

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 2, 2012

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 Gas Plus Inc. and Handel Transport (Northern) Ltd. with respect to *Environmental Protection and Enhancement Act* Environmental Protection Order No. EPO-2010/58-SR and Amendments issued to Gas Plus Inc. and Handel Transport (Northern) Ltd. by the Director, Southern Region, Operations Division, Alberta Environment and Water.

Cite as: Intervenor Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region, Operations Division, Alberta Environment* (02 February 2012), Appeal Nos. 10-034, 11-002, 008, & 023-ID3 (A.E.A.B.).

BEFORE:

Justice Delmar W. Perras (ret.), Board Chair.

SUBMISSIONS BY:

Appellants: Gas Plus Inc. and Handel Transport (Northern) Ltd., represented by Mr. Richard I. John.

Director: Mr. Darren Bourget, Director, Southern Region, Operations Division, Alberta Environment and Water, represented by Ms. Erika Gerlock, Alberta Justice.

Intervenor Applicants: The City of Calgary, represented by Mr. Timothy E. Haufe; Bow Liquor Inc., represented by Mr. Harmam Toor, McLeod & Company; Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Terry Floate and Ms. Heather Cummings, Mr. Andy and Ms. Bonnie Ross, and Mr. Francesco Mele and Ms. Alison Hayter, represented by Mr. Richard C. Secord, Ackroyd LLP; Mr. Tony Pike; Alberta Health Services, represented by Mr. Dennis Stefani, Alberta Health Services; and Shell Canada Limited, represented by Mr. Corbin Devlin, McLennan Ross LLP.

* For all relevant times during these appeals, the Department was named Alberta Environment. However, as of October 12, 2011, the Department was renamed Alberta Environment and Water. For the purposes of this Decision, the Department will be referred to as Alberta Environment.

EXECUTIVE SUMMARY

Alberta Environment and Water issued an Environmental Protection Order to Gas Plus Inc. and Handel Transport (Northern) Ltd. requiring the remediation of a gas station site and portions of a residential and commercial area in Calgary. The remediation is required because a gasoline spill contaminated the gas station site and has migrated from the gas station site into adjacent commercial and residential areas, impacting a number of homes, commercial properties, and city infrastructure. Alberta Environment subsequently issued three amendments to the Environmental Protection Order.

The Environmental Appeals Board received Notices of Appeal from Gas Plus Inc. and Handel Transport (Northern) Ltd. (the Appellants) appealing the Order and subsequent amendments. In response to the Notice of Hearing, the Board received nine intervenor requests.

After reviewing and considering the submissions from Alberta Environment, the Appellants, and the intervenor applicants, the Board granted intervenor status to Mr. Terry Floate and Ms. Heather Cummings, Mr. Fancesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, and Mr. Andy and Ms. Bonnie Ross. These intervenors are residents or property owners adjacent to the gas station site. These intervenors are potentially most impacted by the contamination on and off the gas station site. The Board granted these intervenors the right to participate fully in the hearing.

Bow Liquor Inc. leases and operates a business on the gas station site which could be impacted by the Board's recommendations. The Board determined Bow Liquor Inc, can participate fully in the hearing.

Limited intervenor status was granted to the City of Calgary and Alberta Health Services, because they can provide evidence that is specific to their jurisdiction on matters relevant in these appeals. The Board granted them the opportunity to provide written submissions and orally present their submissions at the hearing.

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I. BACKGROUND

[1] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment and Water (the “Director”), issued Environmental Protection Order No. EPO-2010/58-SR (the “Order”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Gas Plus Inc. (“Gas Plus”) and Handel Transport (Northern) Ltd. (“Handel Transport”). The Order was issued in relation to a gas station site located at 6336 Bowness Road NW, in Calgary, Alberta (the “Site”). The Director issued three amendments to the EPO on April 21, 2011, June 1, 2011, and September 13, 2011.

