ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 8, 2011

IN THE MATTER OF sections 91, 92, 95, and 97 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 Amendment No. 1 issued to Gas Plus Inc. and Handel Transport (Northern) Ltd. by the Director, Southern Region, Operations Division, Alberta Environment.

Cite as: Stay Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment*, re: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* (8 July 2011), Appeal Nos. 10-034 & 11-002-ID1 (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, represented by Ms. Erika Gerlock, Alberta Justice.

Interested Persons: The City of Calgary; Bow Liquor Inc.; Ms. Augustine Yip and Dr. Monica Skrukwa; Mr. Terry Floate and Ms. Heather Cummings; Mr. Andy and Ms. Bonnie Ross and Isabel, Hayley, and Brandon Ross; Mr. Francesco Mele and Ms. Alison Hayter; Mr. John and Ms. Melinda Hillier; Ms. Brenda Parai; Mr. John and Ms. Maureen Whitlock; Mr. John Fitzgerald; and Mr. Paul Bauman.

EXECUTIVE SUMMARY

Alberta Environment 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 area in Calgary known as Bowness. The remediation is required because of contamination caused by a gasoline spill at the gas station site. Some of the contamination has migrated from the gas station site into the residential area, impacting a number of homes. On April 21, 2011, Alberta Environment issued an Amendment to the Order. The Amendment directed that work under a Source Removal Program start by May 10, 2011. The Source Removal Program requires the excavation and removal of all contaminated soil from the gas station site to limit further migration of the contamination.

The Environmental Appeals Board received a Notice of Appeal from Gas Plus Inc. and Handel Transport (Northern) Ltd. (the Appellants) appealing the Order. On April 28, 2011, the Appellants also appealed the Amendment and requested a Stay of the Source Removal Program.

After reviewing and considering the submissions from Alberta Environment, the Appellants, and other interested persons on the Stay application, the Board determined that, even though there is a serious issue to be heard, there are significant human health and public safety issues associated with the contamination on the gas station site and the migration of the contamination into the residential area. Alberta Environment ordered the Source Removal Program to start as soon as possible to prevent additional contamination from moving off of the gas station site and further impacting the environment, the residential area, and possibly the river. The Board found that those who might be affected by the further migration of the contamination, particularly the area residents, would suffer a greater harm than the Appellants if the Stay was granted. The public interest also warranted that the status quo, the requirement to carry out the Source Removal Program, remain in effect. Therefore, the Board denied the Stay application.

The Board noted the willingness of Alberta Environment to consider alternate proposals from the Appellants to remediate the site. However, the Board agrees with Alberta Environment that, in the meantime, the Source Removal Program should proceed as ordered. Since the date to start the Source Removal Program has now passed, Alberta Environment will have to establish new deadlines for this work to be done. (The Board notes that new deadlines have since been set.)

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's reasons for denying an application for the Stay of a portion of an Environmental Protection Order. The application was filed on April 28, 2011, by the persons said to be responsible for contamination resulting from a release of gasoline at a gas station site. The gas station site is located in the Bowness neighbourhood of Calgary, approximately two blocks from the Bow River. Some of the contamination has migrated from the gas station site into a residential area, adjacent to the gas station site, impacting a number of homes. The order requires the remediation of the gas station site and the residential area affected by the contamination.

[2] The Stay was requested for only the portion of the Environmental Protection Order requiring that work under a "Source Removal Program" start by May 10, 2011. The Source Removal Program requires the excavation and removal of all contaminated soil from the gas station site in order to limit further migration of the contamination. This requirement was added to the order by way of an amendment issued on April 12, 2011. After receiving and considering written submissions, the application for the Stay was denied on May 24, 2011 with reasons to follow. An aerial view, showing the gas station site and its proximity to the residential area and the Bow River is attached as Appendix A[1] to provide a context for these reasons.

II. BACKGROUND

[3] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment (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. and Handel Transport (Northern) Ltd. The Order was issued in relation to a gas station site located at 6336 Bowness Road NW, in Calgary, Alberta (the "Site").

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[1] Tab 64 of Alberta Environment's Record filed on January 28, 2011.

[4] 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.

[5] The Order required the Appellants to prepare: (1) a delineation plan to determine the extent of the contamination, and (2) a remediation plan to clean up the contamination. The remediation plan was to begin no later than March 4, 2011 and be completed by August 31, 2011. The Notice of Appeal argues that: (1) the Order should have been issued only to Handel Transport (Northern) Ltd., (2) that the Director exceeded his jurisdiction when he issued the Order, and (3) it may also be necessary to name Shell Canada Ltd. in the Order.[2] The main issue in the first appeal (EAB 10-034) was which of the three companies involved with the Site should be liable for the cost of the work required by the Order. The appeal does not challenge that the essential elements of the Order.

[6] On December 17, 2010, the Board wrote to the Appellants and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the

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[2] The Notice of Appeal (EAB 10-034) asked for the following relief:

"1. A declaration that only [Handel Transport (Northern) Ltd. (HTNL)] is the owner of the [Site] and that pursuant to section 113, and in context of section 240, of the EPEA that HTNL is the 'person responsible' for the leak of hydro-carbons.

2. A declaration that the [Order] is not directed to [Gas Plus] as HTNL is the owner of the property and not [Gas Plus] and is responsible for the tanks, pumps and sumps located on the property and which were the cause of the release of the substance.

3. A declaration that aspects of the [Order] are outside of the jurisdiction provided to a Director pursuant to section 113 of EPEA.

