

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 20, 2014

IN THE MATTER OF sections 91, 92, 95, and 97 of the
Environmental Protection and Enhancement Act, R.S.A. 2000, c.
E-12;

-and-

IN THE MATTER OF an appeal filed by Gas Plus Inc. and
Handel Transport (Northern) Ltd. with respect to the May 16, 2014
letter issued to Gas Plus Inc. and Handel Transport (Northern) Ltd.
by the Director, South Saskatchewan Region, Alberta Environment
and Sustainable Resource Development.

Cite as: *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, (20 June 2014), Appeal No. 14-008-D (A.E.A.B.).

BEFORE:

Justice D.W. Perras (Retired), Board Chair.

PARTIES:

Appellants:

Gas Plus Inc. and Handel Transport (Northern) Ltd., represented by Mr. Richard John, Bridgeland Law.

Director:

Mr. Darren Bourget, Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Erika Gerlock, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a letter to Gas Plus Inc. and Handel Transport (Northern) Ltd. notifying them that AESRD would take action to immediately carry out the terms of Ministerial Order 02/2012 to remediate a former gas station in Calgary. Gas Plus Inc. and Handel Transport (Northern) Ltd. (the Appellants) appealed the letter to the Environmental Appeals Board (the Board).

The Board asked the Appellants to provide reasons why they considered the letter was appealable. The Appellants argued the letter was actually a new environmental protection order that is appealable under the *Environmental Protection and Enhancement Act* (EPEA).

After reviewing the submissions provided by the Appellants and the applicable legislation, the Board found there is no right of appeal of a letter notifying a person of AESRD's intent to carry out the remediation work at the site pursuant to section 245 of EPEA.

The Board did not have jurisdiction to hear the appeal and, therefore, the appeal was dismissed.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding the appeal filed by Gas Plus Inc. and Handel Transport (Northern) Ltd. (the "Appellants").

[2] Alberta Environment and Sustainable Resource Development ("AESRD") issued a letter to the Appellants notifying them that AESRD will carry out the terms of Ministerial Order 02/2012 pursuant to section 245 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). The Ministerial Order was issued accepting the recommendations of the Environmental Appeals Board ("EPEA") following a hearing of the appeals filed by the Appellants regarding the issuance of Environmental Protection Order No. 2010/58-SR (the "EPO").¹ The EPO was issued due to 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 Ministerial Order was issued on January 25, 2012 (the "Ministerial Order") requiring the remediation of all the contamination on and off the site. Work was not proceeding at the site as specified in the Ministerial Order, so an order was issued by the Court of Queen's Bench on February 12, 2013 (the "Court Order"), ordering the Appellants to comply with the Ministerial Order.

[3] AESRD was not satisfied with the progress of the remediation work being done on the site so the letter was issued on May 16, 2014, to ensure the remediation work was completed on the gas station site and the off-site area.

[4] The Board asked the Appellants to provide reasons why they thought the letter was an appealable decision. The Appellants argued the letter was actually a new environmental protection order, which would be appealable under section 91(h) of EPEA.

[5] The Board found the Appellants' arguments did not have merit and the letter was not a new environmental protection order. There is no right of appeal for a letter issued under section 245 of EPEA and, therefore, the Board dismissed the appeal.

¹ 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.).

II. BACKGROUND

[6] On May 16, 2014, the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued a letter to the Appellants (the “Letter”) pursuant to section 245 of EPEA to the Appellants.² The Letter notified the Appellants the Director would carry out the terms of the Ministerial Order. The terms of the Ministerial Order required the remediation of a gas station in Calgary, Alberta.

[7] On May 23, 2014, the Board received a Notice of Appeal from the Appellants appealing the Letter and requesting a stay.

[8] On May 26, 2014, the Board acknowledged the appeal and notified the Director of the appeal. The Board also noted that it appeared the Letter was not appealable. The Board asked the Appellants to provide further comments regarding the appeal and to answer the stay questions.³

[9] The Appellants provided their response on June 6, 2014.

[10] On June 11, 2014, the Board notified the Appellants and Director that the appeal had been dismissed with reasons to follow. These are the Board’s reasons.

² Section 245 of EPEA provides, in part:

- “(1) If the person to whom an environmental protection order is directed fails to comply with the environmental protection order, the Director may take whatever action the Director considers necessary to carry out the terms of the order.
- (2) Costs incurred by the Director under this section are recoverable by the Government
 - (a) in an action in debt against the person to whom the environmental protection order was directed, or
 - (b) by order of the Minister directing any person who purchases land to which the environmental protection order relates including, without limitation, a purchase on the sale of the land to realize a security interest, to pay to the Minister instead of to the vendor an amount not exceeding the amount owing in respect of the costs.”

³ The Appellants were asked to answer the following questions:

- “1. What are the serious concerns of the Appellant[s] that should be heard by the Board?
- 2. Would the Appellant[s] suffer irreparable harm if the stay is refused?
- 3. Would the Appellant[s] suffer greater harm if the stay was refused pending a decision of the Board, than those that may be affected by his activities?
- 4. Would the overall public interest warrant a stay?”

III. SUBMISSION

[11] The Appellants stated they have been and continue to be in compliance with the Ministerial Order and the Court Order. The Appellants considered the letter provided by Curtis Engineering Associates Ltd. on the Appellants' behalf to the Director on December 13, 2013, was sufficient to comply with the Ministerial Order and the Court Order. The Appellants explained they followed up with the Director on January 8, 2014, but the Director did not reply until the Letter⁴ was issued in May 16, 2014. The Appellants argued the Director wrongly stated in the Letter that the Appellants did not provide a response to the Director's request for more details.

