BRITISH COLUMBIA

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APPEAL NOS. 2003-WAS-014(a), 015(a), 017(a), 018(b)

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

BETWEEN:	British Columbia Power and Hydro Authority BC Rail Ltd. City of Quesnel Shell Canada Products Limited	**APPLICANTS**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Imperial Oil Limited	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on July 9, 2003	

APPEARING:	For the Applicants:	
	British Columbia Power and Hydro Authority	David Perry, Counsel
	BC Rail Ltd.	Graham Walker, Counsel
	City of Quesnel	James Yardley, Counsel
	Shell Canada Products Limited	Robert Lesperance, Counsel
	For the Respondent:	Dennis A. Doyle, Counsel
	For the Third Party:	Simon Wells, Counsel

STAY APPLICATIONS

APPLICATIONS

On April 25, 2003, Joe Negraeff, the Regional Waste Manager for the Cariboo Region of the Ministry of Water, Land and Air Protection (the "Regional Manager"), issued an Implementation Order to British Columbia Hydro and Power Authority ("BC Hydro"), BC Rail Ltd. ("BC Rail"), the City of Quesnel, Shell Canada Products Limited ("Shell") and Imperial Oil Limited ("Imperial Oil"). The Implementation Order approves a draft remediation plan submitted by BC Hydro, BC Rail, the City of Quesnel and Shell and requires the persons named to the original Remediation Order OE-17312 to commence implementation of the plan.

Between May 22, 2003 and May 26, 2003, all five of the named parties appealed the Implementation Order. BC Hydro, BC Rail, the City of Quesnel and Shell requested a stay of the order pending a decision on the merits of their appeals.

This decision addresses the applications for a stay of the Implementation Order.

These applications were conducted by way of written submissions.

BACKGROUND

The Implementation Order relates to a contaminated site located at Quesnel Legion Drive, north of and adjacent to the Quesnel River in the City of Quesnel, B.C. (the "Site"). The issuance of this order is one step in the overall process to address contamination at the Site. This order approved a draft remediation plan that was submitted by the Applicants to satisfy one of the requirements in Remediation Order OE-17312. A brief background to the issuance of that Remediation Order and the subsequent Implementation Order is as follows.

The Ministry of Water, Land and Air Protection, or its predecessor, was first advised of petroleum related hydrocarbon contamination in soil and ground water at the Site in April 1994, when an investigation report was submitted by Seacor Environmental Engineering Inc. ("Seacor") on behalf of Shell.

On November 13, 1998, the Regional Manager issued a notice of preliminary determination of a contaminated site to BCR Properties Ltd., BC Rail, Shell, the City of Quesnel, BC Hydro, as well as Imperial Oil.

On February 19, 1999, the Regional Manager issued a final determination that the Site was a contaminated site. Imperial Oil appealed the final determination to the Board, and that appeal is currently being held in abeyance at Imperial Oil's request.

On January 22, 2003, the Regional Manager issued Remediation Order OE-17312 to BC Hydro, BC Rail, the City of Quesnel, Shell, and Imperial Oil, pursuant to section 26.2 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*"). The Remediation Order required all of the named parties to submit and implement a remediation plan to address contamination at the Site. The Remediation Order contained two remedial requirements, which are summarized as follows:

> The responsible persons must submit a remediation plan, with appropriate fees, to the Regional Manager by no later than February 28, 2003; and
>
> The responsible persons must implement the remediation plan in accordance with the terms and conditions of its approval by the Regional Manager.

All named parties appealed the Remediation Order and requested a stay of that order pending a decision on the merits of the appeal. That order is the subject of separate appeals to the Board (see Appeal Nos. 2003-WAS-006, 007, 008, 009, 010).

By a letter dated February 26, 2003, the Board granted an interim stay of the Order. However, on March 21, 2003, the Board denied a stay of the Remediation Order. (A more detailed background to the Remediation Order and the Site may be found in the Board's stay decision, *British Columbia Power and Hydro Authority, Imperial Oil Limited, BC Rail Ltd., City of Quesnel, Shell Canada Products Limited v. Regional Waste Manager* (Appeal Nos. 2003-WAS-006(a), 007(a), 008(a), 009(a), 010(a))).