4. In accordance with the verbal commitment of [the Director] made to HTNL, that all of the time-lines in the [Order] be extended. Such an extension is reasonable in accordance with the nature of the substance released (hydro-carbons) and the nature of the adverse effect contemplated by such release. Moreover, the time-lines imposed by the [Order] are not realistic in light of the availability of contractors and the time required to fully remediate the hydro-carbons released. HTNL has been advised by O'Connor Associates Environmental Inc. that the remediation process may take as long as five years to complete. In this regard, HTNL and [Gas Plus] take the position that the time-lines imposed are patently unreasonable[.]

5. If the level of remediation required by the [Order] requires compliance with a higher standard than that met by Shell [Canada Ltd. (Shell)] in 1997 that the [Order] be extended to and directed to Shell the prior owner of the [Site].

6. That the [Director] be directed to re-issue an 'Information Bulletin' which correctly states the circumstances surrounding the release of hydro-carbons by HTNL. More particularly, the re-issued Information Bulletin should indicate that HTNL is the owner of the subject site and that HTNL has acted reasonably in taking steps to mitigate the impact of the release of hydro-carbons on adjacent residences."

Director of the appeal. The Board also asked the Director to provide the Board with a copy of the records (the "Record") relating to the appeal, and available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received on January 18, 2011 and was subsequently provided to the Appellants.[3]

[7] On January 24, 2011, the Appellants notified the Board that they were working with the Director and asked that the Parties not be required to provide dates at this time. The Board granted an abeyance for two weeks to allow discussions to continue. A further abeyance was requested on February 9, 2011, which the Board granted giving the Parties until April 22, 2011 to continue their discussions.

[8] On April 21, 2011, the Director issued an Amendment to the Order ("Amendment No. 1")[4] changing the dates to receive documents and requiring the start of a "Source Removal Program" at the site by May 10, 2011. On April 28, 2011, the Appellants appealed Amendment No. 1 (EAB 11-002) and requested a Stay of the Source Removal Program portion of Amendment No. 1.

[9] On May 4, 2011, the Board asked the Parties, and any interested persons that might be affected by a Stay, to provide submissions on the following questions:

1. What are the serious concerns of Gas Plus Inc. and Handel Transport (Northern) Ltd. that should be heard by the Board?
2. Would Gas Plus Inc. and Handel Transport (Northern) Ltd. suffer irreparable harm if the Stay is refused?
3. Would Gas Plus Inc. and Handel Transport (Northern) Ltd. suffer greater harm if the Stay was refused pending a decision of the Board, than those that may be affected by the requirements of the Order?
4. Would the overall public interest warrant a Stay?
5. Is it appropriate to consider submissions on the Stay from persons who may be affected by the Order, Amendment No. 1, and the Stay application?

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[3] The Board received a supplemental record from the Director on May 11, 2011 and provided it to the Appellants on May 16, 2011.

[4] A subsequent amendment (Amendment No. 2) was issued after the Board considered this Stay application.

[10] On May 9, 2011, the Board granted a temporary Stay of the Source Removal Program in order to collect written submissions on the Stay application and accommodate its consideration of the Stay application. (This temporary Stay remained in place until May 24, 2011.)

[11] Between May 10 and May 20, 2011, the Board received submissions from the Parties and from interested persons on the Stay questions.[5]

[12] The Board notified the Parties on May 24, 2011, that the Stay application was denied with reasons to follow. As stated, these are the Board's reasons.

III. SUBMISSIONS

A. Appellants

[13] The Appellants explained they have owned and operated a family run gas station for many years. They stated that in May and June of 2010, the Director expressed concern about a gasoline (hydrocarbon) release that became the subject of the Order and Amendment No. 1. The Appellants explained they found and repaired a small leak in their distribution system, but about 7,000 to 9,000 litres of gasoline were released into the ground before the leak was repaired, of which between 3,000 and 4,000 litres were recovered prior to the issuance of the Order.

[14] The Appellants explained that there is a well-delineated plume that has migrated in a north east direction under some of the homes in the residential area and towards the Bow River. The Appellants stated they have complied with the Director's directions and the terms of the Order. The Appellants noted that, even though the Director was aware of the release earlier in 2010, he did not issue the Order until December 3, 2010, and the Order did not, at that time, include a Source Removal Program.

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[5] Interested persons who provided submissions were: The City of Calgary; Bow Liquor Inc.; Ms. Augustine Yip and Dr. Monica Skrukwa; Mr. Terry Floate and Ms. Heather Cummings; Mr. Andy and Ms. Bonnie Ross and Isabel, Hayley, and Brandon Ross; Mr. Francesco Mele and Ms. Alison Hayter; Mr. John and Ms. Melinda Hillier; Ms. Brenda Parai; Mr. John and Ms. Maureen Whitlock; Mr. John Fitzgerald; and Mr. Paul Bauman. The individuals who provided submissions live in the area impacted by the contamination.

[15] The Appellants explained they appealed the Order, as well as Amendment No. 1, because of the unrealistic timelines imposed. The Appellants acknowledged the timelines in the Order have been extended based on their cooperation with the Director. They also acknowledged that they provided the delineation plan to the Director after the January 14, 2011 deadline in the Order, but it was not approved by the Director until February 2, 2011, so the work contemplated by the plan could not be completed by the February 5, 2011 deadline included in the Order. The Appellants stated the results of the delineation plan were provided to the Director the week after the issuance of Amendment No. 1, during the week of May 2, 2011. The deadline in the Order for submitting a remediation plan was also extended by agreement with the Director. However, before the remediation plan could be submitted, the Director issued Amendment No. 1 requiring a Source Removal Program to start by May 10, 2011 and be completed by June 10, 2011.