[12] The Appellants argued the Director acted without jurisdiction in issuing the Letter by failing to provide written approval for the Appellants to carry out remedial work required by the Ministerial Order even though the Appellants requested approval by the Director on December 13, 2013. The Appellants argued the Director acted in bad faith and was in breach of the Ministerial Order and the Court Order.

[13] The Appellants stated neither the Ministerial Order nor the Court Order contemplated the Director would have the authority to use additional sections under EPEA or to have the authority to direct the Appellants to deal with matters beyond the scope of the Ministerial Order, such as requiring an assessment of the bedrock on and off the site and the delineation and remediation of the bedrock.

[14] The Appellants argued the Letter was issued with an improper purpose in mind or for a collateral purpose given the Director was personally named in an action filed by persons who own property adjacent to the site to be remediated.

[15] The Appellants stated its appeal was filed pursuant to section 91(1)(h) of EPEA.

[16] The Appellants noted EPEA does not define "environmental protection order" in the definition section, but section 113 of EPEA⁵ provides guidelines for what the Director may

⁴ Although the Appellants referred to the Letter as the "Decision/EPO," the Board will use the term "Letter."

⁵ Section 113 of EPEA provides, in part:

"(1) Subject to subsection (2), where the Director is of the opinion that

order under an environmental protection order. The Appellants argued that, by drafting the legislation in this manner, the definition of an environmental protection order was left open to ongoing interpretation.

[17] The Appellants said the Director was not correct when he stated in the Letter that the Appellants failed to comply with the Ministerial Order and, therefore, the Director cannot invoke section 245 of EPEA because he has no legal authority to do so. The Appellants argued that, if the Director cannot invoke section 245 of EPEA, then his decision must be an environmental protection order, which is appealable.

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- (a) a release of a substance into the environment may occur, is occurring or has occurred, and
 - (b) the release may cause, is causing or has caused an adverse effect,
- the Director may issue an environmental protection order to the person responsible for the substance....
- (3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:
 - (a) investigate the situation;
 - (b) take any action specified by the Director to prevent the release;
 - (c) measure the rate of release or the ambient concentration, or both, of the substance;
 - (d) minimize or remedy the effects of the substance on the environment;
 - (e) restore the area affected by the release to a condition satisfactory to the Director;
 - (f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;
 - (g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;
 - (i) report on any matter ordered to be done in accordance with directions set out in the order.”

[18] The Appellants submitted the Letter constitutes *de facto* an environmental protection order as contemplated by EPEA. The Appellants argued the Letter, in conjunction with the underlying facts, establishes the appeal is properly before the Board.

[19] The Appellants stated the Director breached the Ministerial Order by unreasonably withholding his consent to the remediation plan, and by not having the authority to invoke section 245 of EPEA, his decision was an environmental protection order because it created a new set of remedial orders that were not sanctioned by the Minister or the Court.

[20] The Appellants submitted the Director based his decision on a false or mistaken claim that he did not receive a response to his written demand of November 21, 2013. The appellants stated they responded within the time allowed and confirmed they accepted the Director's position with respect to the Ministerial Order.

IV. ANALYSIS

[21] The Board derives its jurisdiction under the applicable legislation. Section 91 of EPEA details the specific decisions made by the Director that can be appealed.⁶ The Board does

⁶ Section 91 of EPEA states, in part:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances:...

- (f) where an inspector issues an environmental protection order regarding conservation and reclamation under section 140 or 141, the person to whom the order is directed may submit a notice of appeal;
- (g) where the Director issues an environmental protection order under section 129,
 - (i) the person to whom the order is directed, and
 - (ii) any person who is directly affected by the designation of the contaminated sitemay submit a notice of appeal;
- (h) where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g), the person to whom the order is directed may submit a notice of appeal....”

not have jurisdiction to hear appeals of decisions made by the Director other than those identified under section 91 of EPEA.

[22] In this case, the Appellants are attempting to make the Director's Letter fit into section 91(h) of EPEA in order to file an appeal. The plain reading of the Letter clearly does not convey it is a new environmental protection order.

[23] The Letter clearly states it was issued pursuant to section 245 of EPEA. The Letter explains to the Appellants why the Director was taking over the remediation work at the site and explained what the work was going to entail. It was not ordering the Appellants to conduct the work, which would be included in an EPO. The only requirement of the Appellants was to grant the Director access to the site to complete the remediation work, and the Appellants were responsible for the costs of the remediation work. When looking at section 113 of EPEA, it states the Director can direct the recipient of the environmental protection order to perform specific work. The Letter does not do that. The Letter does not direct the Appellants to do any of the elements listed in section 113 of EPEA.

[24] Even though the EPO, Ministerial Order, and Court Order were issued to the Appellants, it does not preclude the Director from utilizing other sections of EPEA to ensure the required work is completed. The legislation does not state that if a ministerial order or court order applies to the site that the Director is barred from utilizing other sections of the legislation if necessary to ensure the work is completed. Also, neither the Ministerial Order nor the Court Order state the Director would not pursue other options, if necessary, to ensure the site is remediated to the applicable standards. If the Director determines the work is not proceeding as required under the Ministerial Order, he can use other sections of EPEA, including section 245 of EPEA.

[25] Section 245 gives the Director the ability to complete the work necessary to protect the environment and human health.

[26] The Board finds the Letter was a decision of the Director made pursuant to section 245 of EPEA. Section 91 of EPEA does not provide a person to appeal a decision made under section 245 of EPEA. Therefore, the Board does not have jurisdiction to hear the appeal, and the appeal is dismissed.

[27] As the Board has found it does not have jurisdiction to hear the appeal, the Board cannot consider the stay request.

V. DECISION

[28] The Board dismisses the appeal because there is no right of appeal of a letter issued pursuant to section 245 of EPEA.

Dated on June 20, 2014, at Edmonton, Alberta

"original signed by"

D.W. Perras
Board Chair