

Dan McFadyen
Chairman

Via E-mail: brobinson@ecojustice.ca

December 1, 2010

ecojustice
Calgary Office
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Calgary, AB T2P 4V1

Attention: Mr. Barry Robinson

Dear Sir:

**Re: Applications Under Section 39 of the *Energy Resources Conservation Act*
By the Pembina Institute and Water Matters Requesting a Review of
Approval No. 8573H – Tailings Management Plan – Mildred Lake Project
Approval No. 10781B – Tailings Management Plan – Aurora North Project
(Collectively the “Approvals” and “Tailings Plans” Respectively)
Granted to Syncrude Canada Ltd. (Syncrude)
Review Application Nos. 1659037 and 1659041 (Review Applications)**

This letter is to advise that the Energy Resources Conservation Board (ERCB/Board) has considered the Review Applications.

In the Review Applications the Pembina Institute and Water Matters (Review Applicants) seek a review of the ERCB’s decision to approve the Tailings Management Plans submitted under ERCB *Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes* (Directive 074).

In considering the Review Applications, the ERCB considered your letters dated October 6, 2010 and attachments, your letter dated August 24, 2010 and Syncrude’s submissions dated September 16, 2010.

For the reasons that follow, the Board has denied the Review Applications.

Test under Section 39

In order to trigger a review of a decision of the Board under section 39 of the *Energy Resources Conservation Act* (ERCA) and subsection 48(6)(a) of the *ERCB Rules of Practice* (Rules), the review applicant must

- (i) in the case where the review applicant has alleged an error of law or jurisdiction or an error of fact, raise a substantial doubt as to the correctness of the Board's order, decision or direction, or
- (ii) in the case where the review applicant has alleged new facts, a change in circumstances or facts not previously placed in evidence, raise a reasonable possibility that those new facts, change of circumstances or facts not previously placed in evidence could lead the Board to materially vary or rescind its previous order, decision or direction.

In Decision 2000-75, the Alberta Energy and Utilities Board provided the following clarification of the criteria to be used to assist in determining whether a review applicant has established substantial doubt as to the correctness of a decision for the purposes of section 39:

- where new evidence, which was not known or not available at the time evidence was adduced and which may have been a determining factor in the decision, became known after the decision was made;
- where a decision is based on an error of law or fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision;
- where correction of a clerical error or clarification of an ambiguity is required; or
- where other criteria, particular to a given case, are shown to be valid.

Summary of the Parties' Submissions

The essence of the concerns of the Review Applicants is that the Tailings Plans as submitted by Syncrude did not comply with the "purpose and requirements" of Directive 074. Hence, by approving the Tailings Plans and issuing the Approvals, the ERCB improperly exempted Syncrude from mandatory requirements of Directive 074. In doing so, the ERCB erred in law. This error in law casts substantial doubt as to the correctness of the Approvals and, when corrected, will materially affect the ERCB's decision to approve the Tailings Plans.

The Review Applicants explicitly acknowledge that Part 3 of Directive 074 permits the Board to exercise discretion in its approval of tailings management plans submitted under that directive. However, the Review Applicants submit that such discretion does not permit the ERCB to approve tailings plans that do not strictly comply with Directive 074. Further, the Review Applicants submit that the ERCB cannot exercise whatever discretion it does have in a manner that is contrary to requirements of Directive 074 and must exercise such discretion in the public interest. In support of their submissions, the Review Applicants cite two cases as standing for the propositions that the ERCB cannot exempt from mandatory requirements unless explicitly granted that ability in its legislation and cannot permit an activity that is contrary to its legislation.¹

¹ *Seaview Land Estates Ltd. v. South*, (1981) 28 BCLR 288 (BCCA) (*Seaview*) and *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.* [1999] 3 F.C. 45 (Fed. Ct. Trial Division) (*Alberta Wilderness Association*) respectively.

Finally, the Review Applicants submit they are not required to demonstrate they may be directly and adversely affected by the Approvals as a prerequisite to triggering a review under section 39 of the ERCA. Rather, the Review Applicants must only meet the test to trigger a review of the Approvals as articulated in subsection 48(6)(b) of the Rules.

