

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 2, 2012

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 Gas Plus Inc. and Handel Transport (Northern) Ltd. with respect to *Environmental Protection and Enhancement Act* Environmental Protection Order No. EPO-2010/58-SR and Amendments issued to Gas Plus Inc. and Handel Transport (Northern) Ltd. by the Director, Southern Region, Operations Division, Alberta Environment.

Cite as: Issues Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region, Operations Division, Alberta Environment* (02 February 2012), Appeal Nos. 10-034, 11-002, 008, & 023-ID4 (A.E.A.B.).

BEFORE:

Justice Delmar W. Perras (ret.), Board Chair.

SUBMISSIONS BY:

Appellants: Gas Plus Inc. and Handel Transport (Northern) Ltd., represented by Mr. Richard I. John.

Director: Mr. Darren Bourget, Director, Southern Region, Operations Division, Alberta Environment and Water,* represented by Ms. Erika Gerlock, Alberta Justice.

Intervenor Applicants: The City of Calgary, represented by Mr. Timothy E. Haufe; and Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Terry Floate and Ms. Heather Cummings, Mr. Andy and Ms. Bonnie Ross, and Mr. Francesco Mele and Ms. Alison Hayter, represented by Mr. Richard C. Secord, Ackroyd LLP.

* For all relevant times during these appeals, the Department was named Alberta Environment. However, as of October 12, 2011, the Department was renamed Alberta Environment and Water. For the purposes of this Decision, the Department will be referred to as Alberta Environment.

EXECUTIVE SUMMARY

Alberta Environment issued an Environmental Protection Order to Gas Plus Inc. and Handel Transport (Northern) Ltd. requiring the remediation of a gas station site and portions of a residential area and commercial area in Calgary. The remediation is required because a gasoline spill contaminated the gas station site and has migrated into the residential and commercial areas, impacting a number of homes and businesses. Alberta Environment subsequently issued three amendments to the Environmental Protection Order.

The Environmental Appeals Board received a Notice of Appeal from Gas Plus Inc. and Handel Transport (Northern) Ltd. (the Appellants) appealing the Order and subsequent amendments. The Board also accepted seven intervenor requests.

After reviewing and considering the submissions from Alberta Environment, the Appellants, and the intervenors, the Board determined the issues for the hearing will be:

1. Are the remediation techniques and timelines included in the amended Environmental Protection Order to address the on-site and off-site contamination appropriate?
2. Should the amended Environmental Protection Order be reversed or varied based on the alleged “frustration” of Gas Plus Inc. with respect to the Bow Liquor Inc. lease?
3. Should the amended Environmental Protection Order be varied to identify only Handel Transport (Northern) Ltd. as the person responsible, as opposed to both Gas Plus Inc. and Handel Transport (Northern) Ltd. as currently identified in the amended Environmental Protection Order?

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I. BACKGROUND

[1] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment (the “Director”), issued Environmental Protection Order No. EPO-2010/58-SR (the “Order”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Gas Plus Inc. (“Gas Plus”) and Handel Transport (Northern) Ltd. (“Handel Transport”) (collectively the “Appellants”). The Order was issued in relation to a gas station site located at 6336 Bowness Road NW, in Calgary, Alberta (the “Site”). The Director issued three amendments to the Order on April 21, 2011, June 1, 2011, and September 13, 2011 (collectively the “Amendments”). The third amendment issued September 13, 2011, required Gas Plus Inc. and Handel Transport (Northern) Ltd. to choose between two remediation options: Option A is to dig and remove all contaminated material from the Site; or Option B is to build a secant wall along the perimeter of the Site to contain all contaminated material.

[2] On December 10, 2010, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Gas Plus Inc. and Handel Transport (Northern) Ltd. appealing the Order. The Appellants appealed the Amendments on April 28, 2011, June 9, 2011, and September 19, 2011,

[3] In response to the Board’s Notice of Hearing, the Board received nine intervenor requests.¹ The Board accepted the intervenor requests of Mr. Terry Floate and Ms. Heather Cummings, Mr. Francesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Andy and Ms. Bonnie Ross (collectively the “Residents”), the City of Calgary, Alberta Health Services, and Bow Liquor Inc. (collectively, the “Intervenors”).

