

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 21, 2018

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 Cherokee Canada Inc. and 1510837 Alberta Inc. with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to refuse to issue an Amending Approval for Approval No. 00009724-04-00 and to refuse to issue a Remediation Certificate to Cherokee Canada Inc. and 1510837 Alberta Inc.

Cite as: *Cherokee Canada Inc. and 1510837 Alberta Inc. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (21 December 2018), Appeal Nos. 16-028, 029, 034, and 035-ID1 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair;
Dr. Nick Tywoniuk, Board Member; and
Mr. Chris Powter, Board Member.

SUBMISSIONS BY:

Appellants: Cherokee Canada Inc. and 1510837 Alberta Inc., represented by Mr. Ron Kruhlak, Q.C., and Mr. Sean Parker, McLennan Ross LLP.

Director: Ms. Valerie Hoover, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks,* represented by Ms. Michelle Williamson, Alberta Justice and Solicitor General.

* There were a number of Directors and decision makers involved in this file including Mr. Mohammed Habib, who reviewed the application for the amending approval, and Mr. Doug Davies, Remediation Certificate Specialist, who reviewed the application for the remediation certificate. There were also numerous Directors involved on the file

since 2008 when the Appellants purchased the lands. In addition, Mr. Michael Aiton, Regional Compliance Manager, was also involved in the file.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) purported to suspend processing the applications for the issuance of an amending approval and a remediation certificate to Cherokee Canada Inc. and 1510837 Alberta Inc. (collectively, the Appellants) for the former Domtar wood preservative plant in Edmonton. The Appellants had written to AEP demanding a decision be made on their applications for an amending approval and remediation certificate. The Appellants advised that no response was received from AEP and, therefore, according to the Appellants, AEP effectively made decisions to refuse these applications. The Appellants appealed the “deemed refusal” of the applications to the Board. The Appellants also appealed the decisions to “suspend” the applications for the amending approval and remediation certificate.

The Board held an oral preliminary motions hearing to hear submissions and evidence on the question of whether the Board had jurisdiction to hear the appeals.

Based on the submissions and arguments provided, the Board found it has the jurisdiction to hear the appeals. The legislation does not give AEP the right to “suspend” an application. Once the Appellants asked AEP to make a decision on its applications, AEP had a responsibility to process the applications to determine if the amending approval and remediation certificate should be issued. Therefore, the Board will hear the appeals of the decisions to refuse to issue the amending approval and remediation certificate.

As the Board will hear the appeals of the refusals to issue the amending approval and remediation certificate, the Board finds the appeals of the “suspension” of the applications to be moot.

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I. INTRODUCTION

[1] This decision and supporting reasons relate to preliminary matters raised in respect to the decision of the Director, Red Deer-North Saskatchewan Region (“AEP” or the “Director”)¹ to refuse to issue an amending approval for Approval No. 00009724-04-00 (the “Approval”) and to refuse to issue a remediation certificate for the former Domtar wood processing site located in the City of Edmonton. The applications for the amending approval and reclamation certificate were made pursuant to the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).

[2] Cherokee Canada Inc. and 1510837 Alberta Inc. (collectively, the “Appellants”) appealed the Director’s refusal to issue the amending approval and remediation certificate and the Director’s decision to purportedly “suspend” the applications for the amending approval and remediation certificate to the Environmental Appeals Board (the “Board”).

[3] The Board held an oral preliminary motions hearing and heard arguments on whether the Board has jurisdiction to hear the appeals.

[4] Based on the Director’s record and the oral and written submissions from counsel for the Appellants and Director (collectively, the “Parties”), the Board determined it has jurisdiction to hear the appeals pursuant to section 91 of EPEA.

II. BACKGROUND

[5] On December 24, 2014, the Appellants submitted their application to the Director for an amending approval, and on February 13, 2015, the Appellants submitted their application for a remediation certificate to the Director.

¹ There were a number of Directors and decision makers involved in this file including Mr. Mohammed Habib, who reviewed the application for the amending approval, and Mr. Doug Davies, who reviewed the application for the remediation certificate. In this decision, the current Directors will be referred to as the “Director.” There were also numerous Directors involved on the file since 2008 when the Appellants purchased the lands, and these Directors will be referred to as “AEP.” In addition, Mr. Michael Aiton, Regional Compliance Manager was also involved in the file.

[6] On October 3, 2016, the Regional Compliance Manager notified the Appellants their applications for an Approval amendment and a remediation certificate were incomplete until all information required to evaluate the applications was received. The Regional Compliance Manager stated the application process was “suspended” and would only proceed after the additional information required was provided and the “non-compliance” with the berm and site was addressed.

[7] On October 3, 2016, the Board received Notices of Appeal from the Appellants regarding the refusals to issue the amending approval and a remediation certificate. The Board acknowledged the Notices of Appeal on October 7, 2016, and notified the Director of the appeals.

[8] On October 19, 2016, the Director notified the Board of his intent to seek a preliminary decision to dismiss the appeals on the grounds the Appellants did not receive a decision from the Director which allows a right of appeal. The Director submitted the Board did not have jurisdiction to accept the appeals.

[9] On November 1, 2016, the Board received Notices of Appeal from the Appellants regarding the Regional Compliance Manager’s decision, dated October 3, 2017, to suspend the process to issue the amending approval and remediation certificate. The Board acknowledged the Notices of Appeal on November 3, 2016, and notified the Director of the appeals.

