ALBERTA
ENVIRONMENTAL APPEALS BOARD

2019 ABEAB 33 November 13, 2019

Via E-Mail

To Distribution List:

Dear Ladies and Gentlemen:

Re: Decision Letter* – Sears Canada Inc., Concord North Hill GP Ltd., and Suncor Energy Inc./*EPEA* Environmental Protection Order No. EPO-2018/01-SSR & Amendment 2/Our File Nos.: EAB 17-069-070 and 18-013

These are the Board's reasons for its October 9, 2019 decision respecting the participation of the intervenors. This decision was made by Ms. Meg Barker, panel chair.

Decision

As stated in its October 9, 2019 letter, the Board has accepted the intervenor applications of the Hounsfield Heights Landowners Group ("HHLG") and Ms. Linda Barron (collectively the "Intervenors"). The Intervenors are required to file written submissions, and are permitted to file expert reports, present evidence, will be subject to cross-examination, and will be able to cross-examine if they wish to do so. They will also be able to provide opening and closing comments.

Legislation

Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board has the authority to determine who can make representations before it. Section 95(6) of EPEA provides:

> "Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matters before the Board to any person the Board considers should be allowed to make representations."

Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"), requires the Board to determine whether a person submitting a request to make

* Cite as: Intervenor Decision: *Sears Canada Inc. et al*. v. *Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (13 November 2019), Appeal Nos. 17-069-070 and 18-013-DL2 (A.E.A.B.), 2019 ABEAB 33.

representations should be allowed to do so at the hearing of an appeal. Sections 9(2) and (3) of the Regulation provide:

> "(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of appeal and shall give the person written notice of that decision.
>
> (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
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> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
> - the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
> - the intervention will not repeat or duplicate evidence presented by other parties; and
> - if the intervention request is late, there are documented and sound reasons why the intervenor did not earlier file for such status."

Intervenor Applications

The Board received two intervenor applications. The first application was from the HHLG. The HHLG is a group of 10 families who own property in the Hounsfield Heights neighbourhood of Calgary, immediately adjacent to the former gas station that is the subject of the order under appeal. The properties are in the area impacted by the substance release from the former gas station. The HHLG argues that they are directly and adversely affected by the substance release and have a strong interest in seeing the contamination remediated in a proper and timely manner. The HHLG points to monitoring data suggesting the homes of some members may be subject to vapour migration, creating potential exposure pathways that could be a concern.

The HHLG advises they wish to make representations to the Board to ensure the Board understands the concerns of those who are potentially impacted by the contamination. Further, the HHLG advises the information will not be duplicative of the information presented by the parties in the hearing. They advise that their "sole intention … is to ensure the remediation plan properly takes into account the impact of the contamination on the surrounding residential

neighbourhood."

The second intervenor application was from Ms. Linda Barron. Ms. Barron also owns property in the neighbourhood immediately adjacent to the former gas station site that is the subject of the order under appeal. Ms. Barron states her "…land is directly and adversely affected by the continuous and ongoing migration of hydrocarbon contamination…" from the former gas station site. Further, Ms. Barron states:

> "I also believe that the terms and conditions of the [order] should be understood by all Parties and the Board such that remediation protocols and timelines that are necessary to address this far too long outstanding matter of contamination are appropriate and put into effect promptly. I have concerns that this may not happen. I believe that the [order] needs to be more rigorous than as currently written."

Ms. Barron states that after following this matter for over 14 years, her perspective will be unique.

Submissions

Upon receiving the intervenor applications, the Board asked the parties to the appeals for their comments on whether the Board should grant status to the Intervenors, and if so, what level of participation should be permitted.

The Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the "Director") consented to the intervenor applications.

Sears Canada Inc. ("Sears") advised that they would leave it up to the Board whether HHLG and Ms. Barron should be permitted to participate in the hearing. However, Sears noted the Director has already confirmed the acceptability of the Revised Remediation Plan. Therefore, Sears expressed concern that the submissions of the Intervenors would be duplicative.

Concord North Hill GP Ltd. ("Concord") opposed the intervenor applications. Concord argues that neither HHLG nor Ms. Barron have a tangible interest in the appeals because neither have demonstrated that they are potentially being harmed by the contamination and that the Board should not "…assume or infer potential harm…" to the Intervenors. According to Concord, the interests of the Intervenors are adequately represented by the Director. Further, Concord argues that HHLG and Ms. Barron are concerned with the adequacy of the Revised Remediation Plan, which Concord suggests is not a matter before the Board. According to Concord, because the Revised Remediation Plan is not a matter before the Board, the participation of the Intervenors will not materially assist the Board. Finally, Concord argues that HHLG has not indicated whether it supports or opposes the appeals, which is a requirement of an intervenor request.

Suncor Energy Inc. ("Suncor") supported the submissions of Concord and Sears with respect to the intervenor requests.

