BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2003-WAS-003(a)

In the matter of an appeal under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Spike Investments Ltd.	**APPELLANT**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on February 6, 2003	
APPEARING:	For the Appellant: James R. Kitsul, Counsel For the Respondent: Dennis A. Doyle, Counsel	

STAY DECISION

APPLICATION

On December 18, 2002, Alan W. McCammon, the Assistant Regional Waste Manager (the "Assistant Manager"), issued a Site Investigation Order (the "Order") to Spike Investments Ltd. ("Spike"). The Order requires Spike to submit all existing site investigation information and complete a detailed site investigation for a property located at 5608 Kingsway, Burnaby, B.C. and legally described as Lot 1 (BF491514) District Lot 94 Group 1 New Westminster District Plan 12078, PID: 018-039-006 (the "Property").

On January 14, 2003, Spike appealed the Assistant Manager's decision and requested a stay of the Order pending a decision on the merits of the appeal.

This application was conducted by way of written submissions.

BACKGROUND

Spike became the owner and operator of the Property in 1984. Currently, there is a Super Save Gas service station located on the site and, according to Spike; there may have been a service station on the Property as early as the 1920s.

The fact that the Property is contaminated by the presence of gasoline hydrocarbons in the soil is not disputed in this case. In 1999, the then Ministry of Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection) (the "Ministry") was advised by the City of Burnaby that gasoline contamination was identified "in Kingsway," adjacent to the Property. By letters dated July 21, 1999, and August 18, 1999, the Ministry requested that Spike undertake independent site investigation and remediation measures.

In a letter dated August 24, 1999, AquaTerra Consultants Ltd. notified the Ministry that Super Save Gas (Spike) was undertaking independent remediation of the site. They advised the Ministry that remediation would be by way of "vapour extraction of petroleum vapour as a result of the presence of gasoline hydrocarbons in the soil." They also included a time schedule for submitting to the Ministry a detailed site investigation, a remediation plan and an application for an approval in principle, all of which was proposed to be completed by April of 2000. These documents were never submitted. The only document provided was an outline for site investigation work.

The Ministry continued to request that Spike undertake site investigation and remediation by letters dated September 3, 1999; October 20, 1999; August 25, 2000; June 15, 2001; and April 30, 2002. At some point during this time, Spike commenced remediation of the Property by vapour extraction. Although there were concerns about the contamination under Kingsway (adjacent to the northern boundary of the Property), investigation of that area was delayed for some time.

According to Spike, it obtained a permit from the City of Burnaby to drill test holes along the Kingsway road allowance in February 2000. However, when drilling was set to proceed, a representative of the City of Burnaby traffic division demanded that the drilling cease and that the drill rig be removed. Several months later, the City of Burnaby requested that the drilling take place on the Kingsway road allowance. In November 2001, 5 bore holes were drilled – 4 were to the north of the Property and 1 was to the west of the Property, adjacent to the underground storage tanks and gasoline pumps. According to Spike, the 5 bore holes showed no contamination under the road to the north and west of the Property. Spike did not send the results of the November 2001 bore hole testing to the Ministry until January 29, 2003.

On October 22, 2002, the Ministry was advised by the City of Burnaby and Telus Corporation of upgrading activities respecting the drinking water main and Telus services in the underground utility corridor adjacent to the Property. Results of soil sampling by Stantec Consulting Ltd., on behalf of Telus, indicated the presence of contaminated soil in the underground service corridor. The Ministry left telephone messages with Spike requesting a report of site investigations conducted to date. No site investigations were received in response to those requests. (The Board is advised by Spike that Telus has recently completed remediation of the contamination found in its corridors.)

By letter dated November 1, 2002, the Ministry advised Spike of its intention to issue a site investigation order and requested comments from Spike on the draft order. This letter was not provided to the Board but it apparently indicated the presence of new contamination.

On November 5, 2002, Spike conducted a tank and line tightness test on the Property. This test indicated that the storage tank and lines were tight and were not an ongoing source of contamination on the Property.

By letter dated November 7, 2002, Spike informed the Ministry of difficulties that it experienced during attempted site investigations in 1999 and 2000 and advised that site investigation undertaken in 2001 indicated no contamination under the road located to the north of the utility corridor. The 2001 investigation concluded that off-site contamination was restricted to the utility corridor. The letter states that:

> …the statement in your [the Ministry's] letter of November 1, 2002, that new contamination was found is absolutely incorrect. The contamination was present directly under the City of Burnaby water line and under the Telus utility lines. Previously, Telus had noted the contamination but had not been able to excavate under the conduits until recently….
>
> Super Save is of the opinion that the site is being managed in an appropriate manner at this time and there is no additional contamination being generated on the site. The Ministry's request for a costly DSI [Detailed Site Investigation] is unjustified in the circumstances. To date Super Save has spent several hundreds of thousands of dollars on remediation management of the site and continues to spend money on the ongoing remediation;
>
> Seacor Environmental previously did an environmental baseline study of the property…a copy of this report is being sent to the Ministry.

