

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 4, 2008

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Paula McGinnis, Laura Peaire, Mike Agostini, Brenda Reddekopp, Jean Morrison, Jana Siminiuk, and Gordon Phillips with respect to *Water Act* Approval No. 00204375-00-00, *Environmental Protection and Enhancement Act* Approval No. 203803-00-00, *Water Act* Licence No. 00203992-00-00 issued to Burnco Rock Products Ltd., and *Water Act* Amending Approval No. 00022289-00-01 and *Water Act* Amending Approval No. 00022289-00-02 issued to Parkland County by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Intervenor Decision: *McGinnis et al. v. Director, Central Region, Regional Services, Alberta Environment*, re: *Burnco Rock Products Ltd. and Parkland County* (04 March 2008), Appeal Nos. 06-014-030, 032-034, 042-049-ID2 (A.E.A.B.).

BEFORE:

Dr. M. Anne Naeth, Panel Chair.

PARTIES:

Appellants:

Ms. Paula McGinnis, Ms. Laura Peaire, Mr. Mike Agostini, Ms. Brenda Reddekopp, Ms. Jean Morrison, Ms. Jana Siminiuk, and Mr. Gordon Phillips.

Director:

Mr. Tom Slater, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. Bill McDonald, Alberta Justice.

Approval Holders:

Burnco Rock Products Ltd., represented by Mr. J. David Brett, Gowling Lafleur Henderson LLP; and Parkland County, represented by Mr. Brian Rimmer.

INTERVENORS:

Mr. Lee and Ms. Marlene Marczak and Mr. Gary Butterfield, and Mr. Rick Green and Ms. Jennifer Morin.

EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Approval No. 00204375-00-00, *Environmental Protection and Enhancement Act* Approval No. 203803-00-00 and *Water Act* Licence No. 00203992-00-00 to Burnco Rock Products Ltd. for the operation of a gravel pit near Duffield, Alberta, and *Water Act* Amending Approval Nos. 00022289-00-01 and 00022289-00-02 to Parkland County in relation to the gravel pit.

Between April 27 and May 23, 2006, the Environmental Appeals Board received 33 Notices of Appeal from 8 appellants. Mediation meetings were held but no resolution was achieved, so the Board scheduled a hearing of the appeals for December 12 and 13, 2007. In response to the Notice of Hearing advertisement, the Board received two intervenor requests from Mr. Lee and Ms. Marlene Marczak and Mr. Gary Butterfield, and Mr. Rick Green and Ms. Jennifer Morin. After reviewing the requests and the submissions provided by the parties, the Board determined the intervenors could participate through written submissions only, because it appeared the evidence they intended to present would be adequately presented by the appellants.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUBMISSIONS	4
A.	Intervenors	4
1.	Mr. Lee and Ms. Marlene Marczak and family and Mr. Gary Butterfield.....	4
2.	Mr. Rick Green and Ms. Jennifer Morin.....	4
B.	Appellants	5
C.	Approval Holders.....	5
III.	ANALYSIS.....	5
A.	Legislation.....	5
B.	Discussion	7
IV.	DECISION	8

I. BACKGROUND

[1] On March 23, 2006, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00204375-00-00 under the *Water Act*, R.S.A. 2000, c. W-3, Approval No. 203803-00-00 under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), and *Water Act* Licence No. 00203992-00-00 to Burnco Rock Products Ltd. (“Burnco”) for the operation of a gravel pit near Duffield, Alberta, and *Water Act* Amending Approval Nos. 00022289-00-01 and 00022289-00-02¹ to Parkland County in connection with the gravel pit.²

[2] Between April 27 and May 23, 2006, the Environmental Appeals Board (the “Board”) received 33 Notices of Appeal from the following persons:

Mr. Don Meredith, Appeal Nos. 06-011, 06-012, 06-013, 06-038, 06-039;
Ms. Paula McGinnis, Appeal Nos. 06-014, 06-015, 06-016, 06-017, 06-018;
Ms. Laura Peaire, Appeal Nos. 06-019, 06-020, 06-021, 06-042, 06-043;
Mr. Mike Agostini, Appeal Nos. 06-022, 06-023, 06-024, 06-044, 06-045;
Ms. Brenda Reddekopp, Appeal Nos. 06-028, 06-029, 06-030;
Ms. Jean Morrison, Appeal Nos. 06-025, 06-026, 06-027, 06-047, 06-048;
Ms. Jean Siminiuk, Appeal Nos. 06-032, 06-033, 06-034, 06-048, 06-049; and
Mr. Gordon Phillips, Appeal No. 06-046,

(collectively the “Appellants”)³ appealing the Approvals and Licence.

[3] Between May 1 and 23, 2006, the Board wrote to the Parties acknowledging receipt of the Notices of Appeal and notifying the Director and Approval Holders of the appeals. The Board requested the Director provide the Board with a copy of the records (the “Record”)

¹ In this decision, the Board will refer to *Water Act* Approval No. 00204375-00-00, EPEA Approval No. 203803-00-00, *Water Act* Licence No. 00203992-00-00, and *Water Act* Amending Approval Nos. 00022289-00-01 and 00022289-00-021 collectively as the “Approvals and Licence.”

² In this Decision, collectively, Burnco and Parkland County will be referred to as the “Approval Holders.”

³ In this Decision, the Appellants do not include Mr. Don Meredith, as his appeals were withdrawn before the Hearing. The Appellants, Approval Holders, and Director will be referred to, collectively, as the “Parties.”

relating to these appeals and the Parties provide available dates for a mediation meeting, preliminary meeting, or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On June 5, 2006, the Board received a copy of the Record from the Director, and on June 13, 2006, the Board forwarded a copy to the Appellants.

[6] On July 12, 2006, Ms. McGinnis applied for a Stay of the Approvals. The Board asked the Appellants to respond to the Stay request.⁴ The Appellants provided their responses between July 24 and 26, 2006. The Board notified the Parties on August 8, 2006, that the Stay request was denied, and the Board provided its reasons for the denial in the same letter.

[7] After canvassing for the most suitable date, the Board notified the Parties that a mediation meeting would be held on August 16, 2006. The Mediation Meeting was held on August 16, 2006, and a series of subsequent meetings were held (September 10, 2006, January 11, 19, and 23, 2007, and February 12, 2007) in an attempt to resolve the issues. No resolution was reached, and on August 17, 2007, the Board notified the Parties that the appeals would be proceeding to a Hearing on December 12 and 13, 2007.

[8] On August 10, 2007, Burnco requested that issues be set for the Hearing. The Board set the submission schedule, and submissions were received from Ms. Laura Peaire, Mr. Mike Agostini, Ms. Paula McGinnis, Ms. Brenda Reddekopp, Ms. Jana Siminiuk, Burnco, and the Director on September 12, 2007. Response submissions, including a submission from

⁴ In the Board's letter of July 14, 2006, the Appellants were asked to provide responses to the following questions:

- “1. What are the serious concerns that the appellants have that should be heard by the Board?
2. Would the appellants suffer irreparable harm if the Stay is refused?
3. Would the appellants suffer greater harm for the refusal of a stay pending a decision of the Board on the appeal, than BURNCO Rock Products Ltd. and Parkland County would suffer from the granting of a Stay; and
4. Would the overall public interest warrant a Stay?”

Parkland County, were received from September 19 to October 1, 2007. Ms. Reddekopp provided her response submission on October 5, 2007. The Board did not receive submissions from Mr. Don Meredith, Ms. Jean Morrison, or Mr. Gordon Phillips.