[16] The Appellants say there is a serious issue that should be heard by the Board because:

a) The requirement to start the Source Removal Program was issued without evidence to support the objective conclusion that there is sufficient contamination to justify excavating to the water table four to five metres below the surface and to remove all contaminated soil and water from the Site. The Director failed to recognize that the contamination plume "off-site" (the portion of the contamination that migrated into the residential area) has the same characteristics in some places as the "on-site" contamination (the portion of the contamination that has remained on the Site). It is speculation that the water table will rise during the 2011 spring runoff to draw additional contamination off-site and possibly into the Bow River. The Source Removal Program should be stayed pending a more complete exploration of the necessity and impact of the program and alternatives to the program. There has been one rise and fall cycle since the Director became aware of the hydrocarbon release, and the only noted adverse impact was vapours entering into four homes. There has been no impact to the river.

b) The Director was aware of the release when it occurred in the first half of 2010. The contamination has predominantly migrated off-site, so the larger portion of the plume is now off-site, closer to the river, compared to the portion remaining on-site. The Source Removal Program only involves on-site removal and does not address the portion of the plume that is now off-site.

c) Amendment No. 1 was issued without prior notice to the Appellants. The Director has not governed himself in accordance to Alberta Environment guidelines.

d) The requirement to start the Source Removal Program was based on public perception and pressure and speculation that the water table will rise.

[17] In response to the irreparable harm part of the Stay test, the Appellants submitted the following:

a) The Director has not served Amendment No. 1 on Bow Liquor Inc. or on the business in the office building adjacent to Bow Liquor Inc. These businesses will be affected by the requirement to start the Source Removal Program, and if they are not given the opportunity to participate and the Stay is granted, there would be a breach of the principals of natural justice.

b) Compliance with the program would cause the loss of the Bow Liquor Inc. business and may have consequences to the businesses in the office building adjacent to Bow Liquor Inc. Without proper limitations in place, the program will lead to the destruction of the building on the Site, without any material gain made as a result.

c) Without proper planning and a reasonable amount of time to complete the Source Removal Program, risks will unnecessarily be created. With rains and warmer temperatures, the excavation will create a risk of exposure of gasoline vapours to the community. The excavation will cause structural risk to the deep utility lines crossing the adjacent roadways.

d) Amendment No. 1 and the Source Removal Program were ordered without sufficient foresight of their impacts.

[18] On the balance of convenience issue, the Appellants submitted:

a) The Director is not justified in ordering the Source Removal Program, and the speculative benefit of completing the program is outweighed by the need to consider alternatives and not cause irreparable harm.

b) The timeline in Amendment No. 1 in respect of the Source Removal Program is patently unreasonable. There is insufficient time to establish a plan to safely conduct the steps necessary to comply with the program. It would take from one week to at least one month to obtain the necessary permits and approvals to conduct the required work.

c) The manner in which the Director has managed the release is significant in assessing the balance of convenience. The Appellants cooperated with the Director prior to and after the issuance of the Order, but they were not told earlier they would have to complete the Source Removal Program, which would have permitted them to develop a plan to be implemented by June 10, 2011. The Source Removal Program may be a "…visual display to appease stakeholders based on the delay of Alberta Environment."[6] The June 10, 2011 deadline to complete the work was designed to have the Appellants fail to comply.

d) The property and adjacent properties are built on predominantly unconsolidated to weakly consolidated river sand gravel and coble. Without proper planning, any excavation will create instability and have a greater impact on the community.

e) Treatment facilities might not be able to handle the volume of soil and ground water that would have to be removed.

f) The benefit of the public at large does not outweigh the interests of Bow Liquor Inc., the occupants of the adjacent neighbouring commercial building, and the danger created by a hastily performed program. Recent test results indicate the

impact on the indoor air at the four homes affected has been abated and is being effectively managed.

g) The remaining release can be effectively and safely dealt with by *in situ* processes.

h) The urgency suggested is without merit, and the Source Removal Program has been ordered based on speculation and lack of scientific evidence. The contamination plume has been allowed to migrate off-site and it will continue to manage it. The speculated benefit of the Source Removal Program is outweighed by the actual prejudice associated with the expense and negative impact.

[19] The Appellants submit the public interest warrants a Stay for the following reasons:

a) Public safety is paramount, but without proper planning, the Source Removal Program will create a situation where the surrounding properties may be jeopardized.

b) The Source Removal Program will not deal with the contamination plume that has been delineated and is substantially off-site. There is little evidence the remaining contamination in the soil on-site is in sufficient amounts that the required trenching and removal would do anything to protect the public.

c) It is unclear if the Director was pressured to rush Amendment No. 1. The Source Removal Program needs to be studied more.

d) The Director must maintain his objectivity and create a workable plan, perhaps based on alternatives brought forward by the Appellants.

[20] The Appellants supported the right of Bow Liquor Inc. to make submissions on the Stay. They stated there are other occupants and owners in the commercial building adjacent to Bow Liquor Inc. that may not be aware of Amendment No. 1 and Stay application who will be affected by Amendment No. 1 and whose input may assist in assessing the necessity of the Stay.

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[6] Appellants' submission, dated May 10, 2011, at page 9.