[2] On December 10, 2010, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Gas Plus Inc. (“Gas Plus”) and Handel Transport (Northern) Ltd. (collectively the “Appellants”) appealing the Order. The Appellants appealed the amendments on April 28, 2011, June 9, 2011, and September 19, 2011,

[3] In response to the Board’s Notice of Hearing, the Board received intervenor requests from Shell Canada Limited,¹ Mr. Terry Floate and Ms. Heather Cummings, Mr. Fancesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Andy and Ms. Bonnie Ross, the City of Calgary, Mr. Tony Pike,² and Alberta Health Services.

[4] Between September 26 and October 7, 2011, the Board received submissions from the Appellants and Director (Collectively, the “Parties”) on the intervenor applications.

[5] The Board notified the Parties on October 11, 2011, that the intervenor applications were accepted with reasons to follow. These are the Board’s reasons.

¹ On October 19, 2011, the Board confirmed the Appellants abandoned their ground of appeal relating to the claim that Shell Canada Limited should be named as a person responsible for some part of the contamination on the site. Therefore, Shell Canada Limited withdrew its intervenor application, and its submission will not be considered in this decision.

² On October 13, 2011, Mr. Pike withdrew his intervenor application, and his submission will not be considered in this decision.

II. SUBMISSIONS

A. Applicants

1. Mr. Terry Floate and Ms. Heather Cummings

[6] Mr. Floate and Ms. Cummings reside on the property directly northeast of the Site and well within the contamination plume. They explained they first became aware of the contamination in February 2010 when they noticed odours in their home. They contacted ATCO Gas and the City of Calgary in July 2010 when the odours became stronger, and they called 911 in August 2010. In November 2010, Alberta Health Services recommended they move out of their residence, because their property was no longer safe for habitation due to the levels of hydrocarbon vapours.

[7] Mr. Floate and Ms. Cummings experienced exposure to the contamination plume, and they wanted the Board to know how seriously their lives have been disrupted by the gasoline leak. They stated their evidence will materially assist the Board in assessing the direct effects of the contamination on them. Mr. Floate and Ms. Cummings believed the remediation procedures required in the Order are necessary to protect their health and safety.

[8] Mr. Floate and Ms. Cummings stated the Appellants have not complied with the Order requiring implementation of a vapour removal program on their property. According to Mr. Floate and Ms. Cummings, the Appellants will not consider sealing foundation cracks.

[9] Mr. Floate and Ms. Cummings stated that as landowners residing within the contamination plume, they are the direct recipients of the adverse impacts of the contamination. If the appeals are successful, they will be directly and negatively affected, and there would be no way to ensure the contamination would be contained or that they will be protected. They believed the Source Removal Program or the Source Containment and On-Site Remediation Program as described in the Order would provide them with the greatest assurance the contamination would be remedied and their health, safety, and well-being would be protected.

[10] Mr. Floate and Ms. Cummings opposed all grounds of appeal presented by the Appellants.

2. Mr. Francesco Mele and Ms. Alison Hayter

[11] Mr. Mele and Ms. Hayter explained their property, one block northeast of the Site, has been contaminated by the gasoline leak from the Site. Their residence is close to completion, but due to the contamination on their property, it is uncertain whether their residence is safe to inhabit. Alberta Health Services recommended Mr. Mele and Ms. Hayter's home be included in the community indoor air sampling program to ensure their health is not endangered by vapour intrusion. They stated air quality monitoring will give them after-the-fact notice if the air quality is poor or acceptable.

[12] The Director informed Mr. Mele and Ms. Hayter that groundwater under their property exceeds certain Alberta Tier 1 Soil and Groundwater Remediation Guidelines, and it is expected that gasoline vapours are in the soil where the groundwater contamination plume is present.

[13] Mr. Mele and Ms. Hayter are seeking assurance the contamination will be remediated and that their health, safety, and well-being will be protected from harmful contaminants.

[14] Mr. Mele and Ms. Hayter stated their testimony will materially assist the Board in determining how amending the Order might affect their interests. They also want to have a greater and more direct involvement in future implementation and enforcement of the Order since the remediation process directly affects their use and occupation of their land.

3. Dr. Augustine Yip and Dr. Monica Skrukwa

[15] Dr. Yip and Dr. Skrukwa's property is 100 metres north of the Site. They were forced to leave their home in January 2011 due to the gasoline leak causing serious health concerns for their family. They did not trust the regulatory authorities to ensure their safety since no one informed them of the situation or offered air testing of their residence. They reluctantly returned to their residence, but decided to look for a new home.