In accordance with the Remediation Order, BC Rail, BC Hydro, Shell and the City of Quesnel submitted a draft remediation plan to the Regional Manager on February 27, 2003. The draft remediation plan was prepared by Seacor.

On April 25, 2003, the Regional Manager issued the Implementation Order. The portion of that order that gives rise to the present stay applications reads as follows:

> The "Proposed Remediation Plan", authored by Seacor … and dated February 27, 2003, satisfies that part of the remediation order OE-17312 which requires submission of a remediation plan. As required by Order OE-17312, the responsible persons named in the Order are directed to implement this plan (the "Approved Plan").

The Approved Plan sets out a remediation schedule. The schedule states that remediation of the Site is to commence no later than June of 2003, in accordance with a previous determination of the Regional Manager. However, it notes that "before remediation can commence, "a number of project milestones must be realised." Fourteen "milestones" and the approximate time required to complete each milestone were provided in the schedule.

It is not clear from the submissions, which, if any, of these milestones have been met.

BC Hydro, BC Rail, the City of Quesnel and Shell appealed the Implementation Order and requested a stay of that order pending a decision on the merits of their appeals. Imperial Oil has been added as a Third Party to their appeals. It opposes the applications on the grounds that none of the Applicants "offer any meritorious new arguments for a stay of the implementation order … that are distinct from the grounds previously asserted to the Board in support of a stay in relation to the original mandatory remediation order dated January 22, 2003…."

The Regional Manager also opposes these applications on similar grounds.

On August 27, 2003, BC Hydro requested an interim stay of the Remediation Order and subsequent orders on the basis of a decision of the British Columbia Court of Appeal in *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board),* 2003 BCCA 436. In a decision dated September 24, 2003, the Board refused the request (see *BC Hydro v. Regional Waste Manager*, Appeal Nos. 2003-WAS-006(b); 2003-WAS-018(a)).

It should be noted that Imperial Oil submitted its own draft remediation plan. In the Implementation Order, the Regional Manager stated that Imperial Oil's "Remedial Plan" is not approved. The Regional Manager noted that while the general remediation approaches of Imperial Oil's plan and the Approved Plan are similar, Imperial Oil's proposed timeline for initiating remediation "is excessive" and that its plan inaccurately describes the nature of the contaminants at the Site.

Imperial Oil appealed the Regional Manager's decision. There is no stay request associated with Imperial Oil's appeal.

ISSUE

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

A further issue is whether the Panel can consider the Applicants' arguments relating to the initial Remediation Order in the context of this application for a stay of the Implementation Order.

The Panel has addressed the following issues in this decision:

1. Whether the Panel has the jurisdiction to consider issues in relation to the Remediation Order.

2. Whether the Panel should grant a stay of the Implementation Order to any or all of the Applicants pending a decision on the merits of the appeals.

RELEVANT LEGISLATION AND CASE LAW

Section 48 of the *Act* grants the Board the authority to order a stay. Section 48 states:

> 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.) ("*RJR-MacDonald*") applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. There is a serious issue to be tried;

2. Irreparable harm will result if the stay is not granted; and

3. The balance of convenience favours granting the stay.

The onus is on the Appellants to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

1. Whether the Panel has the jurisdiction to consider issues in relation to the Remediation Order.

Many of the parties made lengthy submissions as to the vagueness and unfairness of the Remediation Order, the Regional Manager's intentions in issuing that order, and the Regional Manager's jurisdiction to make that order.

Further, BC Hydro and Shell take issue with the boundaries of the Site, which were established by the Regional Manager and attached as an Appendix to the Remediation Order. BC Hydro argues that this stay application is the first opportunity that it has had to challenge the determination of the Site boundaries. It argues that, at the time the stay application on the Remediation Order was heard, BC Hydro was under no positive obligation to act since there was no Approved Plan or Implementation Order. Therefore, it would have been premature for BC Hydro to seek a stay of the Site boundaries before it was ordered to carry out tasks according to those boundaries.

The Panel disagrees. The parties were aware that the Remediation Order established the Site boundaries and that subsequent remedial actions would be required. Many of the parties to the Remediation Order focussed on the boundary issue in their respective notices of appeal and in their applications for a stay of that order. In the Panel's view, that was the appropriate time for doing so. It is clear that the Site boundaries are contentious. Full argument on the appropriateness of those boundaries will take place during the hearing of the merits of the Remediation Order, they will not take place in the context of these stay applications of the Implementation Order.