B. Director

[21] The Director noted the Stay application is only in respect to those portions of Amendment No. 1 that require the Appellants to undertake removal of all substances from the Site that exceed the Alberta Tier 1 Criteria (the Source Removal Program). It does not apply to the Order or other portions of Amendment No. 1.

[22] The Director provided a brief history of the site:

a) In the spring of 2006, the Director received a public complaint from an adjacent landowner (6335 Bow Crescent) regarding groundwater contamination discovered while preparing for development on his property. On June 15, 2006, the Director contacted Gas Plus to discuss the issue but was advised Gas Plus was not responsible for that contamination, and it would provide information to show the groundwater contamination was not theirs. The Director requested a plan be provided by July 17, 2006, to fully delineate the extent of the groundwater contamination and take any necessary risk abatement measures. On September 25, 2006, Gas Plus' consultant concluded the contamination did not originate from the Site.

b) On April 8, 2010, the Calgary Fire Department received a public complaint regarding gasoline smells from 6324 Bowness Road, a commercial building immediately adjacent to the site. When the Calgary Fire Department contacted Gas Plus, it was advised that no leaks were occurring at the gas station as the leak detection system was normal. The Calgary Fire Department reported the incident to Alberta Environment. The Appellants did not make a report of a substance release as required by section 110 of EPEA.

c) As a follow-up to the Director's June 21, 2006 letter, a letter dated May 3, 2010, was sent to Gas Plus advising a referral to the Compliance Branch of Alberta Environment had started in response to Gas Plus failing to take adequate steps to delineate any potential impacts it might have caused on 6335 Bow Crescent due to a possible release of gasoline in 2006. Gas Plus was also required to comply

with section 112 of EPEA in relation to investigating and remedying any effects of a release of any substance from the site. The landowner of 6335 Bow Crescent notified the Director on May 10, 2010, that a recent sample of a well on the Site had discovered free petroleum product in the groundwater monitoring well. The Director requested Gas Plus take immediate measures to respond.

d) Gas Plus responded on June 7, 2010, explaining there was a small leak in the fuel flex line that resulted in gasoline travelling to the pump sump, but a faulty gear clamp allowed the product to escape from the fuel pump sump to the surrounding soil. Repairs were completed. Gas Plus advised it would drill test holes to determine the scope of the issue. No estimate of the quantity of the release in 2006 or the size of the contamination plume was provided.

e) Gas Plus did not respond to the April 8, 2010 incident during the spring of 2010.

f) On August 4, 2010, the Calgary Fire Department called Alberta Environment reporting gasoline odours in the basement of the home at 6323 Bow Crescent. The odours had been ongoing for six to eight months.

g) On August 5, 2010, Gas Plus confirmed the source of the leak was a bad connection in a fuel pump, which was repaired. It was unsure of the amount of spill, but records indicated 7,000 to 9,000 litres over a few months. Gas Plus included the actions it was taking. The Director reminded Gas Plus on September 1, 2010, of the urgency of the situation to respond to the release and to submit a remedial plan as soon as possible.

h) Between September 1, 2010 and December 3, 2010, when the Order was issued, there were numerous communications between the Director and Gas Plus. The Order required the Appellants to delineate the contamination plume and to develop a plan to remediate the gasoline release to applicable criteria.

i) Alberta Health Services issued orders to Gas Plus on December 29, 2010 and on January 19, 2011, taking the lead jurisdiction over the indoor air quality and public health issues.

j) Gas Plus submitted the delineation plan on January 12, 2011, and the Director provided comments on January 19, 2011. The Director asked for additional technical information after Gas Plus provided a second version of the delineation plan. The Director then met with Gas Plus on February 1, 2011. The delineation plan was approved on February 2, 2011. The Director extended the original dates for completion of the delineation work because the Appellants had up to that point provided inadequate information.

k) The Appellants provided a number of reports, analytical results, and information to the Director, and the Director requested additional information. On March 11, 2011, the Director met the Appellants to discuss the delineation report and the next steps, including the Director's concern over the potential migration of contamination off-site as groundwater levels rose in the spring. The Appellants were advised to immediately implement on-site delineation to determine the potential need for on-site source removal.

l) In late March 2011, the Director formed the Alberta Environment Technical Team (the "Team") to provide technical support and advice regarding technical matters related to the Site. The Team included an independent consulting firm, CH2MHill Canada ("CH2MHill"), an Alberta Environment contaminated sites specialist, and an environmental specialist from the City of Calgary. The Team identified a number of gaps in the reports and data filed by the Appellants. The Team made a number of recommendations for additional information in order to fully understand the characteristics of the contamination on-site and off-site to complete the delineation and start to develop a remedial plan.

m) Just prior to the time the Director contemplated issuing Amendment No. 1, he asked to meet with the Appellants to discuss the amendment, including the Source Removal Program, but the request was refused.

n) On March 29, 2011, the Team discussed with the Appellants that it was standard practice for the owner of the site or the polluter to develop and submit a conceptual site model.

o) CH2MHill reviewed several options for remedial technologies that would apply to the Site, but they cited

> "…a lack of characterization of the Site and spill sources, as the elements in their recommendation for excavation of source materials as the 'preferred' remedial approach on the Site, also taking into account the risk to residences from the continued migration of contaminants from the Site."[7]

p) Test pits dug on the site on March 17, 2011, identified significant soil contamination between the 4.0 and 5.0 metres depth.

q) Amendment No. 1 was issued April 21, 2011, directing removal of all source material from the Site (the Source Removal Program).

r) Alberta Health Services issued an order entitled "Unfit for Human Habitation" under the *Public Health Act*, R.S.A. 2000, c. P-37, preventing the re-occupation of the rental accommodation at 6319 Bow Crescent. There are three other residences north of the Site that have been impacted. The January 19, 2011 Alberta Health Services order required the installation of effective soil vapour intrusion interception technology and a demonstration that acceptable air quality exists at these three residences. Although residents were advised to vacate their homes, the owners of one of the properties decided to stay.

s) Other off-site residential impacts have been confirmed on a number of the residential properties between the Site and the Bow River and non-residential impacts are suspected in the adjacent business.

t) The Appellants did not monitor the river in 2010, so it is not known if any contamination was released into the Bow River. Alberta Environment has done some monitoring of the Bow River in 2011, and no confirmed impacts have been found.