[16] Dr. Yip and Dr. Skrukwa were concerned that, if the appeals are successful, there will be nothing to prevent the contamination from spreading and affecting the health and safety

of their family and of any family who rents or buys their property. Results from monthly air quality testing done in their residence indicate levels of chemicals appeared to be increasing in the spring of 2011. If the Appellants are not correct and the contamination is not contained, then families living in the area would be left vulnerable to further exposure from the contamination.

[17] Dr. Yip and Dr. Skrukwa explained it is difficult to rent their home when it is adjacent to an area of contamination.

[18] Dr. Yip and Dr. Skrukwa reported the results of vapour probes installed in their home indicate there is contaminated groundwater under their property, and gasoline vapours are in the soil under their basement where the groundwater plume is present.

[19] Dr. Yip and Dr. Skrukwa stated their participation at the hearing will ensure their interests will be protected.

4. Mr. Andy and Ms. Bonnie Ross

[20] Mr. and Ms. Ross own an empty lot near the Site where they intended to build their home, but due to the contamination of their land, they are unable to secure a development permit. The City of Calgary indicated the development permit could not be granted until an environmental site assessment was completed, and if the assessment indicated remediation was required, then a remediation or risk management plan must be implemented.

[21] Mr. and Ms. Ross stated they have a direct interest in ensuring the land is remediated in accordance with the Order. They can provide unique and material evidence on how the interests of prospective homebuilders will be affected by the determination of the appeals. They were also dissatisfied with the lack of consultation from Alberta Environment.

5. City of Calgary

[22] The City of Calgary requested its intervenor status be limited to filing a written submission only. It explained it owns adjacent streets and lanes and utilities that are impacted by the off-site contamination, and it owns two properties within 100 metres of the Site. It supported

the requirements of the Order as amended. The City of Calgary stated it would materially assist the Board by providing information on the municipal permitting requirements.

6. Alberta Health Services

[23] Alberta Health Services asked to be able to provide a written submission regarding the health concerns expressed by landowners who applied to intervene and to provide comments on indoor air quality and potentially other issues pertaining to the appeals.

B. Appellants

[24] The Appellants stated the issues of the appeals only peripherally impact the owners whose residences are above the plume and, therefore, all the intervenor applicants should not be allowed to attend at the hearing but be allowed to provide written submissions.

[25] With respect to the specific applicants, the Appellants provided the following:

1. Mr. Floate and Ms. Cummings – An air exchanger was installed in their residence at the Appellants' cost. The Appellants will move Mr. Floate and Ms. Cummings to a rental house while the water and soil outside their home is remediated.
2. Mr. Mele and Ms. Hayter - One test on their property showed low levels of contamination, possibly suggesting contaminated water under the garage. No air tests have been completed at their residence.
3. Dr. Yip and Dr. Skrukwa – Their residence is outside the plume and air quality limits have not been exceeded.
4. Mr. and Ms. Ross – The monitoring well indicates contamination on the front corner of their property.

C. Director

[26] The Director had no objection to the participation of any of the applicants seeking intervenor status.

III. ANALYSIS

A. Legal Basis for Determining Intervenors

[27] The 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.”

[28] 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. Sections 9(2) and (3) of the Regulation provide:

- “(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.”

[29] 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. Landowners

[30] Mr. Floate and Ms. Cummings, Mr. Mele and Ms. Hayter, Dr. Yip and Dr. Skrukwa, and Mr. and Ms. Ross own properties near or adjacent to the Site. The Appellants acknowledged the contamination has migrated off-site and has impacted the landowners’ properties to some degree. It is not clear from the information provided whether the full extent of the impact on the properties has been definitively determined. However, there is no question the landowners have been impacted. Mr. Floate and Ms. Cummings were advised by Alberta Health Services to vacate their homes. Mr. Mele and Ms. Hayter cannot move into their home until air monitoring tests show it is safe to do so. Mr. and Ms. Ross cannot build on their property. Dr. Yip and Dr. Skrukwa are considering moving from their home. It is clear all of these landowners have information that only they can bring forward that is relevant to the Board’s considerations. Their submissions will, therefore, not be duplicative of any other party to these appeals. The Board also notes the landowners are working collaboratively. This should minimize duplication of evidence at the hearing from the landowners’ perspective.