At this time, the only "decision" under appeal is the Implementation Order. The Panel agrees with the Regional Manager that the Panel's considerations in his decision should be limited to those issues relating specifically to the Implementation Order. To consider the arguments relating to the Remediation Order itself, such as the boundaries and the naming of the Applicants as responsible persons would essentially be a re-hearing of their submissions in the previous application.

The Panel finds that its jurisdiction in this case is limited to hearing submissions relevant to an application for a stay of the Implementation Order, as set out below.

2. Whether the Panel should grant a stay of the Implementation Order to any or all of the Applicants pending a decision on the merits of the appeals.

Serious Issue

This branch of the test has the lowest threshold. As stated in *RJR MacDonald* at pages 402-3, unless the case is frivolous or vexatious or is a pure question of law, as a general rule, the inquiry should proceed onto the next stage of the test. A prolonged examination of the merits of the appeal itself is generally neither necessary nor desirable.

Arguments

All of the Applicants submit that there are serious issues to be tried. Their main arguments are summarized as follows:

- the Approved Plan may not be feasible from a technical, economic or practical perspective,
- the Regional Manager should not have approved the plan without first having its viability independently reviewed,
- the Applicants should not be required to implement the Approved Plan, the merits of which have not been tested or confirmed, and
- the Implementation Order itself is vague and uncertain and does not satisfy the minimum requirements of clarity and explicitness.

Shell notes that BC Hydro retained Golder & Associates Ltd. to prepare an expert opinion on the technical feasibility of the remedial plan which is now the Approved Plan. In its June 13, 2003 report, Golder disagrees with some of the requirements of the Approved Plan. Furthermore, Shell has now retained Komex International Ltd. to provide it with, among other things, an expert report on the feasibility of the Approved Plan. Shell submits that these reports put into question the feasibility of the Approved Plan, creating uncertainty amongst the parties responsible for implementing it.

BC Hydro adds that it submitted the proposed remediation plan to the Regional Manager "under protest" since it takes issue with being named to the Remediation Order and subsequent orders at all.

The Regional Manager submits that there are no serious issues that would warrant granting a stay in this case. He states that the Approved Plan is:

- a multi-year plan that contemplates further decisions by the Regional Manager that, once made, would provide new opportunity for review by the Board on appeal,
- the plan "spells out in detail" the process under which remediation will proceed, and
- while there is some "built-in flexibility," this flexibility does not render the approval vague or uncertain.

The Regional Manager provides several examples of specific goals, targets and references contained within the Approved Plan. Professional consultants with a history of knowledge about the Site, and hired by the Applicants, created the Approved Plan. Therefore, the objection that the Regional Manager did not have the plan independently reviewed should not be considered a serious issue to be tried.

Imperial Oil argues that, having collectively submitted the Approved Plan in order to collectively comply with his original Remediation Order, the Applicants cannot now seriously argue that the Regional Manager erred in ordering them to collectively implement that same plan. Similarly, Imperial Oil submits that the Board should not accept as a serious issue the allegation that the plan is flawed since it was the Applicants who submitted it. Furthermore, if it is, in fact, flawed, the appropriate remedy is not a stay, but an application to the Regional Manager for a correction of the Approved Plan under section 27.1 of the *Act*. Accordingly, Imperial Oil submits that since none of the Applicants have availed themselves of the legislated amendment procedure, there is no serious triable issue in this application.

Findings

The question before the Panel at this stage is whether the Applicants' submissions disclose grounds that are frivolous, vexatious, or pure questions of law. If they do not, the Panel should proceed to the next step of the test.

The Panel shares some of the concerns of the Regional Manager and Imperial Oil. The Applicants submitted the plan, had the same plan approved and are now appealing and requesting a stay of the plan based on, among other things, feasibility and technical concerns. This is clearly an unusual situation.

However, a number of the Applicants identify concerns in their Notices of Appeal relating to the time limits in the Approved Plan. Further, the Panel appreciates that the plan was submitted in order to comply with the Remediation Order, and within fairly short time frames. As such, the plan may not have had the full support of the parties submitting it to the Regional Manager. There is also evidence that at least some portions of the Approved Plan may be problematic from a technical point of view as is noted in the June 13, 2003 report by Golder.