[23] In response to the first step in the Stay test, the Director stated there are serious issues under consideration in the appeals that are not just limited to the Appellants. The Director

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[7] Director's submission, dated May 16, 2011, at paragraph 54.

explained the Order was issued in response to his concerns that the Appellants were not taking adequate proactive and efficient actions to deal with the large release of gasoline. The Director was not advised of the magnitude of the release until August 5, 2010. Amendment No. 1 was issued April 21, 2011, based on his concerns that, with the missing site characterization and important technical data that had been previously requested of the Appellants, there was a significant lack of data which prevented the Appellants from developing a remedial plan. The Director was also concerned over the ongoing environmental risk and risks to nearby third parties (the persons living in the residential area) if the source of the contamination was not removed from the Site to prevent further off-site migration.

[24] The objective of the Source Removal Program is to prevent the further progression of off-site contamination to other off-site areas, including residential homes, commercial properties, city lands, and the environment in general. The Director is aware that other off-site "hotspots" might also have to be excavated.

[25] The Director submitted that the timing of the removal of the source contamination is a serious issue to prevent further off-site migration. As groundwater flows increase from upland areas to the nearby Bow River, the flow rate and height of the water table will increase and intrude into the impacted soil zone. This could potentially mobilize the contamination and impact the aquifer and the Bow River to which it is hydraulically connected and only two blocks away from the Site.

[26] The Director noted that, since he was not advised of the size and scope of the gasoline release until August 2010, he could not have prevented the first cycle of groundwater movement from occurring. The loss of one hydrogeological cycle is due to the Appellants' failure to report the gasoline release pursuant to their obligations under EPEA and then to take adequate remedial actions, including their failure to monitor the Bow River, to determine if the contamination had caused off-site impacts.

[27] The Director noted the test pits on-site indicate significant levels of contamination that, if carried away by the groundwater, may continue to cause greater off-site contamination or contaminate areas that are presently not impacted.

[28] The Director submitted that the issue is serious in that three homes have been impacted, other adjacent properties have contaminated groundwater under them, and other properties could be potentially impacted.

[29] The Director believes the Team had ample reasons for recommending the Source Removal Program as the best option in the circumstances because:

1. the source of the groundwater contamination had not been delineated;
2. the geology, hydrogeology, and geochemistry of the site and surrounding area had not been well defined;
3. the impacts on indoor air quality of the nearby homes reached the point of temporary evacuation;
4. the Bow River is approximately 200 metres north of the site;
5. the gravelly substrates would enable the substances to be mobile and migrate from the site; and
6. it is relative quick and effective to getting rid of the source substances, which could otherwise cause on-going contamination of off-site areas.

[30] The Director submitted the Team had ample scientific rationale for recommending that, in the absence of better site and source characterization data, and given the risks to the environment and residential area, the Source Removal Program was the most prudent method of ensuring that a greater volume of contamination did not migrate off-site.

[31] In response to the question regarding irreparable harm, the Director submitted the harm suggested by the Appellants are all losses or harms that can be quantified and compensated for monetarily.

[32] The Director submitted the Appellants' argument that they would suffer irreparable harm due to the timelines in Amendment No. 1 does not relate to irreparable harm and should not be considered in this part of the test. If the Board considered it relevant, the Director submitted that he has already indicated to the Appellants that the deadlines in the Order and Amendment No. 1 are adjustable to some degree, provided the Appellants showed a plan is being developed and progress is being made toward compliance. The Director explained the timelines specified in an order are the best estimate of the time required given practical considerations. The Director stated a timeline is also based on the imminence or urgency of the

situation. The Director noted that the Appellants have not provided any reasonable alternatives for the Director to consider.

[33] The Director submitted that, given the Appellants have not established that irreparable harm will be caused to them or any third parties that cannot be compensated monetarily; they fail the second branch of the Stay test.

[34] In response to the question who would suffer the greater harm, the Director submitted the Appellants had knowledge of the size and magnitude of the release of substances for a longer period than the Director or any of the impacted third parties. The Director noted the third parties have had to deal with the impacts on a daily basis, particularly those who had to vacate their homes or continue to live with uncertainty over their health and well-being.

[35] The timelines can be adjusted to some extent to allow the Source Removal Program be carried out without undue inconvenience to the Appellants while still meeting the intended objectives.

[36] The Director submitted the Appellants failed to act in a reasonable and diligent manner as required under EPEA to address the effects of the spill without the necessity of orders being issued to compel action.

[37] The Director submitted the Appellants failed to take sufficient initiative on their own since they learned of the magnitude of the spill, including: (1) failing to report the spill as soon as it occurred; (2) their reluctance to deal with the release more proactively and diligently on their own; and (3) their lack of willingness to appropriately delineate the contamination as required by the Order.

