ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 8, 2012

IN THE MATTER OF sections 91, 92, 95, 99, and 101 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 and Water.

Cite as: Reconsideration Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment and Water*, (08 May 2012), Appeal Nos. 10-034, 11-002, 008, & 023-RD (A.E.A.B.).

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

PARTICIPANTS:

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.
Intervenors:	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.

EXECUTIVE SUMMARY

Alberta Environment and Water* issued an Environmental Protection Order (the Order) to Gas Plus Inc. and Handel Transport (Northern) Ltd. (collectively the Appellants) requiring the remediation of a gas station site (on-site) and surrounding area (off-site) in the City of Calgary. The remediation is required because a release of gasoline contaminated the gas station site and the contamination has migrated from the site into the surrounding area, including a residential area where it has affected a number of homes. Alberta Environment and Water subsequently issued three amendments to the Order.

The Environmental Appeals Board received Notices of Appeal from the Appellants appealing the Order and each of the amendments. The Board held a hearing to determine the three issues, including:

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

After considering all of the information before it, the Board confirmed Alberta Environment and Water's decision to issue the Order, subject to a number of recommendations to vary the Order. The Minister accepted the recommendations and issued a Ministerial Order on January 25, 2012. The Ministerial Order requires the Appellants to remediate the on-site and off-site contamination within specific timelines.

The Appellants filed a reconsideration request of the Board's recommendations on the basis they were unable to comply with the timelines set in the Ministerial Order. The Board found the information provided by the Appellants to support the request was not new information. The information could have been obtained prior to the hearing, and some of the information should have been collected as soon as the contamination occurred. The Appellants did not provide any exceptional reason that warranted a reconsideration of the Board's recommendations. Therefore, the Board denied the reconsideration request.

The Board also received submissions on whether the application filed in the Court of Queen's Bench by Alberta Environment and Water against the Appellants for being in non-compliance with the Ministerial Order impacted the Board's ability to address the reconsideration request. The Board determined that the two processes can run concurrently.

TABLE OF CONTENTS

[*] At the time the Order was issued, 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 and Water.

I. INTRODUCTION

[1] This is the Environmental Appeals Board's reconsideration decision in relation to four appeals of an Environmental Protection Order issued to Gas Plus Inc. ("Gas Plus") and Handel Transport (Northern) Inc. ("Handel Transport") regarding contamination resulting from a release of gasoline at a gas station site in the Bowness neighbourhood of Calgary. Some of the contamination has migrated from the gas station site into adjacent areas, including a residential area where it is impacting a number of homes. The Environmental Protection Order requires the remediation of all the contamination.

[2] A hearing was held to address three issues, including whether the remediation methods and timelines required in the Environmental Protection Order were appropriate. The Board provided its recommendations to the Minister, who accepted the recommendations and issued a Ministerial Order requiring the remediation of the majority of the contamination to be completed within two months of the issuance of the Ministerial Order. Gas Plus and Handel Transport requested a reconsideration of the Board's recommendations, in particular the timelines imposed to complete this remediation.

II. BACKGROUND

[3] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment and Water[1] (the "Director"), issued Environmental Protection Order No. EPO-2010/58-SR (the "EPO") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Gas Plus and Handel Transport. The EPO was issued in relation to a gas station site located near the Bow River, at 6336 Bowness Road NW, in Calgary, Alberta (the "Site"). The Director issued three amendments to the EPO on April 21, 2011, June 1, 2011, and September 13, 2011.[2]

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[1] At the time the Order was issued, 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 and Water.

[2] The first amendment required the contaminated soil from the gas station site be excavated and removed; the second amendment extended the dates to commence this work; and the third amendment allowed the Appellants to choose whether they would proceed to deal with the contamination on the gas station site by excavating and removing the soil or by building a secant wall (an underground containment wall) around the perimeter of site.

[4] On December 10, 2010, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Gas Plus and Handel Transport (collectively the "Appellants") appealing the EPO. The Appellants appealed the amendments on April 28, 2011, June 9, 2011, and September 19, 2011 respectively.

