



ALBERTA
ENVIRONMENTAL APPEALS BOARD

2019 AEAB 28

August 10, 2019

Via E-Mail

To Distribution List:

Dear Ladies and Gentlemen:

Re: Decision Letter* – Sears Canada Inc., Concord North Hill GP Ltd., and Suncor Energy Inc./EPEA Environmental Protection Order No. EPO-2018/01-SSR & Amendment 2/Our File Nos.: EAB 17-069-070 and 18-013

This is the decision of Ms. Meg Barker, Ms. Anjum Mullick, and Mr. Chris Powter, members of the Environmental Appeals Board (the “Board”) and panel members for the above-noted appeals. The Board has reviewed the comments from Mr. Roth, Ms. Howard, Mr. Plumb, and Mr. Merskey received May 16, 21 and 27, 2019 regarding the issues for the hearing, as well as the Notices of Appeal and the Environmental Protection Order and Amendment 2 (the “EPO”). Although the Board received comments on May 27, 2019 from Mr. Harper on behalf of BMI North Hill Inc. and Bentall Kennedy Prime Canadian Property Fund Inc. (collectively, the “Mall Owners”), the Board only considered the comments on the proposed issues received from Sears Canada Inc. (“Sears”), Concord North Hill GP Ltd. (“Concord”), Suncor Energy Inc. (“Suncor”) (collectively, the “Appellants”), and the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (“Director”).

In order for a matter to be properly before the Board and be set as an issue for the hearing, the matter must be included in the Notices of Appeal, relate to the decision being appealed, and be within the Board’s jurisdiction.

A. Submissions

1. Sears

In its submission to the Board, Sears noted the EPO requires the Appellants to complete delineation by July 1, 2018, submit a remediation plan by December 15, 2018, and complete the remediation by March 4, 2019, or as otherwise approved by the Director. Sears noted it filed its Notice of Appeal on the basis the timelines provided to complete the delineation and remediation were arbitrary and unreasonable, and contrary to the principles of procedural fairness and fundamental justice. Sears stated the Director did not provide any rationale to show the deadlines were appropriate or necessary.

* Cite as: *Sears et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (9 August 2019), Appeal Nos. 17-069, 17-070 and 18-013-DL1 (A.E.A.B.), 2019 AEAB 28.

Sears stated the issues to be determined at a hearing should be:

- “1. Are the timelines provided by AEP for the Parties to complete delineation and remediation activities arbitrary and contrary to the principles of procedural fairness and fundamental justice?
2. If the answer to the first question is yes, then should paragraphs 3 and 6(c) of the EPO be reversed with respect to the dates provided to complete the specified activities?”

2. Suncor

Suncor requested the following issues be heard by the Board:

- “1. Whether the Director acted arbitrarily when it issued the EPO?
2. The interpretation and application of section 2 of the *Environmental Protection and Enhancement Act*, [R.S.A. 2000, c. E-12] (‘EPEA’) to the EPO.
3. Whether the Director erred in issuing the EPO pursuant to section 113 of EPEA?
4. What is the proper interpretation of the definition of ‘person responsible’ for the purpose of Division 1 of Part 5 of EPEA? [Specifically,]
 - (a) Did the Director err in naming any or all of the parties to the EPO as persons responsible for the purposes of a section 113 EPO?
 - (b) Did the Director err in failing to consider the exceptions to the definition of ‘person responsible’ contained within section 1(tt) of EPEA when it named any or all of the parties to the EPO?”

3. Concord

Concord believed the question the Board must consider is whether the Director erred by relying on improper considerations in issuing the EPO. Concord stated the environmental circumstances of the lands and “Off-Site” area have not changed, and there is no risk to human health or the environment. Concord said that, if the Board finds the EPO was validly issued, then it must determine which parties are “persons responsible” and if the Mall Owners should be named.

Concord requested the Board consider the following issues for the hearing:

- “1. Whether the Director erred by
 - a. concluding the circumstances that the presence of the Substances on the Lands and Off-Site area may cause, is causing or has caused an adverse effect; and

- b. relying on Sears' financial circumstances to justify issuing the EPO?
2. If the EPO was validly issued,
- a. should Concord or Suncor be named 'persons responsible' in the EPO; and
 - b. if Concord were to be found to be a 'responsible person'; should the Mall Owners be added as 'persons responsible' in the EPO?"
4. Director

The Director stated the only issue the Board should hear is: "Are Suncor Energy Inc. and Concord North Hill GP Ltd. 'persons responsible' for the purpose of section 113 of the *Environmental Protection and Enhancement Act*?"

The Director explained the issues suggested by Sears could be dealt with outside of the hearing as the Director and Appellants are working to finalize the remediation plan, which may require changes to the deadlines in the Enforcement Order.