[10] On November 9, 2016, the Director requested the appeals of the refusals to issue the amending approval and remediation certificate be heard with the appeals of the decisions to suspend the process to issue the amending approval and remediation certificate.

[11] On November 10, 2016, the Board received the Director’s written submission on the motion to dismiss the appeals.

[12] On November 15, 2016, the Board confirmed the appeals would be dealt with together.

[13] On November 29, 2016, the Appellants provided their written submission on the motion to dismiss the appeals.

[14] On December 22, 2016, the Board notified the Parties that it required the Director's record in order to make a decision on the Director's application to dismiss the appeals.

[15] On June 2, 2017, the Board received the documents the Director said he used in assessing the applications filed for the amending approval and remediation certificate (the "Record"). AEP argued there was no "Record" because no decision had been made. Copies of the Record were provided to the Appellants on June 6, 2017.

[16] On July 7, 2017, the Board confirmed it intended to convene a preliminary motions hearing. On July 21, 2017, the Board stated the preliminary motions hearing would hear arguments in relation to the refusals to issue the amending approval and remediation certificate.

[17] On August 3, 2017, the Board held an oral preliminary motions hearing in Edmonton to hear arguments on the motion of whether the appeals should be dismissed.

III. SUBMISSIONS

A. Appellants

[18] The Appellants stated the motion to dismiss the appeals should be denied, because the applications for the amending approval and remediation certificate were in effect refused, and refusals to issue an amending approval and a remediation certificate are appealable decisions under EPEA.²

² Section 91(1) of EPEA provides:

A notice of appeal may be submitted to the Board by the following persons in the following circumstances:...

(b) where the Director refuses

(ii) to make an amendment, addition or deletion in respect of an approval pursuant to an application under section 70(1)(a),

the applicant may submit a notice of appeal...

1.1 where the Director or an inspector refuses to accept an application for a remediation certificate or refuses to issue a remediation certificate under section 117, any person who receives notice of the refusal as provided for in the regulations may submit a notice of appeal."

[19] The Appellants stated the applications they filed were complete since they filed the materials agreed to as part of the brownfield redevelopment project, and the Appellants confirmed with the Director they were not filing any additional information.

[20] The Appellants said the applications were refused as the Director was now applying a different set of regulatory criteria to the project after it was constructed. The Appellants stated their applications were not handled in a fair, timely, and transparent manner, given there was no transparency as to the multiple Directors' roles and interference with the applications, the application files were mismanaged, and the AEP compliance office recently obtained additional information by drilling on the Appellants' lands without notice or consent and failed to respond to multiple requests for complete disclosure of the information collected.

[21] The Appellants stated there had been an effective refusal of the applications or, stated another way, the applications had been deemed refused.

[22] The Appellants explained they proposed to develop the former Domtar Inc. ("Domtar") wood preservative plant in 2008 and, based on AEP's agreement with the proposal, the Appellants proceeded to purchase the lands and start a multi-year redevelopment of the lands. The Appellants said they completed remediation of Parcel C and received a remediation certificate for that part of the site. The Appellants explained they completed the balance of the work, applied for the remediation certificate and then, as had been previously agreed to with AEP, applied to amend the existing Approval to have it only apply to a portion of the lands which were to be risk managed. The outstanding remediation certificate and amending approval applications are the applications that are the subjects of these appeals.

[23] The Appellants explained Domtar operated a wood preservative plant on the lands from 1924 to 1987 that impacted the site with a number of contaminants including creosote. After the plant ceased operations and was decommissioned, Domtar worked with the City of Edmonton (the "City") and AEP over the next 20 years, until approximately 2007, to address the impacts on the site. The Appellants noted Domtar undertook significant testing and remediation of the site with full and complete knowledge and oversight of AEP, but some residual impacts remained.

[24] The Appellants provided the following history of the redevelopment proposal:

1. In 2008 the Appellants met with representatives of the City and the Director of the Northern Region (the predecessor to the Director of the Red Deer-North Saskatchewan Region) to discuss potential redevelopment of the site.
2. In 2009, the Appellants prepared a plan based on the Alberta Tier 2 Soil and Groundwater Guidelines for remediation and redevelopment of the site. The plan required most of the site to be remediated to allow for residential development on that area.
3. The plan included the construction of an earthen berm, and the core of the berm would contain contaminated soil removed from the remediated portion of the site. The berm would be risk managed. AEP endorsed the plan and encouraged further work and development. The berm was required by the City of Edmonton as a sight and noise barrier from the adjacent highway and rail line.
4. In a 2009 meeting with the City and AEP, it was agreed AEP would be the lead agency regarding environmental review, and AEP encouraged the Appellants to continue redevelopment of the site according to the plan.
5. Part of the redevelopment plan required the Appellants to obtain: (i) an amending approval that would reduce the area of the site in the current Approval to only the berm and a small portion of a parcel of the site known as "Parcel X"; and (ii) remediation certificates for certain parcels of the site, including the area known as "Parcel Y." (A diagram is attached as an Appendix to the Report and Recommendations.) The amending approval and final remediation certificate are required before the Appellants can get the necessary development authorizations from the City.
6. An updated remediation plan was submitted to and accepted by AEP. The updated plan included the construction of the berm and a risk management approach to the areas of the site which would continue to contain contaminated soil.
7. As required under the updated plan, hundreds of soil samples were collected and analyzed, and environmental and human health assessments were completed and submitted to AEP.
8. The berm was constructed in accordance with the updated plan and under the oversight of AEP. AEP was on site from time to time during the berm construction, and the construction was supervised by independent engineers pursuant to conditions of the development permit issued by the City.