Although Imperial Oil is correct that the legislation establishes a method for obtaining amendments to the Approved Plan, at this stage of the test, the only question is whether the appeals are frivolous or vexatious or involve a pure question of law under the *RJR-MacDonald* test. The Panel finds that they are not and that there are serious issues to be tried.

Irreparable Harm

At this stage of the *RJR-MacDonald* test, the Applicants must demonstrate that they will suffer irreparable harm if a stay is not granted. As stated in *RJR-MacDonald*, at 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR-MacDonald*, at 405:

> "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.

Arguments

BC Rail submits that if a stay is not granted, it will suffer irreparable harm as a result of the following:

- it has applied to the Regional Manager for a determination that it is a "minor contributor" to the contamination at the Site, has sought an apportionment of liability of zero percent, and is confident this status will be granted;
- if it does not comply with the Implementation Order, it is exposed to prosecution which creates the prospect of irreparable harm;
- if prosecuted, it would be required to incur legal costs to defend the prosecution and faces fines of up to $300,000 per day pursuant to section 54 of the *Act*; and
- it will suffer further damage to its reputation as a result of potential charges under the *Act*.

It argues that these consequences constitute irreparable harm to BC Rail.

Shell adopts BC Rail's submissions on irreparable harm, including damage to its reputation as a result of potential charges under the *Act*. However, it denies that BC Rail is a minor contributor. It also makes a general fairness argument stating that it should not be put to the expense of remediating contamination that it did not cause and that it may not be able to recover from other responsible persons.

The City of Quesnel submits that implementation of the Approved Plan will disrupt operations at the City works yard, which is coextensive with the Site. It is also concerned that by implementing what may be a defective plan, the City may be exposed to new liability for which it could face sanctions, including prosecution. It would, therefore, face irreparable harm that could otherwise be avoided through a stay of the Implementation Order.

BC Hydro argues that if a stay is denied, it will incur the costs of remediation. However, if BC Hydro is ultimately successful in its appeal, it argues that it will not be able to recover all of those costs because it is only entitled to its *reasonable* costs. It points to the cost recovery provision of the *Act*, section 27(4), which states that a party may secure "reasonably incurred cost[s] of remediation" from responsible persons. It also refers to section 35 of the *Contaminated Sites Regulation*, which provides further guidance for the courts to determine the

compensation recoverable for actions under section 27(4) of the *Act*. Section 35 states:

> **35** (1) For the purposes of determining compensation payable under section 27(4) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.
>
> (2) In an action between 2 or more responsible persons under section 27(4), the following factors must be considered when determining the reasonably incurred costs of remediation:
>
> (a) the price paid for the property by the person seeking cost recovery;
>
> (b) the relative due diligence of the responsible persons involved in the action;
>
> (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
>
> (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
>
> (e) any remediation measures implemented and paid for by each of the persons in the action;
>
> (f) other factors relevant to a fair and just allocation.
>
> (3) For the purpose of section 27 of the Act, any compensation payable by a defendant in an action under section 27(4) is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act*

An example of what BC Hydro submits is an unrecoverable expense is the proposed Vacuum Enhanced Multi-Phase Extraction system, which it argues is neither necessary nor reasonable, but which is required under the Implementation Order. BC Hydro argues that if it is successful in arguing that the required system is unnecessary and unreasonable, it will no longer be able to recover the costs of implementing the system.

BC Hydro observes that there is no jurisprudence providing that costs incurred pursuant to a remediation order are recoverable notwithstanding the fact that it was later established that the ordered remediation requirements were unreasonable.

In addition, BC Hydro submits that there is a "real prospect" that BC Hydro could never recover costs attributable to one of the parties that is responsible for contamination at the Site, Home Oil, because that company has been dissolved.

Since it is "unlikely" that BC Hydro "could be fully indemnified," it submits that the Panel should find that it will suffer irreparable harm. In support of this submission, BC Hydro refers to *International Forest Products Ltd. v. Kern* (2000), 45 C.P.C. (4th) 92 (hereinafter *Interfor*), a decision of the B.C. Supreme Court, in which the Court states:

> [33] The question of irreparable harm is easily addressed. There is no doubt that the activities of the protestors have had an effect upon the business of Interfor and its contractors who are also plaintiffs in this action. Interference with a business as a going concern amounts to irreparable harm: *Tlowitsis Nation and Mumtagila Nation v. MacMillan Bloedel Ltd.*, [1991] 2 C.N.L.R. 164 (B.C.S.C.). In any event, there is no basis upon which to conclude that any damages which might be awarded Interfor, should it pursue the action to completion, would be recovered from Kern and McCallion or any other persons who might be identified as protestors. Plainly stated, damage done by the protestors is not likely to be repaired.