B. Discussion

Concord and Suncor questioned whether the EPO was properly issued. They questioned whether the Director took irrelevant matters into consideration in issuing the EPO. Concord specifically raised the matter of the Director relying on Sears' financial circumstance as the basis to issue the EPO. Sears and the Director did not raise this as an issue. It is a fundamental aspect of the Director's decision-making process to ensure only relevant matters are considered. The Appellants questioned whether the Director's decision was made on environmental concerns or other irrelevant concerns. A determination of whether the issuance of the EPO was based on irrelevant consideration is a matter the Board has the jurisdiction to determine. Therefore, the Board considers it an issue to be heard. The first issue the Board will hear at the hearing is:

Was it appropriate for the Director to issue the EPO? This includes:

- a. Did the Director rely on Sears' financial circumstances as a basis to issue the EPO, and if so was this an irrelevant consideration?
- b. Did the Director err in issuing the EPO under section 113 of EPEA?
- c. Did the Director arbitrarily issue the EPO even though there was no indication the "Substances" on the "Lands" or "Off-Site" caused, were causing, or may cause an adverse effect?

Concord, Suncor, and the Director agreed that one of the issues the Board should consider at the hearing is whether the proper parties are named as "persons responsible" in the EPO. Concord and Suncor questioned whether the Mall Owners should also be included as persons responsible. Both Concord and Suncor raised the matter of who should be named in the EPO in their Notices of Appeal. The question of who should be named in the EPO is clearly within the Board's jurisdiction to ensure the EPO was issued to the proper parties. Therefore, the second

issue the Board will hear is:

Are the parties named in the EPO persons responsible as defined in EPEA and for the purposes of section 113, and are there other parties, such as the Mall Owners, who should be named as persons responsible?

The timelines, as set in the EPO, by which the Appellants are required to complete specific tasks are a concern to the Appellants and they believed it would be a proper issue to be heard at the hearing. Although the Director responded by noting the timelines may be changed as a result of further discussions, there is no certainty as to whether the timelines will be changed and whether the Appellants will have further concerns about them. As the terms and the conditions are within the Board's jurisdiction to consider in an appeal, the Board considers it reasonable to consider the timelines specified in the EPO as an issue for the hearing. If the timelines are amended prior to the hearing, the Board will consider the amended dates, and the Appellants will be given the opportunity to provide submissions on whether the amended timelines are reasonable. Therefore, the third issue the Board will consider at the hearing is:

Are the terms and conditions of the EPO appropriate?

(a) This includes whether the deadlines included in the EPO are appropriate.

C. Decision

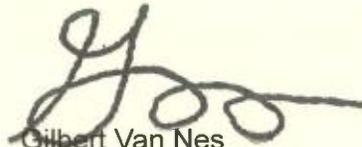
After reviewing the submissions from the Appellants and the Director, the Notices of Appeal, and the EPO, the following issues will be heard at the hearing:

1. Was it appropriate for the Director to issue the EPO? This includes:
 - a. Did the Director rely on Sears' financial circumstances as a basis to issue the EPO, and if so was this an irrelevant consideration?
 - b. Did the Director err in issuing the EPO under section 113 of EPEA?
 - c. Did the Director arbitrarily issue the EPO even though there was no indication the "Substances" on the "Lands" or "Off-Site" caused, were causing, or may cause an adverse effect?
2. Are the parties named in the EPO persons responsible as defined in EPEA and for the purposes of section 113, and are there other parties, such as the Mall Owners, who should be named as persons responsible?
3. Are the terms and conditions of the EPO appropriate?
 - (a) This includes whether the deadlines included in the EPO are appropriate.

Pursuant to section 95(5) of EPEA, the Board will not hear arguments on any other issues at the hearing.¹

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 for Gilbert Van Nes, General Counsel, 780-427-6569 for Valerie Myrmo, Registrar of Appeals, and 780-427-7002 for Denise Black, Board Secretary. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca, gilbert.vannes@gov.ab.ca, and denise.black@gov.ab.ca.

Yours truly,



Gilbert Van Nes
General Counsel and
Settlement Officer

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.

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¹ Section 95(5) of EPEA provides:

“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.”

Distribution List**Parties****Appellants**

Mr. Phil Mohtadi (17-069)
 General Counsel and Corporate Secretary
 Sears Canada Inc.
 #520, 180 John Street
 Toronto, ON M5T 1X5
 (phil.mohtadi@sears.ca)
 (Representing Sears Canada Inc.)

Mr. Alan Merskey
 Norton Rose Fulbright Canada LLP
 #3800 Royal Bank Plaza, South Tower
 200 Bay Street, PO Box 84
 Toronto, ON M5J 2Z4
 (alan.merskey@nortonrosefulbright.com)
 (Counsel for Court Appointed Monitor)
 (Representing Sears Canada Inc.)

Mr. Bernard Roth (17-070)
 Mr. Daniel Collins
 Dentons Canada LLP
 1500 Bankers Court
 850 – 2 Street SW
 Calgary, AB T2P 0R8
 (bernard.roth@dentons.com and
 dan.collins@dentons.com)
 (Representing Concord North Hill GP Ltd.)

Ms. Kimberly Howard (18-013)
 McCarthy Tetrault LLP
 Suite 4000
 421 – 7 Avenue SW
 Calgary, AB T2P 4K9
 (khoward@mccarthy.ca)
 (Representing Suncor Energy Inc.)