9. On April 15, 2013, a risk assessment was prepared for the portion of the berm which contained contaminated soil, and the risk assessment concluded the contaminated soil in the core of the berm would not create any adverse effect to human health or the environment.
10. AEP approved and understood that contaminated soil from the site was being put to beneficial use by forming the core of the berm.
11. In June and July of 2013, AEP reviewed the submitted reports. The remediation certificate for Parcel C was issued.
12. In late 2014 the project was nearing completion and the Appellants were preparing applications for the amending approval and remediation certificate for Parcel Y. The Northern Region Director confirmed the amending approval was part of the agreed to approach and recognized the amending approval was “novel” and that AEP needed to use a customized approach to the amending documents.
13. From 2010-2015, the Appellants analyzed approximately 800 soil and groundwater samples, and their consultants prepared approximately 20 reports in addition to the sampling and investigations undertaken by Domtar.
14. Throughout the process, AEP never raised any objection or concern with respect to the authorization and construction of the berm, the amending approval and remediation certificate, or the planned residential development.
15. AEP did not raise concerns with respect to the frequency or methods of testing and never indicated the soil in the berm would be subject to the requirements of the hazardous waste provisions of EPEA or the *Waste Control Regulation*, Alta. Reg. 192/96.
16. AEP was aware of the soils which were going to be placed in the core of the berm and that risk management to Tier 2 criteria would apply. AEP expressed approval of the approach being undertaken.
17. In April 2015, AEP requested additional information and extensive sampling of the berm. The Appellants tried to contact AEP to review the scientific basis for the additional sampling since it was unclear. AEP ignored or rejected the request.
18. The Appellants continued to contact AEP to find a resolution to the new position AEP was taking. In November 2015, the Appellants met with the Regional Compliance Manager who told the Appellants the berm was unauthorized and contained hazardous waste which the Appellants would be required to address. The Regional Compliance Manager said he would be issuing a regulatory order against the Appellants. The Appellants said this was inconsistent with AEP’s and the City’s actions over the previous

seven years and the basis which the Appellants relied on when they acquired the site and undertook the project.

19. The Appellants made a number of requests for a meeting with AEP and the technical experts to address the new approach being taken by AEP. The Appellants also asked that AEP review its files and discuss how the project was handled with AEP staff who had previously worked on the project. AEP rejected or ignored the requests.
20. In April 2016, the Appellants were asked to conduct further testing and delineation on an area of Parcel X. The request was based on sampling results from the 1990s, before the Appellants acquired the site.
21. In August 2016, AEP requested the Appellants conduct additional investigations, delineation, and remediation of possible contamination on lands described as the "Greenbelt," which is adjoining land owned by the City. The request was based on information AEP had since 1992, 18 years before the Appellants purchased the site. The concerns with the Greenbelt lands were not mentioned to the Appellants previously.
22. In July 2016, the Appellants became aware that AEP entered the site, without notice to or consent from the Appellants, and conducted its own drilling and sampling on the berm. AEP had not provided complete information from the sampling program to the Appellants as of November 21, 2016.
23. The Appellants had numerous discussions with the Regional Compliance Manager and provided additional information, but no progress was made in obtaining the amending approval or remediation certificate.

[25] The Appellants said there were multiple AEP directors involved in the process, but it is not known which director made which decision nor their respective roles in handling the file. The Appellants said this resulted in confusion and a lack of accountability on the part of AEP.

[26] The Appellants noted there is nothing in the Record that suggested the Director had any intention of issuing an amending approval or remediation certificate. The Appellants explained they provided submissions to the Director indicating the berm was always to be risk-managed and the Alberta Tier 2 criteria were to apply, and the Appellants worked to complete the project in accordance with the updated plan previously agreed to and endorsed by AEP.

[27] The Appellants stated the risk assessments conducted confirmed there would be no adverse effect to the environment.

[28] The Appellants said there was an abrupt change in AEP's position after years of work and considerable expense.

[29] The Appellants stated the Director failed to respond to the request to issue the remediation certificate for Parcel Y despite all the information confirming the area was remediated to the agreed upon standard.

[30] The Appellants noted the Director's submission indicated that, "[i]f the information is not provided by the Appellants in a reasonable timeframe, the application may be rejected by the director."³ The Appellants stated it had been 23 months since the application for the amending approval was provided to AEP with the supporting documentation and fee and 22 months since the application for the remediation certificate had been submitted to AEP. The Appellants advised the Director that no further sampling information would be provided because all necessary information to process the applications had already been provided.

[31] The Appellants said they saw more than 20 different AEP individuals involved in their file, including three directors currently involved in various aspects of the file. The Appellants stated they were never notified the compliance and approvals offices were working together on the applications nor of the need for additional information prior to 2015, and they did not hear from the approvals staff after they filed the applications. The Appellants said they never received notice that an investigation was ongoing, resulting in confusion and a complete lack of transparency into how the applications were handled.

[32] The Appellants noted the Director conducted their own site assessment in July 2016 without the Appellants' consent and took samples of the soil in the berm.

[33] The Appellants argued the Board should not accept the Director's submission that he can avoid having his decisions appealed by stating the applications were suspended or still being processed, rather than rejected. The Appellants argued waiting for a final response almost two years after an application is submitted is unreasonable. The Appellants stated regulatory decision-makers must conduct themselves reasonably, including making timely decisions.

³ Appellants' submission, dated November 21, 2016, quoting the Director's submission, dated November 10, 2016.