In response to the Applicants' submissions that possible prosecution may result in irreparable harm, the Regional Manager refers to the Board's decision in *Alpha Manufacturing Inc. v. Deputy Director of Waste Management (BC Gas Utility Ltd. Third Party),* Appeal No. 97-WAS-04(a), (1997) B.C.E.A. No. 52 (Q.L.). In that case, the Board concluded that the threat of prosecution does not constitute irreparable harm.

The Regional Manager submits that the works in the Approved Plan can be carried out by a consultant on behalf of the responsible parties and the costs can be easily quantified by a simple reckoning of the accounts. He submits that the lack of certainty as to individual shares or apportionment of liability does not constitute irreparable harm. Similarly, the possibility that BC Rail may obtain minor contributor status at some later date does not constitute irreparable harm. He states: "There are legal and administrative mechanisms for sorting out those issues and accordingly it is submitted that the Board should reject the Appellants' arguments on this ground."

The Regional Manager submits that none of the Applicants have demonstrated that irreparable harm will result if they proceed to implement the Approved Plan pending a hearing on the merits of their appeals. He submits that the arguments in this case are no different than the parties' arguments in the applications to stay the Remediation Order. He submits that the Board's findings in that case are applicable to this case:

> The Panel notes that none of the Applicants, including Imperial Oil, have indicated that they do not have the financial resources to implement remediation of the Site. In addition, none of the Applicants provided evidence that compliance with the Order would result in permanent market loss, bankruptcy, or company shut down.

> In addition, the Panel finds that there is no evidence that Imperial Oil or any of the other Applicants could not collect damages, or recover against other responsible persons, should they be successful in their appeals…. (pages 17-18):

Findings

The Panel finds that there is no evidence that the Applicants do not have the financial resources to comply with the Implementation Order. In addition, none of the Applicants provided evidence that compliance with the Implementation Order would result in permanent market loss, bankruptcy, or company shutdown.

Although some of the Applicants' refer to "possible prosecution" as irreparable harm, the Board has rejected this argument on a number of occasions, including in the previous stay application, and does so again. The Panel adopts the reasoning from *Alpha Manufacturing*, at paragraph 27:

> With respect to the Applicant's argument that the threat of prosecution constitutes irreparable harm, the Respondent submits that allowing this argument would undermine enforcement actions under the Act. The Board agrees that the threat of prosecution does not constitute irreparable harm. To allow such an argument would result in persons waiting to be out of compliance with orders and then applying to the Board for a stay of the order. The Board cannot accede to such requests.

BC Hydro submits that if it is successful in its appeal of the Remediation Order, costs incurred from complying with the Implementation Order will not be recoverable. This is based on its argument that costs incurred under an unreasonable remediation order could not be "reasonable costs" under section 27(4) of the *Act*.

BC Hydro's argument relies on the meaning of the term "reasonable costs." The actual term used in the *Act* is "reasonably incurred costs." Section 27(4) of the *Act*, states:

> **27** (4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.
>
> [emphasis added]

Section 35 of the *Contaminated Sites Regulation* is of some assistance in interpreting this phrase for the purposes of the irreparable harm argument. According to subsection 35(2), the factors identified in (a) to (f) "must be considered when determining the reasonably incurred costs of remediation." The factor at subsection (e) is "any remediation measures implemented and paid for by each of the persons…." [emphasis added]

Although the Panel is not making a finding of what costs constitute reasonably incurred costs in this matter, the statutory language indicates that *any* costs, whether or not the decision-maker's order is later found to be unreasonable, which are paid for by the responsible persons when implementing remediation measures, can be considered the reasonably incurred costs of remediation.

The Panel also notes that subsection 35(2)(f) includes "other factors relevant to a fair and just allocation." As such, the Panel finds that BC Hydro's interpretation of section 27(4) fails to establish that it will suffer irreparable harm if a stay of the Implementation Order is not granted.