The Ministry maintains that it never received Seacor's report.

In a two page Memorandum to the Assistant Manager dated December 17, 2002, Coleen Hackinen, Senior Pollution Prevention Officer with the Ministry, outlined a brief history of the Ministry's involvement with the Property and then recommended that a site investigation order be issued and attached a draft order to the Memorandum. Her December 17, 2002 memo concludes:

> To date, issues associated with site investigation and remediation of contamination originating from the above-noted site remain outstanding. Although a VES (vapour extraction system) is reportedly operating on-site, in the absence of a detailed site investigation report, it is not possible to establish whether this remedial activity is adequate to address ministry concerns, namely: that contamination originating from the service station has migrated off-site; and that there may be human health or environmental effects associated with that contamination. Submission

> of a detailed site investigation report is therefore needed. Appropriate requirements respecting site remediation would be considered following submission of a detailed site investigation report.
>
> Given the site owner's failure to date to submit a site investigation report, despite repeated requests from the ministry, a more formal mechanism is needed to ensure that this information is provided. It is therefore recommended that a site investigation order be issued as per the attached.

On December 18, 2002, pursuant to section 26.2 of the *Waste Management Act*, the Assistant Manager issued the Order to Spike. The Order has 3 requirements, which are summarized as follows:

1. Submit all existing site investigation information which Spike may have to the Regional Waste Manager by no later than January 3, 2003;

2. Complete a detailed site investigation for the Property including preliminary site information, and prepare an investigation report in accordance with section 59 of the Contaminated Sites Regulation;

3. Submit the detailed site investigation report referenced in Requirement 2, above, to the Regional Waste Manager for review by no later than 12 week from the date of this order.

On January 14, 2003, Spike appealed the Order to the Board and requested a stay of the Order pending a decision on the merits of the appeal.

ISSUE

The sole issue arising from this application is whether the Panel should grant a stay of the Order pending a decision on the merits of this appeal.

The authority of the Board to grant a stay in a *Waste Management Act* appeal is derived from section 48 of that *Act*, which provides:

> An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

a. there is a serious issue to be tried;

b. irreparable harm will result if the stay is not granted; and

c. the balance of convenience favours granting the stay.

The Panel notes that the onus is on the Applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court stated that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

In determining whether the appeal raises serious issues, the Panel has considered Spike's grounds for appeal. Spike's grounds for appeal against the Assistant Manager's Order are summarized as follows:

- Spike has been actively remediating the Property for a few years using a vapor extraction system, has spent considerable amounts of money cleaning the Property, and has made considerable progress cleaning up the Property. It states that notice of this remediation was previously given to the Ministry and that the requirement for a detailed site investigation at this time is unnecessary and costly.

- Drilling was recently carried out on the Property to the north of the utility corridor and no contamination was found there. A report by Seacor Environmental Engineering Inc. dated October 7, 1998, indicated no special waste to be present at this site.

- A report commissioned by Telus shows contamination in the utility corridor. Given the ongoing remediation, Spike says that it is likely that the contamination levels would have been significantly reduced in the 4 years since the report. However, the contamination was restricted to the sand fill in the corridor and Telus recently excavated and removed all of the contamination from the corridor. In addition, the report shows that no contamination has migrated from the corridor.

- Bore holes drilled by Spike did not reveal any groundwater, even at depths of up to 30 metres. It is unlikely that the groundwater on the Property will ever become contaminated or be a conduit for moving the contamination off-site because of the depth of the groundwater.

- The results from the drilling of 5 boreholes in the Kingsway road allowance indicated no contamination under Kingsway north and west of the utility corridor. The test holes were not drilled until November 2001, as a result of problems experienced by Spike, particularly with the City of Burnaby.

In a later submission, Spike does not dispute that the site is contaminated or that it is a responsible party. Rather, Spike questions whether there is any evidence to support the Ministry's concerns about off-site migration and risks to human health or the environment. Spike argues that the Ministry's concerns are not credible and that there is no need for a site investigation given the ongoing remediation of the site and the lack of current contaminating sources.

In addition, Spike notes that it appears that Telus and City of Burnaby lobbied the Ministry to issue the Order. Spike contends that there may have been a breach of natural justice because it was not offered an opportunity to present evidence or argument to the Assistant Manager before the Order was issued. Spike submits that the Order was illegally issued and should be rescinded for that reason.