[34] The Appellants argued it would be a breach of natural justice to prevent the use of a statutory appeal mechanism given the passage of time and the conduct of the Director, including a unilateral change in position and refusal to discuss the scientific basis for the additional sampling requested, which appeared to be the basis for refusing the applications. The Appellants noted the Director could not point to a statutory authority to suspend the applications.

[35] The Appellants stated this is not a situation where an applicant omitted certain information required for a standard approval process and AEP technical staff asked the applicant to provide the missing information. The Appellants said this project was unique with “novel” regulatory requirements. The Appellants argued the decision to suspend the applications has resulted in a *de facto* refusal of the applications and is, therefore, appealable to the Board.

[36] The Appellants stated the applications involve the redevelopment of a brownfield site and bringing it back to a productive use, which benefits the public. The Appellants said continuing to allow the applications to “linger” as proposed by the Director is contrary to public policy and contrary to the purposes of EPEA as set out in section 2(j).⁴ The Appellants stated the current action taken by the Director will discourage future brownfield development and have a detrimental effect on the public. The Appellants stated the project is in the public interest and warrants a timely, transparent, and responsible regulatory process be applied to it.

[37] The Appellants submitted the application to dismiss their appeals must be denied.

B. Director

[38] The Director noted the Appellants’ Notices of Appeal referred to decisions refusing to issue an amending approval and remediation certificate without reasons or formal notice. The Director said the Appellants, despite the lack of notice, became aware of the alleged decisions on October 3, 2016.

⁴ Section 2(j) of EPEA provides:

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

the important role of comprehensive and responsive action in administering this Act.”

[39] The Director noted the Appellants believed the Director had, *de facto*, rejected the applications since their September 22, 2016 letter to the Director requesting confirmation whether the applications had been accepted or rejected received no response from the Director within the timeframe specified by the Appellants in their letter.

[40] The Director noted the Appellants acknowledged receipt of the October 3, 2017 letter from the Regional Compliance Manager, where he stated the applications were “suspended.”

[41] The Director noted the Appellants filed additional Notices of Appeal on November 1, 2016, alleging the decision to suspend the applications had no legal basis because it was made by the Regional Compliance Manager who was not a designated director under EPEA and who interfered with the processing of the applications.

[42] The Director explained the October 3, 2016 letter was the Regional Compliance Manager’s response to the Appellants’ September 22, 2016 letter.

[43] The Director said the applications for the amending approval and remediation certificate that were submitted had not been refused nor had the applications been rejected for being incomplete. The Director stated the application for the amending approval was not administratively complete so the notice of application had not been published. The Director said the applications could not proceed to a decision on the merits because outstanding information was required from the Appellants, and if the information was provided, the application review process could proceed, the merits of the applications could be considered, and a decision made on whether the authorizations should be issued. The Director explained that, if the information was not provided in a reasonable timeframe, the applications could be rejected and the Appellants would receive written notice from the Director.

[44] The Director explained compliance and approvals worked together on the request for additional information because the information requested was required for both processes and both processes arose from the development of the former Domtar lands to residential lots.

[45] The Director stated the October 3, 2016 letter from the Regional Compliance Manager was the third letter requesting additional information. He explained the first letter, sent

on April 2, 2015, listed the deficiencies that needed to be addressed by the Appellants, and a second letter was sent on September 8, 2015. The Director said the letters requesting additional information were signed by the Regional Compliance Manager with the consent of and instructions from the approvals directors. The Director noted all of the compliance managers and approval directors are designated “Directors” for all purposes of EPEA and the regulations.⁵ The Director stated the Appellants were well aware of the identity of the approvals staff involved in processing the applications.

[46] The Director noted that a decision finding an application for an amending approval is incomplete and cannot proceed further in the decision-making process is not appealable, since it is not listed under section 91 of EPEA. The Director argued that, if the decision cannot be appealed, the Board does not have the jurisdiction to review or consider whether the decision was reasonable or rational. In this situation, according to the Director, the Board cannot decide: (1) whether the Director misinterpreted the legislation or its requirements; (2) whether the Director was qualified to determine what information would be required to complete the applications; or (3) whether the appropriate Director signed the letter notifying the Appellants of the need for additional information.

[47] The Director stated the type of decision the Appellants allege to have been made had not been made, and no decision had been made that falls within the provisions of section 91 of EPEA.

[48] The Director stated the supplementary information requests clearly indicated the Director decided the applications were incomplete and could not be processed for the purposes of making a decision. The Director explained he is authorized to request information from applicants where needed.⁶ He noted section 117(3.1) of EPEA authorizes a Director or inspector to refuse to accept an application for a remediation certificate that is not complete,⁷ and the

⁵ The Director noted the one exception is with respect to Environmental Assessment purposes.

⁶ See section 66(2) of EPEA which states:

“The Director may require an applicant for an approval or registration to submit any additional information that the Director considers necessary.”

⁷ Section 117(3.1) of EPEA provides:

“The Director or an inspector may refuse to accept an application for a remediation certificate if, in the Director’s or inspector’s opinion, the application is not complete or not accurate.”