[4] Between September 29 and October 14, 2011, the Board received submissions from the Appellants, Director, Residents, and City of Calgary on the issues that should be heard by the Board.

[5] The Board notified the Appellants, Director, and Intervenors on October 28, 2011, of the issues to be heard at the hearing.

¹ Two of the intervenor applicants, Shell Canada Limited and Mr. Tony Pike, withdrew their applications.

II. SUBMISSIONS

A. Appellants

[6] The Appellants identified the issues as:

1. Neither the Source Containment option nor the On-Site Remedial Program should be implemented, because the extent of the contamination indicates that in-situ bioremediation is the best solution, the industry standard solution, supported by science, and sufficient to remediate the Site without excavation or containing the contamination.
2. The secant wall required under Option B of Amendment No. 3 should be reduced to the triangular portion of the Site leaving Bow Liquor Inc. intact and not disturbing deep services.
3. The Appellants have no right in law pursuant to the lease with Bow Liquor or in equity to require Bow Liquor to vacate the Site.
4. The method of remediation proposed by Tiamat Environmental Consultants Inc. ("Tiamat"), *in situ* bioremediation, is the most appropriate method to deal with off-site contamination.
5. The timelines imposed by the Order are not realistic given the availability of contractors and the time required to fully remediate the hydrocarbons released.
6. Only Handel Transport is the owner of the Site and is responsible for the leak of hydrocarbons and is responsible for the tanks, pumps, and sumps. The Order should not be directed to Gas Plus Inc.

[7] The Appellants asked the issue of off-site remediation be determined concurrently with on-site issues.

B. Director

[8] The Director accepted the first two issues as proposed by the Appellants.

[9] The Director submitted the delineation and remediation of the off-site areas cannot be segregated from the work required on the Site. The Director submitted all of the issues pertaining to the delineation and remediation required under the Order and the Amendments for the entirety of the plume, both on-site and off-site, must be included and heard by the Board at the hearing.

[10] The Director objected to the inclusion of the issue of the lease, because it is a private legal matter between the Appellants and Bow Liquor.

C. The Residents

[11] The Residents asked the Board to consider the following issue:

Whether Alberta Environment can assume the delineation and remediation of the Site and off-site properties given the Appellants' lack of cooperation, continuing delays, and lack of objectivity.

[12] In addition, Mr. Mele and Ms. Hayter, Dr. Yip and Dr. Skrukwa, Mr. and Ms. Ross asked the Board to consider the following as issues:

1. Whether Shell Canada is liable for the contamination;
2. Whether CH2MHill can take over, from Tiamat, the responsibility of providing the necessary environmental consulting work and reports. The Residents were concerned with the reliability and objectivity of Tiamat's work. Tiamat proposed using the secant wall, but now it is denying the effectiveness of the secant wall. According to these Residents this casts doubt on Tiamat's ability to provide effective advice. Tiamat is not qualified to provide an opinion on the displacement of family businesses, and it should not consider the displacement as a factor in its analysis. This demonstrates a lack of objectivity in its recommendations.
3. Whether the Residents can be given a direct role in participating in the formulation and implementation of the delineation and remediation plans and the air quality monitoring.
4. Commencement of the characterization, delineation, and remediation of off-site contamination.

D. City of Calgary

[13] The City of Calgary submitted that limiting the issues to the appropriateness of Option A, Option B, *in situ* bioremediation, or leaving Bow Liquor intact would effectively operate as a stay and further delay the requirements of the Order. It added off-site remediation should not be disconnected from onsite remediation.

III. ANALYSIS

A. Legal Basis for Determining Issues

[14] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing.² The Board has reviewed and discussed the submissions received and determined the issues for the hearing.

[15] In order for a concern expressed by an appellant to be an issue at a hearing, the concern must be within the Board's jurisdiction, be specific to the approval being appealed, and have been included in the Notice of Appeal.