[5] In response to the Board's Notice of Hearing, the Board received nine intervenor requests. 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").

[6] On October 28, 2011, the Board notified the Appellants, Director, Residents, and Intervenors (collectively the "Participants") of the issues for the hearing.[3] The hearing was held in Calgary, Alberta, on November 22 to 25, 2011. The Board issued its recommendations to the Minister on December 29, 2011, and Minister accepted the recommendations and issued the Ministerial Order (the "Order") implementing the recommendations on January 25, 2012.[4]

[7] On March 20, 2012, the Appellants requested a reconsideration of the Board's recommendations with respect to the timelines that were included in the Order. The Board set the schedule to receive submissions on the reconsideration request.

[8] On March 28, 2012, the Director served the Appellants with a filed originating notice seeking an order of the Court of Queen's Bench declaring the Appellants in breach of the Order and directing them to comply with the Order. As a result, the Board requested and received submissions on: What impact does the Director's application before the Court of Queen's Bench have on the Appellants' reconsideration request before the Board?

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[3] The issues for the hearing were:

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?

[4] See: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment*, (29 December 2011), Appeal Nos. 10-034, 11-002, 008, & 023-R (A.E.A.B.).

III. RECONSIDERATION REQUEST

A. Submissions

1. Appellants

[9] The Appellants requested the Board reconsider the recommendations made to the Minister and asked for an extension of the timelines in the Order. The Appellants asked for an extension of 10 to 12 weeks for clauses 16.5, 16.6, 21, and 22 of the Order.[5]

[10] The Appellants argued the Order should be varied for the following reasons:

1. the effort that has been undertaken since the Order was issued;
2. the physical impossibility of complying with the timelines;
3. 10 to 12 additional weeks should be sufficient to complete the work required under the Order;
4. the information was not available at the time of the hearing and the Board contemplated a need for the Order to be adaptive;
5. the logistics of the work required under the Order was not before the Board at the hearing and if the information was known, the Board would have recommended different timelines;
6. the Board should not have imposed timelines that cannot be met;
7. the work will continue as quickly as possible and the imposition of the timelines cannot lead to the work being done in a more expeditious manner; and
8. the reconsideration is limited to a request to partially vary the Order and the public interest would be best served by the work continuing as described by the Appellants.

[11] The Appellants argued some of the timelines imposed by the Order are unrealistic and do not reflect the parameters of the Site. The Appellants stated they are doing everything to

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[5] These paragraphs state:

"16.5 The High BTEX Material Removal Program shall be completed no later than **two months** from the date of this order.

16.6. Within **three months** from the date of this order**,** the Parties shall submit a written final High BTEX Material Removal Program Report prepared by the independent qualified professional who conducted the source removal work….

21. The Source Removal Program shall be completed no later than **two months** from the date of this order.

22. Within **three months** from the date of this order**,** the Parties shall submit a written final Source Removal Program Report prepared by the independent qualified professional who conducted the source removal work, which includes…."

comply with the Order. They stated the building that Bow Liquor Inc. occupied was demolished on March 16, 2012, and the construction of the secant wall has begun. The Appellants explained they were prepared to start construction of the secant wall on March 5, 2012, but did not receive the required permit from the City of Calgary by that date even though they applied for the permit on February 16, 2012.

[12] The Appellants stated there has been a tremendous amount of work done pursuant to the Order, and work on and off site continues to be done as quickly as possible.

[13] The Appellants argued an extension of the timelines would not be detrimental to the public interest or public safety. The Appellants stated they intend to fully comply with the Order but require the timelines be extended in clauses 16.5, 16.6, 21, and 22 by 10 to 12 weeks.

[14] The Appellants stated the Director refused to extend the deadlines in the Order even though the Board acknowledged the Director has the power to amend the Order as long as the amendments are consistent with the original intent of the Minister's decision. The Appellants noted the Director did not explain why he denied the extension.