[38] The Director noted it is not the duty of Alberta Environment to manage a release. Based on the polluter pays principle which underlies EPEA, it is the duty of the polluter.

[39] The Director submitted the Appellants' statement that the benefit of the public does not outweigh the interests of Bow Liquor Inc. is misguided and cannot be given much weight. The Director stated commercial interests can be compensated monetarily.

[40] The Alberta Health Services orders remain in place and, therefore, in the Director's view it cannot accurately be said that the indoor air issue at the three homes has been

abated. The indoor air quality at the three homes is being managed, but the risk continues to exist without the continued operation of the vapour-extraction systems.

[41] The Director submitted the balance of convenience favours not granting the Stay as the impact on the residents, adjacent property owners, and the City of Calgary, far outweighs any inconvenience the Appellants would suffer if the Stay was not granted. The Director acknowledged the Appellants have a commercial interest, but the impacts on them cannot outweigh the concerns of the families for their health, well-being, and uncertainty over when they will be able to return to their normal lives.

[42] The Director submitted the public interest in this instance demands the Stay be denied. Three residences have been impacted and others might be impacted with the continuing off-site spread of the substances. Data and reports submitted to date indicate adverse environmental impacts, including soil contamination, groundwater contamination, and possible risks of ongoing contaminate migration nearer the Bow River.

[43] The Director noted his legislative duty to protect the public interest under section 2 of EPEA.

[44] The direction to conduct the Source Removal Program was based on an assessment of the risk to the environment, impacts to off-site third parties, and on a significant gap in the data the Appellants should have provided. The Appellants' suggestion the Director was influenced by political motivation was, in his view speculative, inflammatory, and completely without merit, and cannot be considered in the context of the Stay application. That allegation should not be given any weight.

[45] The Director considered it appropriate for the Board to consider submissions by any affected person, including nearby residents, businesses, the City of Calgary, and Bow Liquor Inc.

C. Rebuttal Submission

[46] The Appellants referred to a letter they received from Tiamet Environmental Consultants Ltd. ("Tiamet") and submitted that, based on the letter, excavation could not be

completed until August 2011 at the earliest, which is not soon enough to avoid speculated impacts from the seasonal runoff.

[47] The Appellants stated that all matters relating to the earlier investigation had been satisfied and the Director was notified. They were advised by the Director in May 2010 that free hydrocarbons were found in an existing monitoring well located on the site.

[48] The Appellants stated the City of Calgary cannot eliminate statutory and regulatory requirements and the right that stakeholders have to obtain necessary legal and consulting advise.

[49] The Appellants argued that, even if the Source Removal Program had to be done, "…the time-lines imposed are very likely impossible and certainly improbable, invasive and interfering, overly expensive (particularly in light of the larger plume) and accordingly patently unreasonable."[8]

[50] The Appellants argued it is speculation that Bow Liquor Inc. can arrange to move its business, and if Bow Liquor Inc. is required to vacate the property, the business would be ruined and, therefore, irreparably harmed.

[51] The Appellants stated that excavation of the entire site would cause irreparable damage to the operation of the Gas Plus Inc. business at the site. They noted that excavation of the entire site could cause irreparable damage to the adjacent building and irreparably harm the businesses in that building.

[52] The Appellants stated excavation would have little effect on the release that occurred in May 2010 since one seasonal cycle has occurred and the plume has been created. The Appellants argued that the burden of excavating the site outweighs the benefit and favours the granting of a Stay to allow it to deal with the site without the requirement to excavate.

[53] The Appellants submitted the Director's comment that the groundwater rate would increase in spring is conjecture since there is no proof. They argued the lack of knowledge of site characteristics is not a scientifically defensible reason for ordering the

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[8] Appellants' submission, dated May 20, 2011, at page 2.

excavation. The Appellants stated the delineation of the release was done in accordance with all deadlines imposed, and at no time did the Director ask for a conceptual model.

[54] The Appellants argue Amendment No. 1 was issued on a speculative basis rather than on a reasoned, scientific basis. This is because the recommendations provided by the Director's technical consultants, CH2MHill, noted their evaluations and recommendations were at the conceptual level due to limited site characterization data. CH2MHill indicated additional information might result in different recommendations. The Appellants submitted the public interest is not served by upholding an order which is speculative and based on incomplete information.

[55] The Appellants stated there is an underestimated impact on the community and surrounding businesses. They were advised the requirement to do a complete excavation is unheard of in these circumstances and, given the amount of hydrocarbons released, it is usually treated *in situ*. They argued that, given industry practice, the justification for excavating the site may be unprecedented and difficult to justify on the basis of public interest.

[56] The Appellants noted the following from a letter provided by Tiamet:

a) The fuel leak has been identified and corrected, so no further fuel is entering the plume.

b) One complete hydraulic cycle has occurred and, other than the current houses impacted, no additional residences were impacted and there is no known effect to the Bow River.

c) The ingress of vapours into the impacted houses has decreased and they might be ready for re-occupancy.

d) A least one off-site monitoring well has exhibited free liquid gasoline product, and there is a potential for other small pockets of liquid product. Source removal restricted to the gas station property does not reduce the potential for other houses or the Bow River to be impacted.

e) Moving polluted material from one location to another is not Alberta Environment's preferred option.

f) The open excavation is a risk to the public and the environment due to the: (1) release of gasoline vapours into the atmosphere; (2) potential of damaging deep utilities while shoring the excavation: (3) potential impacts on the stability of the foundation of the adjacent building; (4) the need for an off-site staging area for storage tanks and equipment; (5) secondary risks of public exposure from transporting contaminated material off-site; and (6) entire plume should be addressed.

g) The Director should reconsider the Source Removal Program or delay Amendment No. 1 to properly address the data gaps identified by the Director and to determine the most appropriate and effective resolution for all stakeholders.

