

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – June 28, 2019

IN THE MATTER OF sections 91, 92, 94, 95, and 98 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Allied Paving Co. Ltd. with respect to the decision of the Director, Lower Athabasca Region, Alberta Environment and Parks, to issue Administrative Penalty No. EPEA-18/07-AP-LAR to Fred Wishloff and Allied Paving Co. Ltd.

Cite as: *Allied Paving Co. Ltd. v. Director, Lower Athabasca Region, Alberta Environment and Parks* (28 June 2019), Appeal No. 18-016-D (A.E.A.B.), 2019 AEAB 19.

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTIES:

Appellants: Mr. Fred Wishloff and Allied Paving Co. Ltd., represented by Mr. Yuri Wishloff, Chief Operating Officer, Allied Paving Co. Ltd., and Ms. Tara-Lee Ostafichuk, Human Resources and Office Manager, Allied Paving Co. Ltd.

Director: Mr. Simon Tatlow, Director, Lower Athabasca Region, Alberta Environment and Parks, represented by Mr. Lee Plumb and Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Administrative Penalty to Fred Wishloff and Allied Paving Co. Ltd. (the Appellants) for contravening the *Environmental Protection and Enhancement Act*. AEP alleged that between September 1 and November 10, 2016, the Appellants released a substance (asphalt oil) into the environment that may have caused a significant adverse effect, failed to report the release as soon as becoming aware of the release, failed to take all reasonable measures to repair, remedy, and confine the effects of the substance, and failed to remediate, manage, remove, or otherwise dispose of the substance to prevent an adverse effect or further adverse effect and, on November 14, 2016, disposed of waste onto land owned by another person without that landowners' permission. The amount of the Administrative Penalty assessed by AEP was \$28,000.00.

The Appellants filed a Notice of Appeal with the Environmental Appeals Board (the Board). A mediation meeting was held and a resolution was reached whereby the parties recommended to the Board the Administrative Penalty be varied by reducing the assessed amount to \$16,500.00

The Board accepted the mediated agreement and varied the Administrative Penalty accordingly.

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I. BACKGROUND

[1] On November 10, 2016, Alberta Environment and Parks (“AEP”) staff responded to a complaint of odour, smoke, and effluent being emitted from an asphalt plant operated by Mr. Fred Wishloff and Allied Paving Co. Ltd. (the “Appellants”) within an industrial park near Lac La Biche. AEP staff attended the site and observed a large release of asphalt oil on the ground at two locations in the industrial park.

[2] AEP investigated the release and on November 5, 2018, the Director, Lower Athabasca Region, Alberta Environment and Parks (the “Director”), in accordance with section 237 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”),¹ issued Notice of Administrative Penalty No. EPEA-18/07-AP-LAR (the “Administrative Penalty”) to Mr. Fred Wishloff and Allied Paving Co. Ltd. in the amount of \$28,000.00.

[3] The Administrative Penalty consisted of seven counts. Counts 1, 2, and 3 related to the release of asphalt oil in the northeast portion of lands located at NW 34-66-14-W4M in Lac La Biche County. Counts 4, 5, and 6 related to the release of asphalt oil in the southeast portion of the Appellants’ property. Count 7 was related to material contaminated by the asphalt oil being dumped by the Appellants in a different location without authorization. In setting the amount of the

¹ Section 237 of EPEA provides:

“(1) Where the Director is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations, the Director may, subject to the regulations, by notice in writing given to that person require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention.

(2) A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:

(a) a daily amount for each day or part of a day on which the contravention occurs and continues; ...

(3) A person who pays an administrative penalty in respect of a contravention may not be charged under this Act with an offence in respect of that contravention.

(4) Subject to the right to appeal a notice of administrative penalty to the Environmental Appeals Board, where a person fails to pay an administrative penalty in accordance with the notice of administrative penalty and the regulations, the Minister may file a copy of the notice of administrative penalty with the clerk of the Court of Queen’s Bench and, on being filed, the notice has the same force and effect and may be enforced as if it were a judgment of the Court.”

Administrative Penalty, the Director calculated a base assessment of \$20,500.00 plus an additional \$7,500.00 for factors that varied the assessment.²

[4] On November 16, 2018, the Environmental Appeals Board (the “Board”) acknowledged receipt of a Notice of Appeal from the Appellants and notified the Director of the appeal. The Board requested the Appellants and the Director (collectively the “Parties”) provide available dates for a mediation meeting and the Director provide the records he reviewed and that were available to him when making his decision (the “Director’s Record”).