[15] The Appellants explained that, after starting the work pursuant to the Order, it became clear it was not possible to meet the timeline prescribed. They stated there are a number of obstacles and barriers that make off-site excavation impossible within the timelines prescribed, including:

1. Enmax Power Corporation: The overhead power line located in the alley by the Site would be difficult to relocate temporarily and would take a minimum of six months. An alternative would be to shut down one part of the circuit, but the estimated time for the re-configuration, if approved, is a minimum of two months.
2. Telus: The underground structure cannot be relocated, so it will require support. The detailed engineering and planning would require a minimum of two months to implement.
3. ATCO Gas: The existing services in the alley by the Site would have to be temporarily relocated. It would take approximately three months to implement a main feed loop.
4. Private Lands: Consent is required to access private lands. A pre-disturbance assessment needs to be conducted to document existing features, such as fencing, decks, garages, driveways, landscaping, and houses, which may have to be removed. A dewatering plan has to be developed, applications made for off-site disposal of contaminated

> material, and permits obtained for road use, excavation, and de-watering. A staging area for equipment and materials has to be identified and secured.

[16] The Appellants stated that, based on the timing estimates provided by the various agencies, it will take a minimum of 15 months to complete the off-site excavation. On-site remediation will require 10 to 12 weeks to complete.

[17] The Appellants stated they sent letters to the affected landowners, but as of April 4, 2012, none of the affected landowners have provided consent to access their land.

2. Director

[18] The Director explained he has had several meetings with the Appellants since the Order was issued. At the February 24, 2012 meeting, the Appellants verbally requested the Director extend certain timelines in the Order. The Director advised the Appellants on February 27, 2012, that he would not amend the timelines. On March 7, 2012, the Director notified the Appellants of the deficiencies in several proposals and plans the Appellants submitted pursuant to the Order. On March 9, 2012, the Appellants formally requested a 10-week extension to the timelines specified in the Order for the High BTEX Removal Program Off-Site (Clause 16.5) and the Source Removal Program (On-Site Remediation) (Clause 21). On March 15, 2012, the Director reiterated that he would not amend the Order to extend the timelines.

3. Residents

[19] The Residents argued the Appellants did not meet the legal requirements for reconsideration. The Residents noted the timing of when the remediation was to be performed has always been an issue and was included as an issue for the hearing.

[20] The Residents stated the Appellants did not present any evidence with respect to timelines for delineation or remediation before or during the hearing. The Residents argued the Appellants had from the time the original EPO was issued on December 3, 2010 to determine an appropriate timeline to complete remediation on and off-site. The Residents argued this was the type of information the Appellants were specifically requested to present at the hearing.

[21] The Residents stated the Board's Report and Recommendations are meant to bring finality to the proceedings. They argued that in cases like this one, where delay and timing

have consistently been an issue, deadlines are needed to ensure the work is completed. The Residents argued "…the Appellants cannot seek a reconsideration of the Board's recommendations each time they discover something that they should have discovered before had they performed the work as required by the EPO."[6]

[22] The Residents submitted the Appellants' situation does not present an exceptional or compelling reason for reconsideration.

[23] The Residents stated the Appellants provided information in their reconsideration submission that could have and should have been obtained prior to the hearing. The Residents noted the Appellants had a continuing obligation to delineate and remediate the contamination since the EPO was issued. The Residents stated that had the Appellants performed their obligations under the EPO, the Appellants would have discovered the obstacles they are now describing in their submission, and the obstacles could have been dealt with in a timely fashion or at least raised as issues at the hearing. The Residents argued the Appellants cannot ask for more time to complete what they were legally obligated to do since December 3, 2010. The Residents stated that evidence that could have been obtained prior to the hearing is not new evidence and cannot be used to meet the legal requirement for reconsideration.

[24] The Residents noted the Appellants raised the lack of consent from neighbouring landowners as an issue to not being able to complete the off-site excavation. The Residents stated the letter to neighbouring landowners was sent two days before the deadline to complete the remediation, and several questions need to be addressed before the owners would agree to give up their homes for demolition. The Residents submitted the Appellants should have started the discussions with the owners immediately after the Order was issued.