[9] On October 31, 2007 the Board notified the Parties that the issues that would be heard at the Hearing were:

1. Do the terms and conditions of the Approvals and Licence (including the terms, monitoring, complaints process, mitigation and remedial measures, and reclamation) adequately deal with the direct, indirect, and cumulative impacts of the project on the environment (including air quality, water quality and quantity, land, noise, and vibrations) and the health of the residents?
2. Did the Approval Holders adequately consider alternative methods, practices, and locations for the project, including the washing and crushing facilities?
3. Were the assessments completed and the baseline data collected for the application appropriate to represent the area and therefore be used as a basis for the Director to apply appropriate terms and conditions?
4. Did the Director consider all other applicable legislation, policies, and programs that could have influenced his decision prior to making his decision to issue the Approvals and Licence?

[10] Submissions for the Hearing were received from the Parties between November 23 and 27, 2007. No submissions were received from Ms. Jean Morrison and Mr. Gordon Phillips.

[11] On November 28, 2007, Mr. Don Meredith advised the Board that he was withdrawing his appeals. A Discontinuance of Proceedings was issued on December 6, 2007.⁵

[12] The Board placed a Notice of Hearing advertisement in the Edmonton Journal, Edmonton Sun, Stony Plain Reporter, and Spruce Grove Examiner newspapers. In response to the Board's Notice of Hearing, intervenor requests were filed by Ms. McGinnis on behalf of Mr. Lee and Ms. Marlene Marczak and family, Mr. Gary Butterfield, Mr. Rick Green, and Ms. Jennifer Morin (collectively, the "Intervenors"). Submissions regarding the intervenor requests were received from Ms. McGinnis and Burnco. No submissions were received from the other

⁵ See: *Meredith v. Director, Central Region, Regional Services, Alberta Environment*, re: *Burnco Rock Products Ltd. and Parkland County* (06 December 2007), Appeal Nos. 06-011-013 and 06-038-039-DOP

Appellants, Parkland County, or the Director. On November 23, 2007, the Board notified the Parties and the Intervenors that the Intervenors could participate through written submissions only. The submissions were received November 29, 2007. The Hearing was held on December 12 and 13, 2007.

II. SUBMISSIONS

A. Intervenors

1. Mr. Lee and Ms. Marlene Marczak and family, and Mr. Gary Butterfield

[13] Mr. and Ms. Marczak explained they live immediately across from the Burnco extraction site. They expressed concern for their health and the health of their children and their clients due to dust and diesel. They indicated they manage a horse boarding/riding operation and are concerned about the health, behavioral and emotional well being of the animals in their care, because dust, diesel, noise, and vibrations are serious concerns for the animals. The Marczaks stated the Burnco operation had already cost them loss of use and enjoyment of their property and loss of clientele and resulting revenue. They stated they have concerns with the reduction in the quality and quantity of water resources.

2. Mr. Rick Green and Ms. Jennifer Morin

[14] Mr. Green and Ms. Morin indicated they live adjacent to the extraction site. They stated they are concerned with their physical and emotional health due to the dust and diesel. They stated they were concerned with the health of their livestock due to dust, diesel, noise, and vibrations. They believed their missing pets are a direct result of Burnco's operation. Mr. Green and Ms. Morin were concerned about the impact of wet mining on their water quality and availability. They expressed concern about the effect on the ecosystems and the impacts of the reclamation plan and process. They stated they are now experiencing sediment and odour in their water, which never occurred before. They expressed concern about the vibrations and their effect on the structure of their home and livestock. They stated they are having difficulty sleeping

during the day, and they are less able to enjoy the use of their property and their animals because of the dust and noise.

B. Appellants

[15] Ms. McGinnis argued participation by the Intervenors would not delay the process because she would speak on their behalf. She explained the Intervenors have situations unique to them, so there would not be any duplication. She stated Mr. Green filed a Statement of Concern but did not have the time or resources to continue in the process. She explained the Marczak and Butterfield families are new to the area so did not have the opportunity to file a Statement of Concern. Ms. McGinnis stated the Intervenors' concerns have been exacerbated since extraction activities began. She argued the Intervenors should be allowed to participate to provide a complete and more encompassing picture of the residents' concerns.