[5] The Appellants advised on December 4, 2018, that a cheque would be forwarded to AEP for payment of the Administrative Penalty.

² Section 3(1) and 3(2) of the *Administrative Penalty Regulation*, A.R. 23/2003, lists factors a Director may consider when assessing the amount of an Administrative Penalty:

“3(1) Subject to subsections (2) and (3), the amount of an administrative penalty for each contravention that occurs or continues is the amount set out in the Base Penalty Table but that amount may be increased or decreased by the Director in accordance with subsection (2).

BASE PENALTY TABLE				
Type of Contravention				
	Major	Moderate	Minor	
Potential	Major	\$5000	\$3500	\$2500
for	Moderate	3500	2500	1500
Adverse	Minor to	2500	1500	1000
Effect	None			

- (2) In a particular case, the Director may increase or decrease the amount of the administrative penalty from the amount set out in the Base Penalty Table on considering the following factors:
- (a) the importance to the regulatory scheme of compliance with the provision;
 - (b) the degree of wilfulness or negligence in the contravention;
 - (c) whether or not there was any mitigation relating to the contravention;
 - (d) whether or not steps have been taken to prevent reoccurrence of the contravention;
 - (e) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
 - (f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
 - (g) any other factors that, in the opinion of the Director, are relevant.”

[6] The Director's Record was received by the Board on January 9, 2019, and provided to the Appellants on January 11, 2019.

[7] A mediation meeting involving the Parties and a member of the Board acting as a mediator was held on March 19, 2019, in Edmonton. Productive discussions resulted in a resolution of the appeal.

II. DISCUSSION

[8] The mediated agreement resulted in the Parties recommending to the Board the Administrative Penalty be varied by reducing the Administrative Penalty from \$28,000.00 to \$16,500.00. The Board considers the mediated agreement to be reasonable and will vary the Administrative Penalty according to the agreement reached between the Parties. Since the Appellants paid \$28,000.00 to AEP on December 4, 2018, AEP shall return \$11,500.00 to the Appellants.

III. DECISION

[9] Based on the mediated agreement, the Board varies the Administrative Penalty as follows:

1. Count 7 is reversed;
2. The total assessment for Counts 1 to 6 is varied from \$24,500.00 to \$16,500.00; and
3. AEP shall return to the Appellants \$11,500.00 of the Appellants' payment.

[10] Pursuant to section 98 of EPEA, a copy of this decision is to be provided to:

1. Mr. Fred Wishloff, Director, Allied Paving Co. Ltd.;
2. Ms. Tara-Lee Ostafichuk and Mr. Yuri Wishloff, Allied Paving Co. Ltd.; and
3. Mr. Lee Plumb and Ms. Vivienne Ball, Alberta Justice and Solicitor General, on behalf of the Director.

IV. ORDER OF THE BOARD

[11] In accordance with section 98 (1) and (2) of EPEA, the Board has the authority to confirm, reverse, or vary the decision of the Director.³ Therefore, with respect to the decision of the Director to issue the Administrative Penalty to Mr. Fred Wishloff and Allied Paving Co. Ltd., the Board orders the decision of the Director to issue the Administrative Penalty is varied as follows:

1. Count 7 (\$3,500.00) is reversed;
2. The total assessment for Counts 1 to 6 is varied from \$24,500.00 to \$16,500.00; and
3. AEP shall return to Allied Paving Co. Ltd. \$11,500.00 of their payment of \$28,000.00.

Dated on June 28, 2019, at Edmonton, Alberta.

“original signed by”

Alex MacWilliam
Board Chair

³ Section 98 of EPEA provides:

“(1) In the case of a notice of appeal submitted under section 91(1)(n) or (o) of this Act or a notice of appeal submitted under section 115(1)(j), (l) or (q) of the *Water Act*, the Board shall, within 30 days after the completion of the hearing of the appeal, make a written decision on the matter.

(2) In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision.

(3) On making its decision, the Board shall immediately

- (a) give notice of the decision to all persons who submitted notices of appeal or made representations to the Board and to all other persons who the Board considers should receive notice of the decision, and
- (b) make the written decision available in accordance with the regulations.”