4. Rebuttal Submission

[25] The Appellants submitted the details of the obstacles and barriers to the completion of the excavation were not reasonably known at the time of the hearing. The Appellants stated they proposed the in-situ remediation option to the Director on July 21, 2011, but after much time and urging, the Director notified the Appellants the in situ remediation technique would be insufficient and a third amendment to the EPO was issued. The third

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[6] Residents' submission, dated March 30, 2012, at page 2.

amendment was the subject of the hearing. The Appellants stated that it was not until the Order was issued that the EPO expressly provided for excavation to be conducted.

[26] The Appellants stated they acted expeditiously to comply with the Order, but the excavation cannot be done in the timelines specified in the Order.

[27] The Appellants requested the Board reconsider its recommendations and extend the timelines.

B. Analysis

[28] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[29] The Board has stated in previous decisions that its power to reconsider "…is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."[7] The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final.[8] The Board considers finality important in its decision making process and particularly when making recommendations to the Minster. It provides certainty to the approval holders, appellants, and the public that the appeal process is complete and the approval holder or appellant, as in this case, can proceed in accordance with the Minister's order. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for participants to reargue the same issues a second time or to bring evidence forward that could have been presented at a hearing. The onus is on the participant making the reconsideration request to convince the Board there are exceptional and compelling reasons to reconsider the decision.[9]

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[7] *Whitefish Lake First Nation* Request for Reconsideration re: *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment* re: *Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

[8] See: *British Columbia (Worker's Compensation Board)* v. *Figliola* 2011 SCC 52, [2011] 3 SCR 422.

[9] Preliminary Motions: *Bailey et al*. v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment* re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

[30] The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.

[31] The Appellants did not argue there was a substantial error of law in the Board's Report and Recommendations.

[32] The Appellants are asking the Board to reconsider its recommendations only as it applies to the timelines to conduct the remediation work, specifically as found in clauses 16.5, 16.6, 21, and 22 of the Order. They are not asking the Board to reconsider the work that is required, nor did they argue they are not responsible for the contamination. It is inaccurate to state, as the Appellants have, that only the final amendment (the third amendment) was the subject of the hearing. The Board heard the issues raised by the Appellants relating to the original EPO and all the amendments.[10]

[33] One of the issues expressly considered at the hearing was the timelines placed on the Appellants in the EPO. Timing was a principle ground of appeal in each of the Notices of Appeal filed with the Board by the Appellants.[11]

[34] The Appellants are arguing the work required to prepare for remediation is more extensive than originally anticipated. The Board does not consider this new information or information that could not have been obtained prior to the start of the hearing. The Appellants were aware of the contamination, knew they had a legal obligation to ensure the contamination

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[10] This was clearly identified by the Board in its October 26, 2011 letter where it stated, in response to questions from the Appellants:

> "The Board confirms that it will be addressing ALL of the issues included in the Notices of Appeal that are properly within the Board's jurisdiction and that have been clearly identified by Mr. John. The Board will not consider any other issues. … The Board confirms that both the on-site and off-site contamination will be addressed at the November hearing. The central issue at the hearing will be what is the appropriate remediation technique to address both the on-site and off-site contamination."

[11] See: Notice of Appeal, received December 10, 2010, at page 2 where the Appellants requested "…all of the time-lines in the EPO be extended." See also: Notice of Appeal, received April 28, 2011, at page 2 where the Appellants reiterated "…all of the time-lines in the EPO be extended." See also: Notice of Appeal, received June 9, 2011, at page 2 where the Appellants stated "…the Source Removal Program directed by the Further Amended EPO will not be able to be accomplished within sufficient time to accomplish the required objective." See also: Notice of Appeal, received September 19, 2011, at page 3 where the Appellants stated: "The time-lines imposed should be extended as they continue to be patently unreasonable given the time required to coordinate with contractors, develop a plan, and obtain necessary permits."

did not migrate and impact adjacent properties, and knew they had to take all necessary steps to start remediating the contamination as soon as possible. The contamination occurred in 2010, if not earlier. It was at that time the work should have been started. They did not have to wait until the Order was issued to start the work. The Appellants should have delineated the extent of the contamination and assessed options for remediation as soon as they became aware of the contamination.

