By Cindy Chiasson  
Staff Counsel  
Environmental Law Centre

One of the key concepts governing public participation in both the approvals and appeals processes under the Environmental Protection and Enhancement Act (EPEA) is that of the “directly affected” person.1 Those who are directly affected by an application for an approval may submit their views and concerns to Alberta Environment by means of a statement of concern.2 When an approval is issued, those who have a right to appeal the approval include persons who previously submitted statements of concern and are directly affected by the decision to issue the approval.3 Indeed, the question of a party’s status as a “directly affected” person is often one of the first issues dealt with by the Environmental Appeal Board (EAB) in dealing with an appeal.

Background
In this case, the EAB addressed the interrelationship between the approval and appeal processes under EPEA, focusing on the “directly affected” concept. The appellant had submitted a statement of concern to the Director related to an application for a pipeline approval. The Director first asked for further information and subsequently indicated that he would not accept the statement of concern on the basis that the appellant was not directly affected. The appellant sought to appeal that decision to the EAB. Over the course of its dealings with the EAB, the appellant learned that the Director had issued an approval for the pipeline in question and then filed a second appeal with the EAB in relation to the approval.

Decision
A focal point of this appeal was whether the EAB had jurisdiction to deal with the issue of the Director’s rejection of the appellant’s statement of concern. Relying on a previous Court of Queen’s Bench decision on the scope of its jurisdiction4, the EAB found that it must be able to review any of the related procedural decisions made by the Director in issuing an appeal. The EAB found that it did not have jurisdiction to hear an appeal based solely on the Director’s decision to accept or reject a statement of concern. However, it went on to hold that it could review the Director’s decision to accept or reject a statement of concern as part of an appeal based on one of the grounds set out in s.84(1) EPEA, given that in those circumstances it would have jurisdiction to review various elements of the approval process as part of the whole appeal.5

Practical Effects
Ultimately, this case may have the effect of rendering Directors’ decisions on whether parties submitting statements of concern are directly affected somewhat moot. While a Director’s decision on this point is not itself appealable, the opportunity remains for a party who has been deemed by the Director not to be directly affected to appeal based on one of the grounds set out in s.84(1) EPEA and have the EAB deal with the issue of...
its “directly affected” status. This saves such a party the time and cost of having to bring an application for judicial review of the Director’s determination on the statement of concern in order to preserve the possibility of appealing the Director’s ultimate decision on the approval.

Given that this case appears to protect a party’s ultimate ability to commence an appeal, the main practical effect may be to make public participation in the approvals and appeals processes more difficult. The Director is not obligated to provide notice of approvals to parties whose statements of concern have been rejected, which makes it more difficult for these parties given that the appeal period to the EAB begins running upon notice of the issuance of an approval. In this case, the EAB was willing to calculate the appeal period based upon when the appellant had received actual notice of the approval, rather than basing it on the timing of issuance of the approval. However, it is speculative to believe that the EAB would take this position in all appeals before it.

**Policy considerations**

The most troubling aspect of this case is the apparent policy shift by Alberta Environment to a practice that will have the effect of impeding public participation in the regulatory processes. Alberta Environment’s past practice in dealing with statements of concern had been to generally accept and consider all concerns submitted to the Director before making a decision on an application for approval, leaving the issue of a party’s “directly affected” status to be determined by the EAB if necessary. In fact, Alberta Environment had a written policy on this matter indicating that it wished to encourage public participation in regulatory activities and that acceptance of statements of concern should err on the side of inclusivity.6

The only significant impact that a policy of inclusivity would have on the Director relates to the obligation imposed under EPEA to provide notice of decisions to issue or refuse to issue approvals.7 There could be applications that attract many statements of concern, thus obliging the Director to provide notice to all those who submitted if a policy of inclusivity were followed. Otherwise, the Act and its related regulations do not impose any substantive obligations on the Director to take particular actions based on the content of statements of concerns. In fact, there is no statutory requirement for the Director to even consider the content of statements of concern in making a decision on an application for approval.

In light of the stated purposes of EPEA, which include public participation in environmental protection, public policy reasons in support of a more restrictive approach to accepting statements of concern are not readily apparent. Alberta Environment should pursue its stated 1997 policy of erring on the side of inclusivity by accepting all concerns offered and leave the actual determination of “directly affected” status to the EAB.

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2 Ibid., s.70.
3 Ibid., s.84(1).
4 *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* (2000) 33 CELR (NS) 258 (Alta. Q.B.).
5 *Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment re: AEC Pipelines Ltd.*, (20 March 2001) 00-073 (EAB) at 10.
6 Alberta Environmental Protection memorandum from A.R. Schulz, Assistant Deputy Minister, December 1, 1997, Subject: Service Policy on Acceptance of Statements of Concern.
7 Supra note 1, ss.71(1)(e) and 71(3).