C. Approval Holders

[16] Burnco stated it was opposed to the inclusion of the applicants as intervenors. Burnco submitted the Intervenors did not raise any issues that would materially assist the Board, because the Appellants already raised the same issues of dust, health, noise, and water. Burnco argued participation by the Intervenors would delay the hearing process because there will be duplication of evidence. Burnco stated the Intervenors did not attempt to participate in the process until the latest possible stage. It pointed out the Intervenors did not file Statements of Concern or Notices of Appeal.

III. ANALYSIS

A. Legislation

[17] Under section 95 of EPEA the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter

before the Board to any persons who the Board considers should be allowed to make representations.”

[18] Pursuant to sections 7 and 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), the Board must determine whether a person submitting a request to make representations should be allowed to do so at the hearing. Section 7 of the Regulation states:

“7(2) A published notice referred to in subsection (1)(a)(ii) or (b)(ii) must contain the following:

- (a) the date, time and place of the hearing, in a case where an oral hearing is to be held;
- (b) a summary of the subject matter of the notice of appeal;
- (c) a statement that any person who is not a party to the appeal and wishes to make representations on the subject matter of the notice of appeal must submit a request in writing to the Board;
- (d) the deadline for submitting a request in writing under clause (c);
- (e) the mailing address of the Board;
- (f) the location and time at which filed material with the Board will be available for examination by interested persons.”

[19] Section 9 of the Regulation provides:

- “(1) A request in writing referred to in section 7(2)(c) shall
- (a) contain the name, address and telephone number of the person submitting the request,
 - (b) indicate whether the person submitting the request intends to be represented by a lawyer or other agent and, if so the name of the lawyer or other agent,
 - (c) contain a summary of the nature of the person’s interest in the subject matter of the notice of appeal, and
 - (d) be signed by the person submitting the request.
- (2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[20] The Regulation also states that the Board can determine who will be a party to an appeal. Section 1(f)(iii) of the Regulation states:

“In this Regulation... ‘party’ means any other person the Board decides should be a party to the appeal.”

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

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

B. Discussion

[22] An important aspect when determining whether a person should be accepted as an intervenor is whether or not the person will be able to bring additional, relevant information to the process that will not duplicate evidence presented by the Parties. The Board must assess whether the evidence provided by an intervenor will materially assist the Board in preparing its recommendations. The submissions provided by the Intervenors provide limited information on what evidence the Intervenors intend to bring forward at the Hearing. In applying for intervenor status, the request should include some indication on how their evidence would be different from that of the parties or add to the evidence anticipated to be presented.

[23] The Intervenors indicated they had concerns regarding the effect of dust and diesel on their health. They did not provide any information to demonstrate their health concerns were different from those of the Appellants.

[24] The Intervenors stated they had concerns with the effect of the Burnco operation on water quality and quantity. These are issues to be heard at the Hearing, but it is unclear what additional evidence the Intervenors would bring that the Appellants could not present.

[25] The Intervenors stated they had concerns about the impact of the proposed reclamation plan and process. However, there is no indication of the type of concerns they have regarding reclamation of the site.

[26] The Intervenors live adjacent to the Burnco operation. Their concerns appear to be the same as those presented by the Appellants, even though the degree of the effect may be different due to the proximity of their residences to the Burnco operation.

[27] The Intervenors raised concerns regarding the effect of the Burnco operation on the health of the animals on their property and the effect on their business. These are factors that indicate the Intervenors may have a different perspective that could add to the Board's understanding of the issues. Because of their location in relation to the operation and the potential effects on their livestock and businesses, the Board will allow the Intervenors to participate through written submissions only.

IV. DECISION

[28] The Board will allow Mr. Lee and Ms. Marlene Marczak and family, Mr. Gary Butterfield, Mr. Rick Green, and Ms. Jennifer Morin to participate as intervenors in these appeals through written submissions only.

Dated on March 4, 2008, at Edmonton, Alberta.

“original signed by”

Dr. M. Anne Naeth
Board Member and Panel Chair