Director

Mr. Lee Plumb
 Ms. Vivienne Ball
 Alberta Justice and Solicitor General
 Environmental Law Section
 8th Floor, Oxbridge Place
 9820 – 106 Street
 Edmonton, AB T5K 2J6
 (lee.plumb@gov.ab.ca and vivienne.ball@gov.ab.ca)
 (Representing the Director, AEP)

Interested Persons

Mr. Dufferin Harper
 Blake, Cassels & Graydon LLP
 3500 Bankers Hall East Tower
 855 – 2 Street SW
 Calgary, AB T2P 4J8
 (dufferin.harper@blakes.com)
 (Representing mall owners BMI North Hill and
 Bentall Kennedy)

Mr. Gavin Fitch
 McLennan Ross LLP
 1900 Eau Claire Tower
 600 – 3 Avenue SW
 Calgary, AB T2P 0G5
 (gfitch@mross.com)
 (Representing Hounsfield Heights
 Landowners Group – HHLG)



ALBERTA
ENVIRONMENTAL APPEALS BOARD

August 23, 2019

Via E-Mail

To Distribution List:

Dear Ladies and Gentlemen:

**Re: Sears Canada Inc., Concord North Hill GP Ltd., and Suncor Energy Inc.
EPEA Environmental Protection Order No. EPO-2018/01-SSR &
Amendment No. 2/Our File Nos.: EAB 17-069-070 and 18-013**

Further to the Board's letter of August 10, 2019, the Board wishes to provide some clarification regarding issue 1(c). This issue reads:

Did the Director arbitrarily issue the EPO even though there was no indication the "Substances" on the "Lands" or "Off-Site" caused, were causing, or may cause an adverse effect?

The Board wishes to make it clear that it is not, at this time, making a finding that "there was no indication the 'Substances' on the 'Lands' or 'Off-Site' caused, were causing or may cause an adverse effect." Therefore, to provide clarity to this issue, the Board is amending issue 1(c) to read:

Did the Director arbitrarily issue the EPO even though the Appellants argue there was no indication the "Substances" on the "Lands" or "Off-Site" caused, were causing, or may cause an adverse effect?

If you have any concerns with the above, please notify the Board by **August 29, 2019**.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 for Gilbert Van Nes, General Counsel, 780-427-6569 for Valerie Myrmo, Registrar of Appeals, and 780-427-7002 for Denise Black, Board Secretary. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca, gilbert.vannes@gov.ab.ca, and denise.black@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel and
Settlement Officer

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A handwritten signature in blue ink, appearing to be 'J. Ross', is located at the bottom center of the page. The signature is stylized and somewhat cursive.

Distribution List**Parties****Appellants**

Mr. Phil Mohtadi (17-069)
 General Counsel and Corporate Secretary
 Sears Canada Inc.
 #520, 180 John Street
 Toronto, ON M5T 1X5
 (phil.mohtadi@sears.ca)
 (*Representing Sears Canada Inc.*)

Mr. Alan Merskey
 Norton Rose Fulbright Canada LLP
 #3800 Royal Bank Plaza, South Tower
 200 Bay Street, PO Box 84
 Toronto, ON M5J 2Z4
 (alan.merskey@nortonrosefulbright.com)
 (Counsel for Court Appointed Monitor)
 (*Representing Sears Canada Inc.*)

Mr. Bernard Roth (17-070)
 Mr. Daniel Collins
 Dentons Canada LLP
 1500 Bankers Court
 850 – 2 Street SW
 Calgary, AB T2P 0R8
 (bernard.roth@dentons.com and
 dan.collins@dentons.com)
 (*Representing Concord North Hill GP Ltd.*)

Ms. Kimberly Howard (18-013)
 McCarthy Tetrault LLP
 Suite 4000
 421 – 7 Avenue SW
 Calgary, AB T2P 4K9
 (khoward@mccarthy.ca)
 (*Representing Suncor Energy Inc.*)

Director

Mr. Lee Plumb
 Ms. Vivienne Ball
 Alberta Justice and Solicitor General
 Environmental Law Section
 8th Floor, Oxbridge Place
 9820 – 106 Street
 Edmonton, AB T5K 2J6
 (lee.plumb@gov.ab.ca and vivienne.ball@gov.ab.ca)
 (*Representing the Director, AEP*)

Interested Persons

Mr. Dufferin Harper
 Blake, Cassels & Graydon LLP
 3500 Bankers Hall East Tower
 855 – 2 Street SW
 Calgary, AB T2P 4J8
 (dufferin.harper@blakes.com)
 (*Representing mall owners BMI North Hill and
 Bentall Kennedy*)

Mr. Gavin Fitch
 McLennan Ross LLP
 1900 Eau Claire Tower
 600 – 3 Avenue SW
 Calgary, AB T2P 0G5
 (gfitch@mross.com)
 (*Representing Hounsfield Heights
 Landowners Group – HHLG*)