Approvals and Registration Procedures Regulation, Alta. Reg. 113/93, prohibits a Director from reviewing an approval application for the purpose of making a decision until the application is complete.⁸ The Director also referenced section 3(4) of the *Remediation Certificate Regulation*, Alta. Reg. 154/2009, which enables the Director or inspector to require an applicant to submit additional information.⁹

[49] The Director stated that, even though he could reject an application if the information requested had not been provided, in this case the Director has not rejected the application. The Director explained the Appellants would receive written notice if the application was rejected in accordance with section 4(3) of the *Approvals and Registration Procedures Regulation*¹⁰ and section 6(3) of the *Remediation Certificate Regulation*.¹¹

[50] The Director argued the Appellants were aware before October 3, 2016, that the applications were considered incomplete and additional information was needed for the review of the applications to proceed and the information was also needed for the concurrent ongoing compliance process.

⁸ See: Section 4 of the *Approvals and Registration Procedures Regulation*:

- “(1) The Director shall not review an application for the purpose of making a decision until it is a complete application.
- (2) Where the application is not complete, the Director shall notify the applicant in writing and request the information necessary to make the application complete.
- (3) Where the information is not supplied by the applicant within a reasonable time, the Director may reject the application and shall forthwith advise the applicant in writing of that fact.”

⁹ Section 3(4) of the *Remediation Certificate Regulation* provides:

“The Director or the inspector must provide a notice of refusal to the applicant and the registered owner of the land if the Director or inspector

- (a) refuses to accept an application under section 117(3.1) of the Act, or
- (b) refuses to issue a remediation certificate under section 117(3.2) or (4) of the Act.”

¹⁰ Section 4(3) of the *Approvals and Registration Procedures Regulation* states:

“Where the information is not supplied by the applicant within a reasonable time, the Director may reject the application and shall forthwith advise the applicant in writing of that fact.”

¹¹ Section 6(3) of the *Remediation Certificate Regulation* provides:

“The Director or the inspector must provide a notice of refusal to the applicant and the registered owner of the land if the Director or inspector

- (a) refuses to accept an application under section 117(3.1) of the Act, or
- (b) refuses to issue a remediation certificate under section 117(3.2) or (4) of the Act.”

[51] The Director submitted the applications are incomplete pending additional information being submitted. The Director argued there is no appealable decision and the appeals are premature.

[52] The Director requested the appeals be dismissed.

[53] The Director stated the onus is on the Appellants to prove the appeals are validly before the Board. The Director said the issue goes to the jurisdiction of the Board, and the Board can only hear matters that it is statutorily allowed to consider.

[54] The Director argued the appeals are moot because the remedy sought cannot be granted by the Board. If the Board issued the amending approval and remediation certificate, the Board would violate the statutory process for processing applications for amending an existing approval.

[55] The Director stated the Appellants alleged bad faith and negligent representation against the Department in respect to the amending approval and remediation certificate. The Director said these allegations must be heard as civil actions and are currently before the Alberta Court of Queen's Bench as a result of litigation commenced by the Appellants against AEP.¹²

C. Rebuttal Submission

[56] The Appellants stated there is a difference in professional opinion between the Appellants' experts and those of the Director on a number of technical issues which are fundamental to the applications. The Appellants said that, based on the documents in the Record, the Director has effectively determined the applications will not be issued and are refused even though the Director stated the authorizations may still be issued.

[57] The Appellants stated the remediation certificate has been refused by operation of EPEA and the *Remediation Certificate Regulation*, which provide that, if the Director believes an application is incomplete, he must provide a notice of refusal.¹³

¹² See: Director's supplemental submission, dated July 31, 2017, Statement of Claim: *Cherokee Canada Inc. and 1510837 Alberta Ltd. v. Her Majesty the Queen in Right of Alberta*, Court File No. 1603 21288.

¹³ Section 117(3.1) of EPEA states:

[58] The Appellants said the Record demonstrates a breakdown of the regulatory application process with ineffective transitioning among the various AEP staff involved in the review of the applications.

[59] The Appellants stated the Regional Compliance Manager did not provide any legal authority for the “suspension” of the application process of another Director. The Appellants considered this a punitive response to the Appellants’ request to have their applications processed, and it would be an abuse of process to sustain the purported suspension since the applications were refused.

[60] The Appellants submitted the Board can review the appeals, and it is in the public interest to do so to restore confidence in the regulatory process and advance the objectives of the legislation. The Appellants noted the Board can take a broad view of its jurisdiction as a specialized environmental tribunal.

[61] The Appellants stated there is a difference in professional opinion between the Appellants and Director on whether the contaminants in the berm and elsewhere are soil-bound or mobile. They said there is also a difference of opinion regarding the application of the waste criteria to the spoils in the berm. The Appellants stated they did not omit information required for a standard type of approval. The Appellants said this is a unique project with “novel” regulatory requirements, and the delay in the processing of the applications was the result of a difference in professional opinions.

[62] The Appellants explained they requested a meeting to address the different views held by the technical experts, but the Director refused to have such a meeting.

[63] The Appellants stated that, as a result of the current AEP staff adopting a new approach for this project, the Director effectively rejected the berm, which contains contaminated

“The Director or an inspector may refuse to accept an application for a remediation certificate if, in the Director’s or inspector’s opinion, the application is not complete or not accurate.”

Section 6(3) of the *Remediation Certificate Regulation* provides:

“The Director or the inspector must provide a notice of refusal to the applicant and the registered owner of the land if the Director or inspector

- (a) refuses to accept an application under section 117(3.1) of the Act, or
- (b) refuses to issue a remediation certificate under section 117(3.2) or (4) of the

soil at the core, even though this concept was accepted and endorsed by previous directors and was fundamental to the project. The Appellants said with the changes in AEP personnel reviewing the project, there was a lack of reasonable transition of knowledge, representations, and documents and no effective communications with the Appellants.