The Assistant Manager argues that Spike's has not raised any serious issues about the need for delineation of the contamination at this site. Spike acknowledges the contaminated conditions at the site and does not dispute that it is the responsible party, as owner of the Property. The Assistant Manager submits that Spike's argument is that the site investigation should not be required because it may result in costs being incurred, which are not recoverable. The Assistant Manager does not believe that financial or cost recovery considerations constitute serious issues.

It is the Assistant Manager's position that Spike has not raised any meritorious defences to the Order or demonstrated any serious issues that need to be resolved by the Board and, accordingly, Spike has failed to meet the serious issue test.

The Panel finds that the issues to be addressed are neither frivolous, vexatious nor do they raise pure questions of law. The Panel finds that the appeal demands a predominantly factual inquiry and raises issues about procedural fairness and the reasonableness of the Order. Specifically, the Panel notes Spike's concern that the Assistant Manager failed to give Spike notice of the concerns raised by third parties and failed to offer Spike an opportunity to be heard before the Order was issued. In addition, the Panel notes Spike's concern that the decision to issue the Order was unreasonable in light of Spike's ongoing remediation and investigation.

Accordingly, the Panel finds that there are serious issues to be tried.

Irreparable Harm

Spike submits that it will suffer irreparable harm if the stay is not granted. The irreparable harm that would be suffered by Spike is the monetary loss that it would incur as a result of having to prepare preliminary and detailed site investigations and to have the investigations reviewed by the Ministry. Spike submits that it has already spent a significant amount of money acquiring a vapour extraction system, installing and operating it for the last 4-5 years. Spike submits that if the stay is not granted and it is ultimately successful on the appeal, all of the monies expended on the site investigation report would be unrecoverable.

The Assistant Manager submits that if a stay is not granted, Spike will not suffer irreparable harm. The only harm alluded to by Spike is the cost associated with

carrying out a detailed site investigation. The Assistant Manager submits that in the context of this appeal, it is clear that any damages incurred by Spike while complying with the Order can be quantified in monetary terms and cannot be considered "irreparable."

In addition, the Assistant Manager argues that if Spike is successful on appeal, it may be able to recover costs against the previous owners or operators of the Property. In its submissions, Spike indicated that the Property was operated as a gasoline service station dating back to the 1920s and that the Property has been suffering from hydrocarbon contamination for a significant period before Spike became the owner/operator in 1984. The Assistant Manager submits that under the provisions of section 27 of the *Waste Management Act*, Spike would have a right of recovery against the previous owners or operators of the site.

In reply, Spike maintains that it would be virtually impossible for it to recover the costs associated with the site investigation, if successful on its appeal. Spike indicated that the practical realities of a cost recovery action against a previous owner are that it would take a considerable period of time and involve significant costs. In addition, a cost recovery action presupposes that any owners or operators are still alive or that any companies that may have owned or operated the site continue to exist as companies at this time.

In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR-MacDonald*:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

The Panel notes that the only harm that Spike alleges is the cost of carrying out the detailed site investigation. Specifically, Spike indicated that the Order will cost the company a significant amount of money. However, the Panel notes that Spike did not indicate that the company does not have the financial resources to comply with the Order, nor was any evidence provided that compliance with the Order would result in job losses or company shut down. While the Panel has consistently accepted that, in some circumstances, financial loss can be irreparable harm, on the information presented the Panel finds that there is no evidence that Spike will suffer harm that is "irreparable" in that there is no evidence that Spike could not collect damages, or recover against the previous owner or operators of the site should it be successful on its appeal. In particular, the Panel notes that Spike has an available remedy under section 27(4) of the *Waste Management Act*.

For these reasons, the Panel is not satisfied that Spike will suffer irreparable harm if the stay is denied.

Balance of Convenience

The balance of convenience test requires the Panel to determine which of the parties will suffer greater harm from the granting of, or refusal to grant the stay application pending a determination of the appeal on its merits.

Spike submits that the balance of convenience weighs in favour of granting a stay. Spike submits that it has been actively involved in the remediation of the site for a number of years and continues to remediate the site using a vapour extraction system. Spike submits that it has made significant progress in reducing the hydrocarbons in the soil and that it has provided notice of its remediation efforts to the Ministry.

In addition, Spike submits that there is no chance of groundwater contamination on the Property because the groundwater level is very deep. Drilling to a depth of 30 metres has not revealed any groundwater. Spike submits that no migration of hydrocarbons from the site is occurring because there is no conduit, such as flowing water, to carry the hydrocarbons.

Spike submits that the only evidence of possible off-site migration relates to the contamination found by Telus in the utility corridors to the east and west of the station. It states that utility corridors are notorious for facilitating contamination migration because they are usually filled with sand or other porous material conducive to the migration of hydrocarbons. As a result of finding the contamination in the utility corridors, Telus immediately cleaned up the entire contaminated length of the corridors.