In response, Syncrude submits the Review Applicants have no standing to bring the Review Applications. Syncrude submits the ERCB properly denied standing to the Review Applicants in relation the original application by Syncrude for the Southwest Sands Storage Application (SWSS Application) that resulted in issuance of the Approvals. Syncrude submits the Tailings Plans comply with the spirit and intent of Directive 074. However, even if they did not, compliance of the Tailings Plans with Directive 074 is a matter between the ERCB and Syncrude and any noncompliance does not result in any direct and adverse impact on the Review Applicants or the exercise of legal rights outside the project site. Syncrude also submits Directive 074 is a mine planning document that acts as an extension of the ERCB's annual mine planning and approval process and is intended to ensure that mining and tailings disposal operations are conducted in an orderly and efficient manner. Syncrude also submits that it has been operating the projects since 1978, its project approvals have been in effect for many years, and Directive 074 was never intended to rescind existing approvals.

Syncrude also submits that, in adapting the phase in requirements in Directive 074 to Syncrude's existing projects, the ERCB acted in reasonable manner and in a manner that is consistent with the explicit provisions of Directive 074 that contemplate discretion and flexibility in the application of those requirements. Syncrude submits that, in exercising its discretion under Directive 074, the ERCB should be afforded significant deference. Syncrude also submits the standard by which decisions by the ERCB requiring interpretation of its own governing statutes and regulations is reasonableness. Given the ERCB's decisions to issue the Approvals were reasonable, there is no basis on which to review them. Finally, Syncrude submits the Review Applicants' allegations of error of law on the part of the ERCB lack *prima facie* merit and have not raised a substantial doubt as to the correctness of the ERCB's decisions to approve the Tailings Plans.

Reasons for Decision

As a preliminary matter, the ERCB agrees that the Review Applicants are not required to demonstrate they have rights that may be directly and adversely affected by the Approvals as a prerequisite to triggering a review of the Approvals under section 39. To trigger a review of the Approvals under section 39, the Review Applicants must establish the criteria outlined in subsection 48(6)(a) of the Rules. It is only in circumstances where a review applicant establishes one or more of the tests outlined in subsection 48(6)(a) of the Rules that the Board is required to review its decision. In all other situations, it is entirely within the Board's discretion as to whether to review one of its decisions under section 39.

The *Oil Sands Conservation Regulations* (OSCR) specifically references Directive 074 in three sections:

24.1 An operator shall apply for and obtain the approval of the Board for the management of tailings and shall manage the tailings in accordance with Directive 074.

28.1 Before constructing a dedicated disposal area, an operator shall submit a dedicated disposal area plan to the Board in accordance with Directive 074 and shall obtain the Board's approval of the plan.

30 An operator shall submit to the Board for its approval, by September 30 each year, details of its annual mine plan for the next calendar year of operation which shall include, where applicable,.....

(f) a tailings management plan prepared in accordance with Directive 074.

Subsections 20(1)(a) and (b) of the *Oil Sands Conservation Act* (OSCA) provide authority for the Board to make regulations prescribing the manner in which an application under this Act or the regulations is made. Subsection 20(2) and (3) state:

- (2) If a regulation made pursuant to subsection (1) authorizes the Board to approve an activity or method of operation, the Board may prescribe the conditions under which it grants the approval.
- (3) Notwithstanding a regulation made under subsection (1)(b), the Board may act on an application that does not contain all the information specified in the regulation or may require any other information in addition to or instead of the information specified in that regulation.

The ERCB finds that subsections 20(2) and (3) of the OSCA gives it authority to approve tailings management plans under Directive 074 subject to any conditions it may prescribe. Those conditions may include exemptions from or alterations of otherwise mandatory requirements.