[64] The Appellants noted the latest application directors did not request any additional information relating to the applications, but the compliance Director and Regional Compliance Manager requested additional information for enforcement purposes. The Appellants noted there were no outstanding information requests pertaining to the remediation certificate for Parcel Y, but the Director did not review the application.

[65] The Appellants stated the Director's Record is incomplete, demonstrating a lack of transition and a mismanaged process.

[66] The Appellants argued the Director's position that further sampling data for the berm are required to process the amending approval application was untenable. The Appellants stated the Director changed the regulatory criteria after the project was essentially completed and, in doing so, made it impossible to consider the applications as contemplated. The Appellants stated that by retroactively applying waste criteria to the berm and refusing a sound scientific evaluation of contaminant mobility, the Director effectively refused the application for the amending approval.

[67] The Appellants explained the berm was always required to facilitate the project, and the berm was always going to contain contaminated soil from the site. They said this was set out in the original plan which was accepted by AEP. The Appellants stated they constructed the berm in accordance with the plan for the redevelopment of the site and with the support of AEP officials.

[68] The Appellants said they were advised by the Regional Compliance Manager at a meeting on November 19, 2015, almost a year after the application was submitted, that what they had done was illegal and the berm contained hazardous waste. The Appellants stated the Regional Compliance Manager based his position on an unwritten policy that, as soon as

impacted soil is excavated, it is waste and must be characterized as waste even if it remains on site. According to the Appellants, the Regional Compliance Manager viewed the construction of the berm as a waste management facility or landfill.

[69] The Appellants stated the Director was aware that, if the berm was considered to contain waste, then pursuant to setback requirements in the *Subdivision and Development Regulation*, Alta. Reg. 43/2002, the Appellants could not proceed with the redevelopment of the site as agreed. The Appellants stated the approach by the Regional Compliance Manager undermines the viability of the project.

[70] The Appellants submitted the soil contaminants in the berm are not mobile, and the issue must be assessed using the provincial remediation guidelines. The Appellants stated the impacted soils in the berm are not waste, were never to be considered waste, and such interpretation is contrary to the descriptions set out in the legislation and guidelines.¹⁴

[71] The Appellants stated they advised the Director that there is a fundamental difference of professional opinion on the scientific data, including the interpretation of the data in view of AEP's guidelines.

[72] The Appellants stated AEP understood from the start of the project that, following remediation of the site, remediation certificates would be issued for Parcels C and Y. The Appellants noted a remediation certificate was issued for Parcel C on July 9, 2013.

[73] The Appellants stated a similar application for a remediation certificate for Parcel Y was filed on February 13, 2015. The Appellants noted that, in these appeals, the Director stated further information was needed to process the application for the remediation certificate.

[74] The Appellants noted the applicable legislation, in particular section 117(3.1) of EPEA and section 6(3) of the *Remediation Certificate Regulation*.¹⁵ The Appellants argued the

¹⁴ See: *Waste Control Regulation*, Alta. Reg. 192/96; Alberta Environmental Protection, *Alberta User Guide for Waste Managers* (Environmental Protection, 1996).

¹⁵ Section 117(3.1) of EPEA states:

“The Director or an inspector may refuse to accept an application for a remediation certificate if, in the Director's or inspector's opinion, the application is not complete or not accurate.”

Section 6(3) of the *Remediation Certificate Regulation* provides:

Remediation Certificate Regulation effectively provides that, if the Director thinks an application is incomplete, that means it is refused.

[75] The Appellants stated it did not appear there were any requests for additional information for the remediation certificate application, and when the Appellants contacted the Director on September 22, 2016, the Director stated he had not reviewed the application yet.

[76] The Appellants submitted the reason the applications were not advanced was due to a breakdown in the responsible regulatory management of the applications by the Director. The Appellants noted there were over 20 different AEP staff members involved in the applications and the staff members who initially reviewed and advanced the project are no longer employed by AEP.

[77] The Appellants stated a review of the Record showed: (1) there was acknowledged confusion as to who was looking after the file and whether it should be approvals or the compliance group; (2) staff reviewing the applications were not aware of the previous agreement on remediation criteria; and (3) they reached misguided conclusions without appreciating the information in the risk management plan that was submitted. The Appellants believed there was a failure to transition work between what was done by the initial staff on the applications and newer staff, who could not locate key documents that had been submitted months or years earlier.

[78] The Appellants stated AEP accepted the plan for the project and encouraged the Appellants to proceed with the plan even though AEP was aware that appropriate resources needed to be in place to provide timely regulatory oversight in order to achieve a successful conclusion of the project. The Appellants submitted that, since AEP supported and encouraged the project, the Appellants had a legitimate expectation that AEP would commit the necessary resources for the proper regulatory oversight and management of the project once the plan was

“(3) The Director or the inspector must provide a notice of refusal to the applicant and the registered owner of the land if the Director or inspector

- (a) refuses to accept an application under section 117(3.1) of the Act, or
- (b) refuses to issue a remediation certificate under section 117(3.2) or (4) of the Act.”

accepted. The Appellants argued the Director failed to meet his regulatory responsibilities and provide the procedural fairness owed to the Appellants.

[79] The Appellants said the new staff assigned to the applications in 2014 concluded the project was out of compliance but did not raise these concerns with the Appellants. The Appellants said they were advised by other AEP staff to proceed with their final applications and their “tremendous work” on the site would be recognized when reviewing the amending approval application.

