

**ALBERTA ENVIRONMENT
OFFICE OF THE MINISTER**

**MINISTERIAL ORDER
19/2002
ENVIRONMENTAL PROTECTION & ENHANCEMENT ACT
R.S.A. 2000, c. E-12**

**ORDER RESPECTING ENVIRONMENTAL APPEAL BOARD
APPEAL NO. 01-062**

- and -

**ENVIRONMENTAL PROTECTION ORDER
NO. EPO - 2001-01**

**Reasons of the Minister
May 20, 2003**

1. INTRODUCTION

On June 25, 2001, the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") issued Environmental Protection Order ("EPO") No. EPO-2001-01 (the "Order") to Imperial Oil Limited ("Imperial") and its subsidiary Devon Estates Limited ("Devon Estates") under the *Environmental Protection & Enhancement Act* ("EPEA"). This Order was appealed to the Environmental Appeal Board (the "Board") on July 3, 2001 and following the completion of the appeal process I was provided with the Board's Report and Recommendations dated May 21, 2002 (the "Report and Recommendations"). On July 22, 2002, I issued Ministerial Order 19/2002 and in keeping with my practice and that of previous Ministers of Environment, I did so without reasons.

Imperial and Devon Estates applied for Judicial Review of this matter and following the hearing of this matter by the Honourable Madam Justice Rosemary E. Nation of the Court of Queen's Bench of Alberta, she issued Reasons for Judgment dated April 30, 2003. In the Reasons for Judgment, Justice Nation indicated that this is one of those unique and rare circumstances where I ought to have given reasons with the Ministerial Order, at least in relation to the September Letters (as described in her Reasons for Judgment). In light of the foregoing and Justice Nation's direction, I now provide my reasons but with some reluctance.

2. JULY, 2002 - PERSPECTIVE

After considerable analysis, the Board concluded that the September Letters formed part of an adaptable process and were not in and of themselves subject to appeal under EPEA. The Board stated that the September Letters were only evidence in relation to Issue 5 which dealt with the reasonableness and precision of the Order. The Board indicated it was examining the September Letters on that basis but as Justice Nation subsequently observed, the Board "in a round about way" proceeded to fully review the September Letters. Although the Board couched their recommendations in language to fit the context of Issue 5, the Board treated the September Letters as though they were part of the Order or a new EPO. It was apparent to me, based on the Board's own reasoning in the Report and Recommendations that the Board had gone beyond the scope of its authority. I nonetheless took into careful consideration all of the recommendations put forward at page 109 of the Report and Recommendations including those regarding the September Letters. I do not propose to list those recommendations here but will simply identify to the relevant ones by reference to the number assigned by the Board.

Recommendations 3, 4, 5 and 6 arise from the September Letters. Recommendations 3 and 4 confirm the Director's decision with respect to removal of soils containing greater than 140 ppm of lead between 0.3 and 1.5 metres and the removal of 0.3 metres of soil under decks, fences, gardens, shrubs and trees. I agreed with the Board's analysis with respect to issues 3 and 4 and the substance

of those recommendations. With respect to Recommendation 5, I disagreed with the Board. Although I acknowledge that the semi-permanent nature of the structures provide a barrier to exposure, I was concerned that driveways, patios and sidewalks are accessible and can be and are removed and moved to other locations. Failure to clean-up in accessible areas under semi-permanent structures leaves open the possibility for future clean-up and potential for inadvertent or unexpected exposure to lead contamination in the future. Practically this may result in future claims for compensation and the costs of future clean-up being borne by future generations who, for example, move their sidewalk at some later time. This financial consideration is quite apart from the potential for the creation of exposure pathways to lead being unknowingly or unwittingly created and the requirement for continued risk management on those lands. Although the risk may be low, it was my view that clean-up under semi-permanent structures creates a certainty from a financial, safety and public health perspective which is beneficial for current and future owners, the environment, the public, Imperial and Devon Estates.

With respect to Recommendation 6, I was in agreement with the Board that it would be improper for the Director to delegate his authority under Section 102(3) of EPEA. In light of the explanation provided by the Director set out in the Report and Recommendations that he only intended that Imperial and the owners have dialogue to identify restoration objectives and concerns, I was satisfied there had been no delegation at all and that the Director retained control over acceptability of remediation throughout.

3. JULY 22, 2002 - MINISTERIAL ORDER

By Ministerial Order, I confirmed the Order subject only to a consideration unrelated to the September Letters. When doing so I had accepted the view of the Board that the September Letters were not part of the Order per se or new Orders and therefore not subject to appeal to the Board. I was of the view that by upholding the Order it permitted the Director to proceed with implementation of the Order. Although I was cognizant of the Board's recommendations, having concluded the September Letters were independent of the Order, the consequence in my view was that the directions set out in the September Letters continued without modification.

4. REASONS OF JUSTICE NATION

I have now had the benefit of reviewing the Reasons for Judgment of the learned Justice Nation. She expressed her view that some, although not all letters made in furtherance of an EPO, may be considered an amendment to an EPO or a new EPO and subject to appeal to the Board under EPEA. She observed that for the remedial standards in the September Letters to have life and meaning they must be further EPO's or amendments to the Order. With this guidance, it is clear that the Board in describing its approach was mistaken in its characterization of the September Letters and its authority to review them. The Board purported to characterize the September Letters as evidence but, in fact, having heard evidence on the substance of the September Letters, proceeded with a complete and thorough analysis of the aspects of the September Letter raised by Imperial and Devon Estates as concerns and made recommendations as though the September Letters were under

appeal.


5. CONCLUSIONS

I accept Justice Nation's view that aspects of September Letters having provided a framework and foundation for implementation of the Order including the setting of remedial standards must have their genesis in an EPO to be effective. After receiving Justice Nation's guidance, my perspective now is that the September Letters were amendments which formed a constituent part of the Order and therefore properly the subject of an appeal by the Board. The Board although describing its process differently, in fact, heard a complete and thorough appeal of the Order including the September Letters.

I have addressed in these reasons my concurrence with the Board in relation to its confirmation of the Director's establishment of a standard of 140 ppm of lead and the depth of soil removal generally. In addition, I have indicated why I disagreed with the Board in relation to removal of soil under semi-permanent structures and that I require cleanup under those structures. On the issue of delegation, I wish to be abundantly clear that the Director is the only one who can make a decision on the acceptability of restoration of the private residential properties. I disagree that the Director delegated this decision and I am of the view that he retained his authority throughout. Having now examined the issues arising from the September Letters in the context of an appeal to the Board, I have not changed my views on those issues and the consequence of Ministerial Order 19/2002 in the end result remains the same.

The above constitutes my reasons in response to the direction by Madam Justice Rosemary Nation. I again express my reluctance to issue reasons but in light of the finding that this is a unique and rare circumstance calling for reasons, I have done so. Although it may be self evident, I wish to make it clear that no one should take the giving of these reasons as a basis for the expectation that reasons will be given in the future.

Dated at the City of Edmonton in the Province of Alberta this 21st of May, 2003.


Honorable Dr. Lorne Taylor
Minister of Environment