Analysis

As stated, the Board has accepted the Intervenors' requests and permit them to participate with the same rights as a party to the appeal. In the Board's view, the Intervenors have a

tangible interest in the appeals and their participation may materially assist the Board, the participation of the Intervenors will not be duplicative, and both Intervenors effectively oppose the appeals.

The Board rejects the view expressed by Concord and supported by Suncor, that the Intervenors do not have a tangible interest in the appeal. Concord argues having land that is affected by the contamination plume is not sufficient to demonstrate a tangible interest, and that some level of greater proof of harm is required. The Board notes that Concord accepts that conclusive proof of harm is not required at this stage. Given the state of the proceedings, where evidence is still being filed and where the evidence will not be tested until the hearing, in the Board's view, there is a low threshold of proof that the Intervenors need to meet in order to meet this requirement of the test.

In the Board's view, the fact you own property that is potentially contaminated as the result of the actions of another person is a sufficient tangible interest to apply to intervene. No proof of actual harm is required. In the Board's view, the potential stigma associated with potential contamination, and the impact that this has on the ability to sell the property, along with the concern for potential health impacts, is sufficient to create the necessary tangible interest to intervene. An intervenor is not an appellant, and need not show the same type of direct effects.

Further, the Board believes that the Intervenors will materially assist the Board. The remediation work that is being undertaken is to benefit and protect the environment, but it is also to benefit and protect the people who are impacted by the contamination. The Intervenors are the people the order is intended to protect and benefit, and as a result, their views are of interest to the Board in making its recommendation to the Minister to confirm, reverse, or vary the order that has been appealed. While the Board recognizes that the Director represents the broader public interest, this does not replace the useful information the Board can obtain from the Intervenors.

Part of the argument made by Concord, and some of the other parties, is based on the belief that the Revised Remediation Plan has been signed off by the Director – which is of concern to the Intervenors – and is, therefore, not before the Board. Respectfully, this belief is incorrect. The issues that have been set for the hearing of the appeal[1] make it clear that the Board's recommendations and the Minister's decision can result in changes to the Revised Remediation

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[1] As advised on August 10 and 23, 2019, the issues for the hearing are:

"1. Was it appropriate for the Director to issue the EPO? This includes:

   a. Did the Director rely on Sears' financial circumstances as a basis to issue the EPO, and if so was this an irrelevant consideration?

   b. Did the Director err in issuing the EPO under section 113 of EPEA?

   c. Did the Director arbitrarily issue the EPO even though the Appellants argue there was no indication the "Substances" on the "Lands" or "Off-Site" caused, were causing, or may cause an adverse effect?

2. Are the parties named in the EPO persons responsible as defined in EPEA and for the purposes of section 113, and are there other parties, such as the Mall Owners, who should be named as persons responsible?

3. Are the terms and conditions of the EPO appropriate?

   (a) This includes whether the deadlines included in the EPO are appropriate."

Plan. Specifically, the issues “Was it appropriate for the Director to issue the [order]?” and “Are the terms and conditions of the [order] appropriate?” make it clear the Board could recommend the order be varied to include additional requirements that need to be included in the Revised Remediation Plan. Adding additional requirements to the order may require the Appellants to further revise the Revised Remediation Plan. The Board notes that the Revised Remediation Plan is of particular importance to the Intervenors, and the requirements of the Revised Remediation Plan have the potential to affect the Intervenors significantly.

With respect to whether the Intervenors support or oppose the appeal, it is clear from their submissions that they want changes to the order and want to make it more rigorous. To this extent, the Intervenors effectively oppose the appeals and are, in general, adverse in interest to the Appellants. In the Board’s view, this is sufficient for meeting this requirement of being an intervenor.

Finally, with respect to the requirement not to unnecessarily delay the hearing, the Board has developed a revised schedule that was previously provided to the parties, that accommodates the participation of the Intervenors, while still concluding the hearing in the 3 days that were planned. A copy of this schedule is attached.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6569 for Valerie Myrmo, Registrar of Appeals, and 780-427-7002 for Denise Black, Board Secretary. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca and denise.black@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel and
Settlement Officer

Att.

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of these appeals. The information you provide will be considered a public record.

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Distribution List

Parties

Appellants

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Mr. Bernard Roth (17-070)
Mr. Daniel Collins
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Ms. Kimberly Howard (18-013)
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Intervenors

Mr. Dufferin Harper
Blake, Cassels & Graydon LLP
(*Representing mall owners BIM North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Ltd.*)
(Board granted party status for the hearing to Mall Owners on Aug 25, 2019)

Mr. Gavin Fitch
McLennan Ross LLP
(*Representing Hounsfield Heights Landowners Group – HHLG*)
(on Oct 9, 2019 permitted to intervene in hearing)

Ms. Linda Barron
(on Oct 9, 2019 permitted to intervene in hearing)

Interested Persons

Mr. Allan Legge

Ms. Nicole Bradac

Ms. Eileen Jones

President
Hounsfield Heights-Briar Hill Community Association

Mr. Allan de Paiva

Mr. George Kingston