[80] The Appellants explained that in April 2015, the Regional Compliance Manager advised that substantial sampling of the berm and analyses needed to be undertaken. The Appellants said they started to see a fundamental shift in how the project was being assessed by AEP even though there was no direct communication with the Appellants.

[81] The Appellants stated they requested a technical meeting with the Director’s staff to review the basis for the new position and the sampling requested given the amount of technical information already available. The Appellants said the Regional Compliance Manager refused the Appellants’ repeated requests for a meeting, and the approvals Director never responded to the requests. The Appellants noted the Regional Compliance Manager told the Appellants that he was not interested in what prior regulatory officials may have advised the Appellants.

[82] The Appellants stated that when they asked the approvals Director about the status of their applications, it was the Regional Compliance Manager who advised the Appellants the applications were suspended. The Appellants noted the Regional Compliance Manager has not explained the legal authority that allows him to “suspend” the applications, and there is nothing in the Record to indicate how the Regional Compliance Manager even became aware of the letters to the application Director.

[83] The Appellants submitted the impasse with respect to the processing of the applications is a difference of professional opinion on the technical information and how to apply the provincial remediation guidelines and legislation. The Appellants stated the difference of opinion has given rise to a refusal to issue the amending approval and remediation certificate.

[84] The Appellants stated a review of the Record indicates the Director would not allow the project to proceed based on his new position, so regardless of what information is provided, the applications are effectively refused.

[85] The Appellants said the decision finding the application for the remediation certificate was incomplete was deemed to be a refusal based on the legislation.

[86] The Appellants stated it is in the public interest to review the applications and assess the position of the Appellants and the different positions taken by the Director and AEP staff. The Appellants said the appeals should be allowed to proceed to provide procedural fairness to the Appellants.

[87] The Appellants noted the Board has been recognized by the courts as an expert tribunal with broad powers and has the jurisdiction to determine whether it can hear an appeal. They noted the courts have also determined the Board has broad discretion to hear and determine appeals on a wide variety of matters. The Appellants submitted the Board is the appropriate specialized tribunal to review the matter and provide its recommendations to the Minister with respect to this dispute.

IV. ANALYSIS

[88] The documents included in the Director's Record show the Appellants wrote Ms. Val Hoover, the Approvals Coordinator, on September 22, 2016, asking to be advised of the status of their applications for the amending approval and remediation certificate. Ms. Hoover forwarded the letter to different individuals within the Department to determine the status of the applications, including the Remediation Certificate Specialist, Mr. Davies, and the approval coordinator, Mr. Weiguo Wu. At the preliminary motions hearing it was clarified to the Board that Mr. Davis was the person who would make the final decision regarding the remediation certificate and Mr. Mohammad Habib would make the final decision on the amending approval. In response to Ms. Hoover's request, she was informed there were compliance issues and the application for the amending approval was put on hold.

[89] After the applications were received, the Director requested further information. The Director did not believe there was sufficient information on which to make a solid decision regarding the issuance of the amending approval and remediation certificate. The Director has the right to ask for additional information, and at this point, the applications were in abeyance until the information was received. By giving an applicant the opportunity to provide additional information to support the application, it eliminates the need for an applicant to resubmit the application.

[90] The status of the applications changed, however, when the Appellants notified the Approvals Coordinator on September 22, 2016, that they wanted to know the status of their applications by October 2, 2016, and they were not providing any additional information. At that time, the Approvals Coordinator was required to respond.

[91] In responding, the Director had three options. The Approvals Coordinator could: (1) notify the Appellants the applications were rejected; (2) accept the applications and issue the amending approval and/or the remediation certificate; or (3) refuse to issue the amending approval and/or the remediation certificate.

[92] The Department chose not to reply to the letter until after the Appellants filed their Notices of Appeal. It was only then that Mr. Michael Aiton, Regional Compliance Manager, wrote to the Appellants explaining the applications for both the amending approval and remediation certificate had been “suspended.”

[93] Mr. Aiton is neither the approvals director nor the director responsible for issuing remediation certificates. Mr. Aiton is a compliance manager and although he has the right to make decisions pursuant to EPEA, it was clear there was a comingling of the compliance side of the Department with the approvals side. In most appeals before the Board, the director whose decision led to the appeal has always made a clear distinction between the two processes, with approvals director not making any comments or decisions related to the compliance side. Here we have a compliance manager responding to a letter addressed to the approvals coordinator, even though one would expect the person who would be responsible for the ultimate decision would have been the person responding. The Appellants asked about the status of their

applications for the amending approval and remediation certificate, not the status of any enforcement action that may have been investigated.

[94] The approvals director needed to make a decision based on the information before him and not rely on the enforcement staff to become involved in the decision making process. If an amending approval or remediation certificate was issued by the approvals director, compliance staff could still proceed with any investigation.

[95] The Board notes there is no jurisdiction under EPEA or the regulations that grants a director the power to “suspend” an application. The director can only make the decisions specified in the legislation. He does not have the authority to incorporate words or phrases into a decision that results in a decision that is not actually identified in the legislation. When the Approvals Coordinator received the letter from the Appellants on September 22, 2016, requesting she make a decision on the applications, the Approvals Coordinator had an obligation to respond and advise whether the applications were rejected or accepted. The Department responded through the Regional Compliance Manager and tried to avoid doing either by using language that did not apply to the circumstances.