Further, the Panel does not find that *Interfor* is support for BC Hydro's claim of irreparable harm. In that case, the Court noted that International Forest Products Limited ("Interfor") commenced an action against Mr. Kern claiming damages for "interference with contractual relations, obstruction, intimidation, nuisance, conspiracy to do injury to Interfor in its business, conspiracy to harm the economic interests of Interfor and trespass as well as an interlocutory and permanent injunction." The particular injunction application before the Court was one of a series of injunction applications through which Interfor was attempting to prevent protesters from interfering with its logging operations in portions of the Upper Elaho River Valley.

The Court in *Interfor* found that, if Interfor was successful in its civil action, the protesters could not pay the damages.

However, the facts in the case are different. Pursuant to section 27(1) of the *Act*, liability for remediation is absolute, retroactive and joint and several. Any person who incurs costs carrying out remediation may pursue an action or proceeding to recover those costs from one or more responsible persons (section 27(4) of the *Act*). Therefore, even if Home Oil has been dissolved, that is not critical to BC Hydro's cost recovery action.

The Panel finds that reasonably incurred costs incurred by BC Hydro in complying with the Implementation Order are quantifiable and recoverable in damages - they are not irreparable. As stated above, there is no evidence to suggest that the other responsible persons do not have the financial resources to pay a damage award to BC Hydro.

Based on the foregoing, the Panel finds that none of the Applicants have demonstrated they will suffer irreparable harm if the stay is not granted.

Balance Of Convenience

At this stage of the test, the Board must 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. The potential for harm to the interests of the Applicants must be balanced against the harm that could be suffered if the stay is granted.

Arguments

The Regional Manager submits that there is no dispute that free phase hydrocarbons are entering the Quesnel River from the Site. He argues that this pollution will almost certainly result in further environmental degradation. He argues that there is an imminent risk to the environment if remediation does not proceed without delay. He also argues that if the Implementation Order is stayed, there will be no Approved Plan and remediation could not proceed under the Remediation Order.

The Regional Manager notes that the extent of contribution from the various sources within the Site remains an issue, however, in keeping with the legal principles set out in *Beazer East Inc. v. Environmental Appeal Board et al*., 2000 B.C.S.C. 1698, contribution and allocation issues should not be allowed to delay remediation. He argues that consideration of equitable factors at the remediation plan approval stage would, in the circumstances, be contrary to the scheme of the legislation and accordingly, do not favour the imposition of a stay.

All of the Applicants argue that, regardless of the Regional Manager's concerns, a stay should be granted to one or all of them, at least until the Approved Plan can be further scrutinized. The City of Quesnel suggests that a 3-month stay of the Implementation Order would allow questions about the Approved Plan to be considered and addressed and would serve the balance of convenience.

The Applicants also point out that they have voluntarily participated in the remediation process to date but should not be put to the expense of remediating contamination that, they maintain they did not cause. Each of the Applicants argue that if they are granted a stay of the Implementation Order, the environment will not be at risk because the other remaining parties have the financial resources to complete remediation of the Site, whether by the Approved Plan or otherwise.

Imperial Oil did not address the balance of convenience issue in its submissions.

Findings

The Panel accepts that the Regional Manager made the order in accordance with his statutory mandate to protect the environment. There is no dispute that there is contamination at the Site, and that it needs to be remediated.

The Panel notes that the new reports and critiques of the Approved Plan support the application for a stay of the Implementation Order. However, the evidence of the Regional Manager is that the implementation of the remediation plan will take a number of years. Further, there are methods of seeking an amendment of the plan. If there are legitimate issues regarding the Approved Plan, the parties may apply to the Regional Manager to vary the order. Therefore, the Panel is satisfied that the Applicants have an available remedy to change the Approval Plan without resorting to the extraordinary remedy of a stay.

The Panel has already found that none of the Applicants have demonstrated that they will suffer irreparable harm if a stay of the Implementation Order is not granted. Accordingly, the Panel finds that the balance of convenience favours the

protection of the environment as contamination continues to migrate to the Quesnel River from the Site. A stay of the Implementation Order is denied.

DECISION

The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

The Panel denies the applications for a stay of the Implementation Order.

Alan Andison, Chair
Environmental Appeal Board

October 3, 2003