D. Interested Persons

[57] The Board received submissions from 20 interested persons, including the City of Calgary, Bow Liquor Inc., and neighbouring residents. The neighbouring residents and the City of Calgary opposed the granting of the Stay. In general, they argued that the Appellants need to move as quickly as possible to deal with the release and the Source Removal Program will assist with this. Beyond this, the Director's submission adequately represented the arguments advanced by the neighbouring residents and the City of Calgary, and the Board therefore views it as unnecessary to provide a detailed summary of their submissions.

[58] The Board also received a submission from Bow Liquor Ltd. Bow Liquor Inc. is a tenant operating a retail business in the building located on the gas station site. If the Source Removal Program is implemented the building will likely have to be demolished. If this happens then Bow Liquor Inc. will, at a minimum, be required to cease operations on the site for a period of time and may, according to the submission of the Bow Liquor Inc. be "put out of business."[9] The Board has reviewed the submissions of Bow Liquor Inc. Their arguments are also advance by the Appellants in the submission reviewed above. These submissions have been fully considered but do not have to be repeated.

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[9] Bow Liquor Inc. submission dated May 16, 2011, page 2.

IV. STAY TEST

A. Legal Basis for a Stay

[59] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."[10]

[60] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[11] and *Stelter,*[12] is adapted from the Supreme Court of Canada case of *RJR MacDonald.*[13] The steps in the test, as stated in *RJR MacDonald,* are:

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally,

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[10] Section 97 of EPEA also provides:

> "(3) Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,
>
> (a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and
>
> (b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

[11] *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* re: *Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

[12] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

[13] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon,* [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 41.

> an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[14]

[61] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[15]

[62] The second step in the test requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[16] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*,[17] the Alberta Court of Appeal defined irreparable harm by stating:

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be denial of justice."[18]

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.[19] The damage that may be suffered by third parties may also be taken into consideration.[20]

[63] The third step in the test is the balance of convenience: "…which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a

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14 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 43.

15 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 50.

16 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110.

17 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

18 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

19 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

20 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

decision on the merits."[21] The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,[22] third parties who may suffer damage,[23] or if the reputation and goodwill of a party will be affected.[24]

[64] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test.

[65] The environmental mandate of this Board requires the public interest be considered in appeals before the Board. Therefore, the Board has assessed the public interest as a separate step in the test. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[25] The effect on the public may sway the balance for one party over the other.

B. Analysis

[66] The Parties agree there is a serious issue that needs to be heard, so the first step of the Stay test has been met. The appeal raises serious issues about when and how on-site contamination is to be removed, as well as at whose expense. The Order and Amendment No. 1 were issued in response to hydrocarbons migrating from a contaminated site and affecting persons (including peoples' homes) and the environment in the adjacent area. The Order was issued to ensure the work was completed in a timely manner, and the Parties have been in discussions since prior to the issuance of the Order. The Appellants seek to Stay the portion of the Order that would force it to begin removing contaminated soil from the site and to expedite the testing and planning involved. The Appellants do not disagree that this work needs to be done to remediate the gas station site and affected residential areas.

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21 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

22 *MacMillan Bloedel* v. *Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

23 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

24 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

25 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 66.

[67] The second step is to determine whether the Appellants would suffer irreparable harm if the Stay is not granted. The concerns expressed by the Appellants relate to the costs of conducting the excavation, the time required to conduct the work, the displacement of a tenant and its retail business as well as the Appellants' gas station business.

[68] While the Board believes that these concerns can be converted into monetary terms, the Board accepts there may be some question as to who could pay these costs in the event it was determined that the Appellants' appeals were successful. While the Director is statutorily protected against a claim in damages, in reviewing the Notice of Appeal the Board notes that the Appellants accept that the spill occurred and that some form of remediation is necessary. Instead, they argue that only one of them (Handel Transport (Northern) Ltd.) should be held responsible or alternatively that Shell Canada Ltd. should also be held responsible. Further, with respect to the Amendment No. 1, what the Appellants are primarily arguing about is how the clean up should be carried out.

[69] The third step in the Stay test is to assess who will suffer the greater harm, the Appellants if the Stay is granted or the Director if the Stay is not granted. In this respect, the Director is representing the environment and the public interest, which the Board has previously characterized as the fourth step in the test for granting a Stay. In this case, in looking at the greater harm step, the Board will also look at the public interest element of the test. In the Board's view, this is the crux of the matter, and it is in taking into account the balance of convenience and the public interest where the Appellants' application for a Stay fails.

[70] The Appellants accept there is contamination, that at least one of them is a person responsible for the contamination, that the contamination has migrated off-site, and that at least one of them is responsible for the remediation of the contamination. It appears the outstanding issues are the amount of contamination still present at the gas station site and the timeline for starting and completing the remediation work.

[71] The Order and Amendment No. 1 were issued because of a detrimental impact to the environment with the release of a contaminant and, as of yet, a failure to contain the contaminant. Alberta Health Services required one home (a rental property) to be evacuated because of vapours entering the home from contaminants that had migrated off-site and it was

strongly recommended that two other homes should be vacated.[26] This clearly demonstrates there are public impacts due to the release of these contaminants.