B. Analysis

[16] The issues raised by the Appellants regarding the remediation techniques is a valid issue before the Board. The issue was raised in the Notices of Appeal and is specific to the Order and Amendments, which require the Appellants to complete delineation and remediation on the Site as well as off-site, but the Appellants and Director have differing views on the best method to implement. The Residents have also expressed concern regarding the remediation process to be undertaken, including timing of the work and the method that should be used. Therefore, the first issue that will be heard is:

1. Are the remediation techniques and timelines included in the amended Environmental Protection Order to address the on-site and off-site contamination appropriate?

[17] The Board notes that in their correspondence, the Appellants and the Director have identified a number of proposed remediation techniques including: digging up and removing the contaminated material (Option A); using different configurations of secant walls to contain the contaminated material (Option B being a perimeter secant wall, and Option C being a

² Section 95 of EPEA states:

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....
- (4) “Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

smaller “triangular” secant wall); using bio-remediation (Option D); and using combinations of these techniques (Option E). The Board anticipates the participants at the hearing will address all of these options, and any other options that are available, that will achieve the desired outcome.

[18] The Appellants asked the issue of frustration be included as an issue for the hearing. At the present time, Bow Liquor operates a business from a leased building on the Site. Depending on which remediation option is implemented, Bow Liquor may be required to vacate the premises. The Appellants stated the contract they have with Bow Liquor does not allow them to break the lease. The Board’s jurisdiction is limited to providing recommendations to the Minister on whether the Order should be confirmed, reversed, or varied. The Board considers the contractual aspect of the frustration argument outside of its jurisdiction and would have to be settled in the courts. Therefore, the Board will consider the aspect of frustration only as it applies to whether the Order was issued properly. The second issue for the hearing is:

Should the amended Environmental Protection Order be reversed or varied based on the alleged “frustration” of Gas Plus Inc. with respect to the Bow Liquor Inc. lease?

[19] The Appellants asked the EPO be varied to have only Handel Transport named in the Order and to have Gas Plus Inc. removed from the Order. This is relevant to the Order, was identified as an issue in the Notices of Appeal, and is within the Board’s jurisdiction. Therefore, the third issue that will be considered by the Board at the hearing is:

Should the amended Environmental Protection Order be varied to identify only Handel Transport (Northern) Ltd. as the person responsible, as opposed to both Gas Plus Inc. and Handel Transport (Northern) Ltd. as currently identified in the amended Environmental Protection Order?

[20] The issue of Shell Canada Ltd. being liable cannot be considered by the Board. The Appellants have abandoned their claim against Shell Canada Ltd. and, as such, is no longer an issue before the Board.

[21] The issue regarding the delineation and remediation of the off-site contamination is captured in the first issue identified above.

[22] The remaining points raised by the Residents do not relate directly to the remediation work, which is the reason for the Order. Therefore, the Board will not consider these points as issues in and of themselves, but the Board is prepared to hear arguments on these points as part of the submissions as to what is the appropriate remedy the Board should recommend to the Minister in its Report and Recommendations.

[23] Pursuant to section 95(4) of EPEA, the participants will be allowed to make representations on the issues identified above only. If matters beyond these defined issues are argued, the Board will not consider the arguments in its deliberations.

IV. CONCLUSION

[24] The issues for the hearing will be:

1. Are the remediation techniques and timelines included in the amended Environmental Protection Order to address the on-site and off-site contamination appropriate?
2. Should the amended Environmental Protection Order be reversed or varied based on the alleged “frustration” of Gas Plus Inc. with respect to the Bow Liquor Inc. lease?
3. Should the amended Environmental Protection Order be varied to identify only Handel Transport (Northern) Ltd. as the person responsible, as opposed to both Gas Plus Inc. and Handel Transport (Northern) Ltd. as currently identified in the amended Environmental Protection Order?

Dated on February 2, 2012, at Edmonton, Alberta.

“original signed by”

D.W. Perras
Chair