[96] The Board appreciates the Department had earlier provided the Appellants the opportunity to provide additional information to support their applications and the Director had the right not to make a decision on the applications until the information was provided. This changed when the Appellants advised no further information would be provided and asked the Director to make a decision. The rules of natural justice require the Director to make a decision and not hold the Appellants in “limbo” until such time as the Director is ready to make a decision. The applications for the amending approval and remediation certificate were filed on December 24, 2014, and February 13, 2015, respectively. Not having received any decisions by September 22, 2016, the Appellants requested the Director make a decision by October 2, 2016. The Appellants were not asking the Director to make a decision on the applications without allowing the Director time to review the applications. The Director had the applications for more than 15 months before the Appellants made their request.

[97] There is nothing in the legislation that requires a full assessment of the application be completed, including publishing Notice of the Application or receiving Statements of

Concern, for the Director to decide to refuse to issue an amending approval. The Director in this case did not notify the Appellants of the status of their application. He is required to notify an applicant if the approval has been issued or if the application has been rejected,¹⁶ but there is no obligation to notify of a refusal to issue. At the preliminary motions hearing in response to the Board's questioning, the Director could not specify what a "reasonable timeframe" would be for the Appellants to submit the requested information. The Director did not notify the Appellants that the applications were not accepted nor that the amending approval would be issued. Based on the Director's actions or inactions, it appears the Director refused to issue an amending approval, an appealable decision under section 91(1)(b) of EPEA.¹⁷ Therefore, the Board will hear the Appellants' appeal of the Director's decision to refuse to issue the amending approval.

[98] At the hearing, counsel for the Director stated that if the Appellants had refused to provide the additional information as requested by the Director, then a decision had to be made about the applications. The wording of the September 22, 2016 letter from the Appellants indicates their belief all of the information required to process the applications had been provided. This indicates the Appellants were not going to provide additional information to support the applications. The Appellants believed it was a difference in technical opinion that resulted in further information demands from the Director, but the additional information was not necessary to assess the applications. Therefore, the Director was required to make a decision on whether the applications should be accepted or rejected.

[99] With respect to the remediation certificate, the Board recognizes the remediation certificate application does not apply to the berm. Most of the issues that concern the Director

¹⁶ Section 4(3) of the *Approvals and Regulations Procedure Regulation*, Alta. Reg. 113/93 states:
"Where the information is not supplied by the applicant within a reasonable time, the Director may reject the application and shall forthwith advise the applicant in writing of that fact."

¹⁷ Section 91(1)(b)(ii) of EPEA provides:
A notice of appeal may be submitted to the Board by the following persons in the following circumstances:...

- (b) where the Director refuses
 - (ii) to make an amendment, addition or deletion in respect of an approval pursuant to an application under section 70(1)(a),
the applicant may submit a notice of appeal."

relate to the berm. In fact, the Director did not ask the Appellants for additional information in support of the application for the remediation certificate.

[100] The Director had three options in responding to the Appellants' September 22, 2016 letter: either issue or refuse to issue a remediation certificate or decide not to accept the application.¹⁸ The Director was required, under section 6(3) of the *Remediation Certificate Regulation*,¹⁹ to notify the Appellants that the application for the remediation certificate was rejected or that the remediation certificate was refused. Since there was no indication the remediation certificate was issued, the application for the remediation certificate was, in effect, refused (i.e. a deemed refusal). The Director did not ask for additional information, the application was deemed accepted and, therefore, the remaining options were to either issue or refuse to issue the remediation certificate. A refusal to issue a remediation certificate is appealable under section 91(1)(1.1) of EPEA.²⁰ Therefore, the Board will hear the appeal regarding the Director's decision to refuse to issue the remediation certificate.

[101] The Board denies the Director's motion to dismiss the appeals. Therefore, the Board has jurisdiction to hear the appeals and will proceed with the appeal process.

¹⁸ Section 4(1) of the Remediation Certificate Regulation states:

"The Director or an inspector may issue or refuse to issue a remediation certificate pursuant to section 117 of the Act."

¹⁹ Section 6(3) of the *Remediation Certificate Regulation* provides:

"(3) The Director or the inspector must provide a notice of refusal to the applicant and the registered owner of the land if the Director or inspector

- (a) refuses to accept an application under section 117(3.1) of the Act, or
- (b) refuses to issue a remediation certificate under section 117(3.2) or (4) of the Act."

²⁰ Section 91(1)(1.1) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:...

- 1.1 where the Director or an inspector refuses to accept an application for a remediation certificate or refuses to issue a remediation certificate under section 117, any person who receives notice of the refusal as provided for in the regulations may submit a notice of appeal."

V. SUSPENSION OF APPLICATIONS

[102] The Appellants filed appeals of the Regional Compliance Manager's decision to “suspend” the applications for the amending approval and remediation certificate (Appeal Nos. 16-034 and 16-035). The Appellants filed these appeals to reserve their right to appeal should the Board decide it did not have jurisdiction to hear the appeals of the refusal to issue the amending approval and remediation certificate.

[103] Since the Board will hear the appeals of the refusal to issue decision, the appeals of the “suspension” of the applications are now moot. Therefore, the Board dismisses Appeal Nos. 16-034 and 16-035.

VI. CONCLUSION

[104] The Board denies the motions to dismiss the appeals with respect to the refusal to issue the amending approval and remediation certificate. As the Board will hear these appeals, the appeals of the Director’s decision to “suspend” the applications are now moot.

Dated on December 21, 2018, at Edmonton, Alberta.

“original signed by”
Alex MacWilliam
Board Chair

“original signed by”
Nick Tywoniuk
Board Member

“original signed by”
Chris Powter
Board Member