Further, and more relevant to the Review Applications, Part 3 of Directive 074 states as follows:

... Operators are required to make submissions to the ERCB on how they will meet the new requirements and identify any project-specific constraints that may have a bearing on meeting the requirements. ***Requirements will be phased in and adapted, as approved by the Board, to take account of particular mining and tailings plans, facilities, and the status of a project.***

The ERCB recognizes that fluid tailings management is developing and that operators may need ***flexibility*** to apply technologies and techniques that best suit the circumstances of particular projects. ***The ERCB will consider submissions of operators and will determine project-specific requirements related to the directive.*** (emphasis added)

Subsections 20(2) and (3) of the OSCA specifically contemplate situations where the ERCB may choose to approve an application or submission that does not strictly comply with the regulation and/or impose conditions on such approvals. In addition, Part 3 of Directive 074 provides a clear and explicit discretionary authority to the Board to consider submissions from oil sands mining operators and take into account the unique circumstances of individual projects and the principles of flexibility and adaptability to adopt “project-specific requirements.” In other words, the ERCB’s own enabling legislation and regulations and other instruments made under it permit the ERCB to exempt from its own regulatory requirements.

The discretion provided in Part 3 of Directive 074 recognizes that imposition of the tailings management requirements may have significant impacts to existing and prospective oil sands mining operations, many of which have operated for many years prior to implementation of Directive 074 in February, 2009. Further, given the ERCB’s recognition that many industry operators are testing and utilizing new technologies to achieve compliance with Directive 074, providing explicit authority both within approvals and the directive to work with operators and adapt tailings management plans to new and existing projects and evolving tailings management technologies is consistent with the spirit and intent of Directive 074.

The Review Applicants submit this discretion does not allow the Board to “change the requirements of the *Directive*.” The ERCB finds the explicit discretion and flexibility contemplated in Part 3 of Directive 074 is an integral part of the requirements contained in it. Any decision made by the ERCB pursuant to the discretionary authority provided in Part 3 is made “in accordance with Directive 074” and is therefore in accordance with the requirements of the OGCR.

Also, inclusion of Part 3 in Directive 074 is clear evidence that the purpose and intent of the directive includes the ability of the ERCB to exercise flexibility and discretion in imposing the requirements of the directive, and to “determine project-specific requirements.” This language expressly contemplates that the ERCB may exercise discretion to permit tailings management plans to conform to the nature, age, complexity, technology and other factors relating to individual oil sands mining operations. This express discretion and flexibility is necessary to determine the most appropriate, project-specific manner in which to achieve the ultimate goals of reducing fluid tailings and creating trafficable surfaces. It also recognizes the potential negative implications of rigidly applying mandatory requirements to all oil sands operations, without regard for the unique circumstances and the complex and evolving technologies involved in individual mining projects. It is for these very reasons that Directive 074 provides express and explicit discretion in applying the requirements of the directive.

Finally, while the Board permitted flexibility in terms of the amount of and time frames for fines capture, it is noteworthy that, as a result of the conditions imposed in the Approvals, the cumulative fines capture at both projects will ultimately meet or exceed the requirements of Directive 074.

Discussion of Case Law Provided by the Review Applicants

The ERCB notes the two decisions cited by the Review Applicants and finds they do not apply to the present circumstances.

First, the *Seaview* decision involved application of a by-law by an approving officer. The approving officer was not involved in development of the by-law and was in no position to determine its purpose or intent or to interpret it. His only job was to apply and enforce it. By contrast, over several years the ERCB researched, developed, consulted stakeholders on, authorized and then implemented Directive 074 and is, therefore, the foremost authority on its purpose, intent and proper application. Another significant distinction is that the enabling legislation in the *Seaview*, case generally permitted the governing body to regulate subdivision of land “by by-law”, whereas Directive 074 is explicitly referenced in the OSCR itself.

Also, the Review Applicants rely on the Court’s statement in the *Seaview* decision that “there can be no departure from any statute or by-law unless such departure is sanctioned by statute.”² Given that an essential component of Directive 074 is the discretion contemplated in Part 3, the ERCB finds that departure from the requirements of Directive 074 is contemplated, and indeed sanctioned, by the directive. Further, to the extent Directive 074 is incorporated by reference in the OSCR, the discretion is also contemplated, and sanctioned, by regulation.

