (at paras 82 - 105);
- d. *EPEA* contemplates that a wide range of effects may ground standing before the Board, including environmental, social, economic, cultural, property, human health, safety, and regulatory (at paras 82-105);
 - e. a direct economic impact that has an indirect environmental impact may ground standing before the Board; relevant economic impacts include those which result from a decision by the Director which constitutes a change to the regulatory regime governing an activity which, in turn, may adversely affect the commercial viability of a business that facilitates environmental protection concerning an activity regulated under *EPEA* (at paras 111-118);
 - f. it is not necessary for a prospective appellant to demonstrate a how an economic impact on its operations is directly linked to an environmental impact (at para 128)
 - g. a ‘direct affect’ may result from both an activity subject to a decision made by the Director, as well as the Director’s decision itself (at para 119);
 - h. a determination of whether a prospective appellant has standing before the Board need not be determined conclusively before hearing any of the substantive issues raised for the appeal (at paras 133-134);
 - i. the consideration of whether a prospective appellant is ‘directly affected’ by a proposed activity or the Director’s decision on that activity necessarily requires a consideration of the nature and merits of the appellant’s substantive concerns with the activity or the decision (at paras 135 – 136)
 - j. a determination of whether a prospective appellant is “directly affected” and how the Board allocates onus in standing determinations must take into account the fact that *EPEA* requires the person to submit a notice of appeal no later than 30 days after receipt of notice of the decision sought to be appealed; a precautionary approach to standing determinations is warranted in light of the fact that if it becomes apparent later that a

prospective appellant whose notice of appeal was dismissed without a hearing is directly and adversely affected, there are few remedies available. The Director's decision is final and the Minister is deprived of the appellant's input and the Board's recommendations (at paras 138 – 139);

- k. the onus on a prospective appellant is only to establish a reasonable possibility that it will be directly affected by the Director's decision or the activity approved; a prospective appellant does not bear the onus of establishing conclusively that it is or may be directly affected (at paras 140 – 141).

III. THE APPELLANT HAS MET THE 'DIRECTLY AFFECTED' TEST

57. The submissions made in this Part III are to be read in conjunction with the Directly Affected Statement of Normtek filed with the Board concurrently with this Argument, which fully details how the Amending Approval directly affected the Appellant.

58. The Appellant has concerns with respect to the potential for significant adverse impacts on the environment and human health from the surface disposal of NORM waste in a landfill at levels of radioactivity which exceed allowable thresholds of any other jurisdiction in the world for a facility that is not regulated by a nuclear safety regulatory agency. To be clear, the Appellant does not object to the landfilling of *low-level* radioactive materials.

59. The Appellant's submissions in the Directly Affected Statement of Normtek demonstrate a reasonable possibility that the Amending Approval, and the activity authorized it, will directly affect the Appellant's business, namely because the terms and conditions of the Amending Approval fail to accord with national and international science-based standards for NORM management and thereby impair the integrity of a regulatory system which is intended to protect human health, the environment, and future generations from the hazards of NORM waste, a regulatory system upon which the Appellant depends and which is significantly undermined by the Amending Approval because it allows a competitor in such a small industry to adhere to lower standards for the handling of NORM waste, all of which is more particularly set out in the Directly Affected Statement of Normtek under the following categories of concern:

- a. the terms and conditions of the Amending Approval are inconsistent with Canadian and international guidelines for the handling of NORM waste;
- b. the Amending Approval improperly classifies NORM waste as non-hazardous;
- c. the terms and conditions of the Amending Approval establishes a disposal scheme for NORM waste which fails to accord with best safety practices for exposure to radiation;
- d. the terms and conditions of the Amending Approval establish a standard for detection of NORM which fails to accurately detect and monitor the radioactivity of NORM;
- e. the Amending Approval allows for the importation of radioactive waste into Alberta for disposal, in the absence of regulations;
- f. the Director has failed to demonstrate the application of requisite expertise necessary to fully and properly assessment the impacts to human health, the environment, and future generations, of the activity authorized by the Amending Approval.

60. The Directly Affected Statement of Normtek incorporates and references the prior submissions made by the Appellant to the Board in this matter, which are on the existing record. In relation to these submissions, the Court of Appeal observed:

The economic interest which Normtek argued was directly affected was based on its interest in ensuring that naturally occurring radioactive materials are managed in accordance with generally accepted regulatory standards to which it said it was required to adhere. Properly understood, Normtek's concern was as much regulatory concern as it was an economic or commercial concern. Normtek argued that the Director's decision directly affected its interest, as an industry participant, in a regulatory regime which governed its industry in the interests of protecting the environment. It is hard to think of a better basis for standing before the Environmental Appeals Board than a concern about a regulatory decision which is alleged to adversely impact a party economically and which also may have implications for environmental protection, particularly when the regulatory decision permits an activity which involves the disposal of a substance of concern under the Environmental Protection and Enhancement Act (i.e. radiation). The foregoing, of course, assumes that there is merit to Normtek's substantive submissions which the Board, at the urging of the Director and approval-holder, ignored.

(Normtek at para 118)

Respectfully submitted on March 5, 2021.



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