[31] The landowners and residents in the area have a valid concern and interest in the manner in which the remediation work is undertaken to ensure their safety, health, and use and enjoyment of their properties. They, more than any one else, could, or are currently, affected by the off-site contamination.

[32] The Board grants Mr. Floate and Ms. Cummings, Mr. Mele and Ms. Hayter, Dr. Yip and Dr. Skrukwa, and Mr. and Ms. Ross intervenor status, and they can participate fully in the hearing. They can provide a written submission, provide opening and closing comments, present evidence as one panel, and be subject to cross-examination by the Appellants and Bow Liquor and answer questions by the Board.

C. City of Calgary

[33] The City of Calgary has applied to intervene on the basis of its knowledge regarding permitting requirements. This information is clearly within the City of Calgary's knowledge and control. The information may also be beneficial in the Board preparing its recommendations for the Minister.

[34] The City of Calgary owns property within 100 metres of the Site and is responsible for the streets and lanes and associated utilities that run along the Site. The City has an interest in how the Site and off-site areas will be remediated since its properties could be impacted by the remediation technique used. Therefore, the Board grants intervenor status to the City of Calgary.

[35] In its intervenor application, the City of Calgary requested to participate through written submission only. Since there may be questions that the City of Calgary would be the most appropriate body to respond, the Board asks that a representative attend at the hearing in order to speak to the written submission and to respond to questions in cross-examination by the Appellants and Bow Liquor and to questions posed by the Board.

D. Alberta Health Services

[36] Alberta Health Services issued an evacuation order to one residence and recommended other residences be vacated as a result of the contamination plume migrating off-site. Alberta Health Services can provide information on the health effects of the contamination. It is familiar with the Site and the issues raised by the landowners. The Board considers it appropriate to grant intervenor status to Alberta Health Services.

[37] In its intervenor application, Alberta Health Services requested the opportunity to participate through written submissions only. Since the Board may have additional questions that arise from the submission, the Board grants Alberta Health Services the right to file a written submission and requests a representative attend the hearing in order to speak to the written submission and respond to questions. The evidence presented will be subject to cross-examination by the Appellants and Bow Liquor and by questioning by the Board.

E. Bow Liquor

[38] Bow Liquor filed a request to intervene after the Board reminded Bow Liquor there was a possibility it could be affected by the Board's recommendations. Bow Liquor's business premise is located on the Site. Depending on the Board's recommendation to the Minister after the hearing, there is a possibility Bow Liquor's business premise will have to be demolished in order for the Appellants to comply with the Order. It is clear Bow Liquor has a valid interest in the appeals.

[39] Bow Liquor is in a position to provide evidence that none of the other parties or intervenors can present. Its evidence will assist the Board in understanding the affect of the Order on Bow Liquor's business.

[40] The Board grants Bow Liquor intervenor status with the opportunity to participate fully in the hearing, including presenting direct oral evidence and argument, cross-examination of the landowners, the Director, the City of Calgary, and Alberta Health Services, and providing opening and closing statements. Bow Liquor will be subject to cross-examination by the Director and landowners and questioning by the Board.

IV. CONCLUSION

[41] The Board grants intervenor status to Mr. Terry Floate and Ms. Heather Cummings, Mr. Fancesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Andy and Ms. Bonnie Ross, and Bow Liquor Inc. These intervenors are the most potentially impacted by the contamination on and off the Site. They can participate fully in the hearing.

[42] Intervenor status is also granted to the City of Calgary and Alberta Health Services, because they can provide evidence that is specific to their jurisdiction on relevant matters in these appeals. They can provide written submissions and orally present their submissions. They will be subject to cross-examination from the Appellants and questioning by the Board.

Dated on February 2, 2012, at Edmonton, Alberta.

“original signed by”

D.W. Perras
Chair