[35] Dates were extended by the Director in each amendment to the EPO in an effort to accommodate the Appellants. Yet, at the hearing, the Appellants chose not to bring forward any concerns regarding the timing of the remediation work other than the time it would take to remediate the Site using the Appellants' preferred method, in situ remediation. The Appellants, as well as their consultants, were at the hearing and heard the evidence provided by the Residents' consultant, Dr. Jim Sevigny. Dr. Sevigny had prepared a remediation plan for on-site and off-site, which included estimated timeframes to complete the work he set out in his report. Much of the work recommended by the Board in its Report and Recommendations was based on Dr. Sevigny's report. His report was provided to the Appellants almost two weeks prior to the hearing. The Board considers this adequate time for the Appellants to have reviewed the proposal and formulated questions to test the practicality of the proposal, including the timelines. During questioning, the Board raised the issue of whether the timelines were reasonable. However, the Appellants chose not to question the timelines in the proposal or to provide their own anticipated timelines. They chose instead to focus only on their preferred remediation technique, which the Director did not accept as a viable option to remediate the contamination. By having the submission prior to the hearing, the Appellants should have been prepared to cross-examine the Residents' panel on the feasibility of conducting the work within the timelines that were suggested. Even though the Appellants may not have accepted Dr. Sevigny's remediation plan, they were free to raise concerns about the plan, including the feasibility of completing the work within the proposed timelines.

[36] The obstacles now raised by the Appellants in their submission are not new information. The Appellants were fully aware they had to consider the infrastructure in any work that was required. The City of Calgary attended the hearing and provided a written submission prior to the hearing. The City of Calgary explained its infrastructure would be

impacted by the contamination and the remediation work. The Appellants had the infrastructure marked on the maps indicating the contamination. None of this can be considered new information that was not available prior to the hearing. The Participants discussed the presence of the infrastructure during the course of the hearing. If the Appellants failed to cross-examine on the timing of the work as presented by the Residents, the Appellants cannot now use it as a basis to request a reconsideration of the Board's recommendations.

[37] Regardless of the method used to remediate the Site, the existing infrastructure had to be dealt with, but the Appellants made no effort to determine what would be required until after the hearing. The Appellants knew the work would have to be done, and there was nothing preventing them from starting the process and getting all of the required plans approved by the other entities prior to the hearing. In essence, the Appellants had from the time the contamination occurred to gather the information they are now trying to argue is new information and not obtainable prior to the hearing.

[38] In the affidavit provided by Mr. Normand Landry, Principal and Senior Project Manager for Lawson Projects, there were some inconsistencies or inadequate explanations of the timelines proposed by the Appellants to complete the remediation work. He summarized letters and emails provided by entities that have existing infrastructure that may be impacted by the remediation work. In the affidavit, it states that a minimum of two months would be required to re-configure the circuits for the power lines. However, in the email provided by ENMAX, it states one option could be done in "a month or two," suggesting a maximum of two months would be required, not a minimum. The Board acknowledges there is no indication of how long it would take ENMAX to approve the re-configuration.

[39] In the same affidavit, it states it would take two months to design the structure that would be required to support the Telus infrastructure. However, it is not clear how the timeframe was determined; the email from Telus that was attached to the affidavit does not specify any timeframe. The letter from Telus states it has dealt with many hydrocarbon issues before, so it is reasonable to assume Telus can provide the specifications required to build the protective structures. Therefore, it appears the timeframe referred to in the affidavit may be longer than necessary.