Although the Ministry was concerned that there was some contamination migrating further off the site and in particular, under Kingsway, the 5 boreholes revealed that no contamination is migrating off site to the north or west of the station. Spike submits that the possibility that off-site migration is occurring is remote at best because of the ongoing site remediation, the nature of the soils at the site and the lack of groundwater.

Spike submits that the balance of convenience weighs in favour of granting the stay because there is no credible evidence to support the Ministry's contention that contamination is migrating off-site or that there is any risk to human health or the environment. It says that while a detailed site investigation may have been needed before (i.e. in 1999 when the contamination was identified as a concern), it is no longer needed in light of the information it has provided since that time. On the other hand, if the stay is not granted, Spike will have to expend large amounts of money to comply with the Order, which will almost certainly be unrecoverable if Spike is successful on its appeal.

The Assistant Manager explains that the purpose of the Order is to identify contaminants on the Property and assess possible exposure pathways that would put public health and the environment at risk. He submits that there is a history of contaminant escape from the Property and there are clearly exposure pathways by which that contamination might continue to escape to the environment beyond.

The Assistant Manager refers to the Board to its observations at page 14 in *Beazer East Inc. et al v. Assistant Regional Waste Manager* (Appeal 2000-WAS-012, 013, 014-October 12, 2000):

> With respect to the harm to government, the Respondent must show that it was charged with the duty of promoting or protecting the public interest and that the amended Order was issued pursuant to that responsibility. Upon proof of these two things, the court in *RJR MacDonald* stated that the onus of demonstrating harm to the public interest will nearly always be satisfied. The court also notes that, generally, it will not be necessary to prove that actual harm would result from the restraint sought.

The Assistant Manager submits that the balance of convenience operates in favour of requiring compliance with the Order without further delay.

In reply, Spike submits that, with respect to the utility corridors, any contamination in the corridors has now been entirely cleaned up. In addition, while the utility corridors are notorious for facilitating migration, no source for the migration exists at this time and it is clear from the drilling on Kingsway that any previous contamination in the corridors did not migrate out of those corridors.

The Panel has reviewed all of the submissions and has concluded that, if a stay is granted, the potential risk to human health and the environment and the public interest outweighs the potential harm to Spike, if a stay is not granted. The Panel finds that if the stay is denied, any harm to Spike will be financial. Specifically, the Panel notes that Spike will be subject to the obligations under the Order and the costs associated with the Order.

Although Spike argues that the results of tests to date indicate that there is no off-site migration or chance of groundwater contamination, the Panel notes that this is based on very limited testing and the results of the testing were not provided forthwith to the Ministry. The location, nature and the magnitude of the contamination on and around the Property has not been fully investigated, despite Spike's commitment to do so in 1999 when it notified the Ministry that it would undertake voluntary remediation. The Panel further notes that the Assistant Manager's authority for ordering a detailed site investigation under section 26.2 of the *Waste Management Act* does not require more than a "reasonable suspicion" that the site is contaminated.

There is no dispute that there is contamination on the Property and that the contamination is in need of remediation. Spike, itself notes in its stay submissions that the Property may have been suffering from "significant hydrocarbon contamination" for a "significant period of time", even prior to 1984. Similarly, there appears to have been a "lengthy history of contamination at the site." Although the Panel recognizes that a detailed vapour extraction system has been operating on the site, in the absence of a detailed site investigation report, it is difficult to determine whether this remedial activity is adequate.

In addition, the Panel accepts that there are legitimate concerns with regard to off-site migration of contaminants, in light of the history of migration and the presence of utility corridors that are known conduits for contamination.

The Panel notes that the Assistant Manager made the Order in accordance with his statutory mandate to protect the environment. The Assistant Manager made the Order to determine the precise nature of the contamination and to assess the risks to human health and the environment. Therefore, the Panel finds that the Order will protect the public interest.

A detailed site investigation requires Spike to identify, among other things, which substances may cause or threaten to cause adverse effects on human health or the environment and identify the specific areas, depths, and degree of contamination on the Property including the areas and extent of migration. The Panel notes that in the absence of a detailed site investigation it cannot be satisfied that the Property does not pose a serious threat to human health and the environment. Nor can the Panel be satisfied that Spike's remediation efforts are adequate. The Panel agrees that Spike must comply with the Order without further delay.

Considering the above, the Panel finds that the balance of convenience weighs in favour of refusing a stay of the Assistant Manager's decision.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons provided above, the Panel finds that the Appellant's application for a stay of the Assistant Manager's Order is denied.

Alan Andison, Chair
Environmental Appeal Board

February 13, 2003