

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – September 2, 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-18/08-AP-LAR-19/04 to Fred Wishloff and Allied Paving Co. Ltd.

Cite as: *Allied Paving Co. Ltd. v. Director, Lower Athabasca Region, Alberta Environment and Parks* (2 September 2019), Appeal No. 18-027-D (A.E.A.B.), 2019 AEAB 30.

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTIES:

Appellants:

Mr. Fred Wishloff, Allied Paving Co. Ltd., represented by Mr. Yuri Wishloff, Chief Operations 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; and Ms. Kelly Kennedy, Compliance Assurance Lead, Lower Athabasca Region, Alberta Environment and Parks.

Mediator:

Ms. Anjum Mullick, Board Member.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Administrative Penalty to Mr. Fred Wishloff and Allied Paving Co. Ltd. (the Appellants) for contravening the *Environmental Protection and Enhancement Act*. AEP alleged that between June 21, 2017 and October 23, 2017, the Appellants failed to record all required information in the environmental log, failed to retain the environmental log, caused dust emissions by depositing particulates on an adjacent property, and exceeded the concentration of particulates in each effluent stream from the paving plant's dryer stack to the ambient air. The amount of the Administrative Penalty assessed by AEP was \$19,500.00.

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 that 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 June 19, 2017, Alberta Environment and Parks (“AEP”) staff received a public 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, Alberta. AEP staff attended the site and observed several contraventions of the Code of Practice for Asphalt Paving Plants (the “Code of Practice”).

[2] AEP investigated the observed contraventions and on November 16, 2018, the Director, Lower Athabasca Region, Alberta Environment and Parks (the “Director”), released a Preliminary Administrative Penalty Assessment (the “Preliminary Assessment”). On February 5, 2019, the Director met with the Appellants to discuss the Preliminary Assessment.

[3] On March 8, 2019, under section 237 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”),¹ the Director issued Notice of Administrative Penalty No. EPEA-18/08-AP-LAR-19/04 (the “Administrative Penalty”) to the Appellants in the amount of \$19,500.00.

[4] The Administrative Penalty referenced eight counts contained in the Preliminary Assessment. Counts 1 and 2 related to the odour released by the asphalt plant, which the Director

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.”

determined was not unusual and were not included in the Director's final penalty assessment. Counts 3, 4, 5, and 6 related to the Appellants' failure to record specified information in environmental logs and retain those logs as per the requirements of the Code of Practice. Counts 7 and 8 involved the emission of particulate matter with a potential for adverse effect. The Preliminary Assessment recommended a base assessment penalty of \$25,500.00 and a factors to vary assessment penalty of +\$7,500.00.

[5] The Director adjusted the Administrative Penalty according to the factors listed in section 3(2) of EPEA as follows:

- (a) concerning the importance of the regulatory scheme, the Director added \$1,000.00 for not completing the environmental logs over several years;
- (b) in considering the degree of wilfulness or negligence in the contravention, the Director added \$1,000.00 for not completing an annual Stack Test according to the Code of Practice;
- (c) with regard to whether or not there was any mitigation relating to the contravention, the Director subtracted \$1,000.00, noting the Appellants have implemented protocols to ensure the daily environmental logs are completed in a timely manner;
- (d) the Director reviewed whether or not steps have been taken to prevent reoccurrence of the contravention, and added \$500.00 for failing to conduct a Stack Test despite a previous request by AEP; and
- (e) in considering whether or not the person who receives the notice of administrative penalty has a history of non-compliance, the Director added \$500.00 for a previous administrative penalty assessed against the Appellants.

[6] In setting the Administrative Penalty amount of \$19,500.00, the Director followed sections 3(1) and (2) of EPEA² and calculated a base assessment of \$17,500.00, plus an additional \$2,000.00 for factors that varied the assessment.

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).

[7] On March 25, 2019, the Appellants filed a Notice of Appeal with the Board, appealing the Administrative Penalty.

[8] On March 27, 2019, 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”).

[9] The Director’s Record was received by the Board on May 17, 2019, and provided to the Appellants on May 28, 2019.

[10] A mediation meeting involving the Parties and a member of the Board acting as a mediator was held on July 24, 2019, in Edmonton, at which the Parties reached a resolution of the appeal.

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.”

II. DISCUSSION

[11] The mediated resolution resulted in the Parties asking the Board to vary the Administrative Penalty by reducing the total penalty from \$19,500.00 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.

III. DECISION

[12] Based on the mediated resolution, the Board varies the Administrative Penalty as follows:

1. The Administrative Penalty is reduced from \$19,500.00 to \$16,500.00.

[13] 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. Simon Tatlow, Director, Lower Athabasca Region, Alberta Environment and Parks.

IV. ORDER OF THE BOARD

[14] 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.,

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.”

the Board orders the decision of the Director to issue the Administrative Penalty be varied as follows:

1. The Administrative Penalty is varied by reducing the total assessment from \$19,500.00 to \$16,500.00;
2. No interest is owing or to be charged on the Administrative Penalty for any period before 30 days after the date of the Board's decision; and
3. The Administrative Penalty shall be paid within 30 days of the issuance of the Board's decision.

Dated on September 2, 2019, at Edmonton, Alberta.

"original signed by" _____
Alex MacWilliam
Board Chair