[72] The Board notes that, based on the submissions provided and the Board's experience, it appears the contaminants are migrating from the gas station site quite quickly. Additional evidence might prove otherwise, but without this additional information, the Board appreciates the concerns of the Director of ensuring further contaminants do not migrate off-site. While the current information indicates that the contamination has not reached the river, this possibility remains a concern, and if it were to occur it would be a significant issue. The risk of this happening is at least diminished once the contaminants remaining on-site are removed. This is one of the main purposes of the Source Removal Program. The longer it takes before the source is removed, the greater the likelihood of the hydro-carbons continuing to migrate from the site and moving closer to the river, and further impacting the homes in the area.

[73] In issuing Amendment No. 1, the Director required the Appellants to start removing all of the contaminated soil from the gas station site. The Appellants argued this is an excessive method and other methods are available that would be just as effective and less invasive. The problem with this argument is that the Appellants have been given numerous opportunities to present information to support these alternatives or to begin implementing them, and have failed to so. In effect, the Appellants are requesting the Stay to give them more time to do what they have put off doing up to this point.

[74] The problem facing the Director is the need to ensure any remaining product on-site does not migrate off-site, and without more detail of the site and the options being considered by the Appellants, the Director ordered the Appellants start remediating the site using the one method that would definitely prevent further migration from the site from occurring. Given the circumstances, where more information is not available because of the delay by the Appellants, the Board believes the Director acted prudently and in support of the public interest.

[75] In *RJR McDonald* the Court considered the actions of a public authority in a Stay application:

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26 The Board understands that Alberta Health Services will not "force" the evacuation of a home where it is occupied by the owner.

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."[27]

[76] Although the comments were made regarding *Charter* cases, the principle can be applied in other Stay applications involving a public authority.[28] The role of the Director is to make decisions to protect the environment and such decisions must invariably take into consideration public health and the well-being of society. The Appellants recognize that the source of the odours that required one home to be evacuated, or where occupants of the two other homes were advised to vacate the premises, was not from their site. They argue the extent of the odours was not, or is no longer, at a level to cause human health concerns. Again, without further data, this cannot be confirmed or denied with any level of certainty. What is certain is that if more contaminants migrate off-site, existing problems will be exacerbated and new problems may develop. By removing the source, the Director ordered the course of action that would ensure these concerns would not occur.

[77] The Director issued Amendment No. 1 requiring the excavation of the gas station site in part due to limited site characterization data that would be necessary to accept some less invasive method of remediation. Such data should have been provided by the Appellants. They were aware of the spill in May 2010 and they knew their responsibilities under EPEA to report and take remedial actions. It is at this time that delineation should have started and data regarding the spill and the extent of the contamination should have been obtained. It is the Appellants' responsibility to contact the Director and to collect the data. The Appellants are now

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[27] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 68.

asking for a Stay to collect more data and provide options that should have been provided to the Director much earlier.

[78] The Appellants noted there have been no additional houses impacted other than those already identified even though one hydraulic cycle (the annual freeze and thaw) has been completed. This does not mean additional houses will not be impacted as a result of further movement of the plume or additional contaminants migrating with the current hydraulic cycle. The Appellants stated the plume is now closer to the Bow River than when it was on the gas station site. The Board recognizes Amendment No. 1 requires excavating the gas station site only, but it also seems reasonable that all efforts should be taken to minimize the possibility of additional contaminants migrating off-site and moving towards the river and the homes in the area.

[79] Based on the information and data available at this time, the Board considers the action taken by the Director to order the removal of the contaminated material from the site a prudent step. The Board finds the environment and the public interest risks and harms outweigh the interests of the Appellants and affected parties like Bow Liquor Inc. if the Stay is denied.

[80] The Board understands the Director will continue to work with the Appellants in order to achieve the desired outcome of having the site remediated as soon as possible. The Appellants have the onus of demonstrating to the Director other methods are viable and just as effective to achieve the desired outcome. The City of Calgary confirms its agreement to expedite all required permits and approvals it would have to grant to allow the work to be done under Amendment No. 1.

[81] As some of the timelines specified in Amendment No. 1 have passed, the Board will leave it to the Director in the first instance, in consultation with the Appellants, to develop a new schedule to ensure the work under Amendment No. 1 proceeds as quickly as possible, reserving jurisdiction to set reasonable alternative dates if necessary.

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[28] See: *Western Forests Products Inc.* v. *Sunshine Coast Regional District*, 2007 BCSC 1283 (CanLII).

V. CONCLUSION

[82] The Board denies the Stay application. The release of a substance and the resulting effects on the environment and residents in the area are serious issues. The appeal raises serious issues. However, to the extent it may result in a redistribution of the costs of remediation, any harm can be redressed monetarily. To the extent the Appellants say they are now being put to the costs of on-site removal of contaminants rather than some less expensive remediation that might be developed with further testing and planning, that harm is primarily a result of their own delay and default which has already lead to extensive off-site migration and harm to the environment and property owners in the vicinity. The balance of convenience strongly favours denying the Stay, when the public interest is taken into account. The public health and safety concerns, which in the Board's view are paramount in this case, also strongly support the denial of the Stay.

[83] The Appellants are required to comply with the Order and Amendment No. 1. Since some of the dates in Amendment No. 1 have passed, the Director will determine new dates, taking into consideration the Appellants' concerns regarding timing.

Dated on July 8, 2011, at Edmonton, Alberta.

- original signed -

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D.W. Perras
Chair

APPENDIX A (AENV Record-Tab 64)