[40] Another example of the inconsistencies in Mr. Landry's affidavit was the reference to the email from ATCO Gas. In the email, it appears ATCO Gas prefers to have its systems interrupted in the spring and summer. Therefore, it appears further delays by the Appellants will impact their ability to complete the remediation work in an expedient manner.

[41] In the Appellants' original submission, the Appellants requested a 10 to 12 week extension for clauses 16.5, 16.6, 20, and 21 of the Order. In a supplemental submission, the Appellants clarified the 10 to 12 week timeline applied only to the excavation of the Site, not off-site, and it would take approximately 15 months to complete the remediation work off-site. Clauses 16.5 and 16.6 of the Order clearly refer to off-site remediation work. The Board is uncertain why the Appellants had originally thought 10 to 12 weeks would have been adequate to complete all of the remediation work, but later found they would need up to 15 months to complete the off-site work. It appears the Appellants are still unclear as to what is required.

[42] The Appellants requested the Director amend the Order by extending the timelines by 10 to 12 weeks. If the Director had agreed and the work was not completed, which the Appellants now say it would not have been finished in that timeframe, then the Appellants would have asked for a further amendment. There appears to be a continuous cycle of no definitive plan resulting in further delays to the work that needs to be done sooner rather than later for public safety and health reasons as well as addressing the environmental impacts.

[43] In their rebuttal submission, the Appellants argued they did not know excavation would be required. The Director had previously explained to the Appellants that the in situ remediation program advanced by the Appellants would not be acceptable to deal with the high BTEX areas. It would have been reasonable for the Appellants to consider various options to remediate the contamination before opting for a single, in situ method. In the assessment of the various options, it would have been prudent to calculate the expected timelines to complete the work under the various options. Even a cursory outline could have been developed and presented at the hearing. This certainly would have allowed the Appellants to assess if the timelines suggested by Dr. Sevigny would be inadequate. However, The Appellants did not raise any concerns with the timelines at the hearing, despite the fact it was a principle ground of

appeal in each of the Notices of Appeal the Appellants filed. It was also expressly identified as an issue to be considered at the hearing.[12]

[44] The Appellants referred to the Board's March 5, 2012 letter, in which the Board stated:

> "…the Director is empowered to amend the [Order] as long as the amendments are consistent with the intent of the Ministerial Order. The intent of the Board's Recommendations and the Minister's Order is to ensure that the remediation work is completed as soon as reasonably possible."

[45] Section 243 of EPEA allows the Director to amend the EPO, or in this case the Order, if warranted.[13] In this case, the Director amended the EPO three times before the hearing, including extending the dates each time to allow the Appellants additional time to complete the work that was required. The Board notes the Appellants appealed each of the amendments and requested stays of these amendments.

[46] On March 9, 2012, six weeks after the Order was issued, the Appellants made a request of the Director to have the Order amended by extending the dates further. The Director did not believe an extension was warranted. If there was an indication the Appellants had taken every reasonable effort to make progress on the required work, but was prevented from completing the work for a legitimate reason, then it may have been appropriate for the Director to amend the dates in the Order. However, the Appellants have made no attempt to make a concentrated effort to move quickly to complete the remediation work. Different aspects of the work can occur concurrently and much of the preliminary work could have been completed prior to the hearing.

[47] The Appellants argued there was a "tremendous amount of work which has been done pursuant to the Ministerial Order." The list provided to substantiate the work done includes delineation work. Although the Board acknowledges some work has been completed or is ongoing, much of the work, in particular delineation and monitoring, should have been

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[12] One of the issues set by the Board for the hearing was: "Are the remediation techniques and timelines included in the amended Environmental Protection Order to address the on-site and off-site contamination appropriate?" (Emphasis added.)

[13] Section 243(1) of EPEA provides: "The Director may amend a term or condition of, add a term or condition to or delete a term or condition from an environmental protection order."

completed as soon as the Appellants became aware of the contamination. They should not have waited until the Order was issued.