Finally, the Review Applicants submit that “the Board must exercise the discretion that it does have in the public interest in rigorously enforcing the requirements of the Directive.” As quoted by the Review Applicants, the Court in *Seaview* relied on a statement of the Court in *R. v. Can. Breweries Ltd.*, [1960] O.R. 601, 33 C.R. 1 (H.C.) as follows:

“When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest.”

When the ERCB exercises discretion under Part 3 of Directive 074, it is validly exercising power conferred on it by the OSCR, which are validly made regulations under the OSCA. Based on the Review Applicants’ own submissions and the case noted above, it must be assumed the ERCB is exercising such power in the public interest.

Second, in the *Alberta Wilderness Association* case, the Court found the Minister of Environment could not issue a permit under the *Fisheries Act* (which the Court found was lawful within the internal context of its enabling legislation) that permitted activity that was contrary to the *Migratory Birds Regulations* and that to do so was “contrary to law”. In other words, the problem lay with the fact that a permit validly and lawfully issued under the *Fisheries Act* was, at the same time, in contravention of another regulation (the *Migratory Birds Regulation*). The Review Applicants submit that the intent of Directive 074 is to set specific performance criteria for reduction of fluid tailings and formation of trafficable deposits and the ERCB has acted contrary to law by approving tailings plans that do not strictly comply with Directive 074.

² Paragraph 47

In the present circumstances approval of the Tailings Plans is lawful under both the OSCA and OSCR. Further, in light of the explicit discretion afforded under Part 3 of Directive 074, approval of the Tailings Plans is lawful under the directive itself. In that regard, the ERCB notes the following comments of the Court at paragraph 107 in the *Alberta Wilderness Association* decision:

“107 But there is a way that this result of apparently conflicting legislative provisions can be avoided. Under s.35(2) of the *MBCA Regulations* as above quoted, the Minister can avoid all liability for contravention of s.35(1) of the *MBCA Regulations* by the passage of appropriate regulations. Were the Authorization in the present case made within jurisdiction, and were regulations passed under s.35(2) before the Authorization was acted upon, the applicant's present argument could not be successfully made.”

The ERCB clearly has, and has exercised, authority to amend or pass appropriate regulations governing imposition of requirements regarding tailings disposal and management via the OSCR and/or other instruments such as Directive 074. As indicated above, those regulations (i.e., the OSCR) require operators to comply with Directive 074. Directive 074 imposes specific requirements and also provides explicit discretion to the Board in applying and enforcing those requirements. Hence, in issuing the Approvals, the ERCB has acted lawfully and in a manner consistent with its own legislation and regulations and the explicit discretion contemplated in Directive 074.

In summary, the exercise of discretion by the ERCB in approving the Tailings Plans under Directive 074 was

- i) reasonable in the circumstances,
- ii) not an illegal or improper exercise of discretion,
- iii) not contrary to Directive 074 or the OSCR,
- iv) not contrary to the public interest, and
- v) consistent with the spirit and intent of, and explicit discretionary authority provided in, Directive 074.

Based on the foregoing, the ERCB finds that the Review Applicants have not established an error of law or jurisdiction or an error of fact or raised a substantial doubt as to the correctness of its decision to approve the Tailings Plans. Nor have the Review Applicants alleged new facts, a change in circumstances or facts not previously placed in evidence so as to raise a reasonable possibility that those new facts, change of circumstances or facts not previously placed in evidence could lead the ERCB to materially vary or rescind the Approvals. As such, the ERCB finds the Review Applicants have not met the test to trigger a review of the Approvals under section 39 of the ERCA and/or subsection 48(6)(a) of the Rules.

Accordingly, the ERCB hereby denies the Review Applications.

Yours truly,

A handwritten signature in blue ink, appearing to read "Dan McFadyen", with a long horizontal flourish extending to the right.

Dan McFadyen

cc: Fraser Milner Casgrain LLP, Attention: Mr. Bernard J. Roth (e-mail: Bernard.Roth@fmc-law.com)