[48] The intent of the Order is to ensure the remediation work is completed thoroughly and as expeditiously as possible. People in the community have been adversely affected by the contamination and they need to have the Site and off-site areas remediated as soon as possible to protect their health and the environment and to allow them to enjoy the use of their properties.

[49] As stated previously by the Board, it appears the Appellants do not understand it is their responsibility to remediate the contamination, not the Director's or the Residents'. The Appellants have the responsibility to ensure all the work is completed to the satisfaction of the Director. The polluter pays principle is clearly stated in section 2(i) of EPEA.[14] At the hearing, the Appellants acknowledged they were responsible for the contamination. As such, they are also responsible for the remediation work, including the planning of the work that will be undertaken and to ensure the work is done as soon as possible.

[50] The Appellants have not provided any arguments or information to convince the Board its recommendations should be reconsidered. As stated, the Board is reluctant to allow reconsideration unless the applicant can meet the onus of demonstrating there is new or previously unattainable information. The Appellants have not met the onus of demonstrating there were exceptional circumstances that prevented them from obtaining the information prior to the hearing. Further, the Board believes the public's interest will not be served by granting the reconsideration request. Therefore, the Board denies the reconsideration request.

IV. COURT ACTION

[51] On March 28, 2012, the Director filed an application with the Court of Queen's Bench against the Appellants to have the Appellants declared in breach of the Order and directing the Appellants to comply with the Order. The issue was raised as to whether the reconsideration request was impacted by the Director's decision to file the court application.

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[14] Section 2(i) of EPEA states: "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing … the responsibility of polluters to pay for the costs of their actions."

A. Submissions

1. Appellants

[52] The Appellants submitted that, based on the Alberta Court of Queen's Bench decision of *Montgomery* v. *Edmonton Police Service* 1999 ABQB 913 ("*Montgomery*"), the Court should not enforce the Order until the reconsideration application has been concluded. They argued administrative remedies should be exhausted before resorting to a judicial review, unless the cost and inconvenience outweigh the benefits.

2. Director

[53] The Director submitted the enforcement proceedings before the Court of Queen's Bench have no impact on the Board's reconsideration process. The application to the Court is a separate and distinct process from the reconsideration process. The Director acknowledged he is seeking a remedy from the Court that the Board cannot grant. The Director explained the application to the Court is confined to a declaration that certain terms of the Order have been breached, and this is a factual determination that will be made at the time the matter is before the Court. The Director stated that if either he or the Minister extended the timelines such that the Appellants were no longer in breach of the Order, then the application to the Court would be moot.

[54] The Director submitted the Court application is not a judicial review as discussed in *Montgomery*. The Director argued the Court has the discretion to enforce orders notwithstanding a pending reconsideration request before the Board.

3. Residents

[55] The Residents stated the enforcement proceedings have no bearing on the Board's reconsideration process.

B. Analysis

[56] The Board agrees the reconsideration process is separate and distinct from the Court's process. Only if the Board recommended extending the deadlines, or if the Court extended the deadlines, could the different processes possibly affect each other. In this case, the

Board is not granting the reconsideration, and therefore, the Board will not recommend the dates to complete the remediation work be varied.

[57] The action filed by the Director is a civil action against the Appellants. The decision relied on by the Appellants, *Montgomery*, was the Court's response to a judicial review of the tribunal's decision. The reconsideration application before this Board is also not a judicial review. Therefore, the case of *Montgomery* does not apply to the reconsideration request.

[58] The Board understands the Appellants are attempting to exhaust all alternatives to the appeal process. However, the Appellants must take responsibility for the contamination and remediate the Site and off-site area as quickly and as efficiently as possible.

V. DECISION

[59] The application to the Court by the Director against the Appellants is a separate process and does not impact the Board's reconsideration process.

[60] The Board denies the reconsideration request. The Appellants did not provide any new evidence that was not available at the time of the hearing and did not provide exceptional and compelling circumstances that would warrant the reconsideration.

Dated on May 8, 2012, at Edmonton, Alberta.

"*original signed by*"

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D.W. Perras
Chair