



Province of
British Columbia

Environmental Appeal Board

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APPEAL NO. 2004-WAS-007(a)

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

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| BETWEEN: | 427958 B.C. Ltd. (dba the Super Save Group of Companies) | APPELLANT |
| AND: | BC Hydro and Power Authority | APPLICANT |
| AND: | Deputy Director of Waste Management | RESPONDENT |
| AND: | Ocean Construction Supplies Ltd. | THIRD PARTY |
| BEFORE: | A Panel of the Environmental Appeal Board Alan Andison, Chair | |
| DATE: | Conducted by way of written submissions concluding on July 16, 2004 | |
| APPEARING: | For the Appellant: James R. Kitsul, Counsel Patricia Houlihan, Counsel For the Applicant: David G. Perry, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: Tanya Punjabi, Counsel | |

PRELIMINARY ISSUE OF JURISDICTION

APPLICATION

427958 BC Ltd., doing business as the Super Save Group of Companies ("Super Save"), appealed the April 30, 2004 decision of Alan W. McCammon, Deputy Director of Waste Management, Ministry of Water, Land and Air Protection (the "Deputy Director") to issue an approval in principle ("AIP") to the BC Hydro and Power Authority ("BC Hydro"). The AIP pertains to a proposal to remediate certain contaminated lands as set out in scenario 4 of a remediation plan titled, *Revised Recommended Remedial Strategy for the Rock Bay Site Victoria, B.C.* (July 22, 2003), prepared by Golder Associates (the "Remedial Action Plan").

BC Hydro made an application to dismiss the appeal on the basis that the Board lacks jurisdiction to hear the appeal. Specifically, BC Hydro submits that Super

Save lacks standing to bring the appeal, and that the decision to issue the AIP is not a "decision" within the meaning of section 43 of the *Waste Management Act* (the "Act") that may be appealed to the Board.

The Board invited submissions from all of the parties on the issue of jurisdiction. This application was heard by way of written submissions.

BACKGROUND

The AIP was issued pursuant to section 27.6(1) of the *Act*, and constitutes the Deputy Director's authorization for BC Hydro to implement a plan to remediate a contaminated site comprising three parcels of land owned by BC Hydro in the City of Victoria (the "BC Hydro Properties"). The BC Hydro Properties are located on Rock Bay, and are adjacent to property owned by the federal Crown and administered by Transport Canada. The BC Hydro Properties, as well as much of the sediments within Rock Bay and portions of the federal property, are contaminated with coal tar and coal tar components, as well as other materials such as ammonia liquors, cyanide, hydrocarbon fuels, oxide box wastes, wood waste, and metals. The contamination is largely a result of historical commercial and industrial activities in and around Rock Bay, including the operation of a coal gas manufacturing plant from 1862 to the late 1940's.

It should be noted that the AIP applies only to the BC Hydro Properties. The property owned by the federal Crown is subject to federal legislation, such as the *Canadian Environmental Protection Act* and the *Fisheries Act*. Provincial standards for contaminated sites have been applied to the federal lands as a guideline only.

The Remedial Action Plan was developed jointly by BC Hydro and Transport Canada, who have been working together since 1996 to develop a remediation strategy for the site. BC Hydro and Transport Canada consulted the Ministry of Water, Land and Air Protection, Environment Canada, the Department of Fisheries and Oceans, the City of Victoria, and adjacent property owners, including Ocean Construction Supplies Ltd. ("Ocean Construction") and Super Save, regarding the Remedial Action Plan before the AIP was issued.

The AIP approves scenario 4 in the Remedial Action Plan, which involves the excavation, disposal and replacement of all soil with contaminant concentrations exceeding the commercial and industrial land use standards set out in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "CSR"), and the excavation/dredging and disposal of all sediments in the bay with contaminant concentrations exceeding the standards set out in the *Special Waste Regulation*, B.C. Reg. 63/88. The estimated total cost of implementing scenario 4 of the Remedial Action Plan is \$30.5 million.

Super Save owns property at 2122 Government Street, which is adjacent to the BC Hydro Properties and the Transport Canada property. Super Save has operated a gas station on its property for several years. In 2003, Super Save hired AquaTerra

Consultants Ltd. ("AquaTerra"), an environmental consulting firm, to conduct a preliminary investigation of its property to determine if it is contaminated. AquaTerra drilled bore holes and collected soil and ground water samples at several locations on Super Save's property, based on proximity to underground storage tanks and the adjacent contaminated lands. In reports dated May 9, 2003 and December 10, 2003, AquaTerra stated that Super Save's property is "extensively contaminated with various petroleum hydrocarbon substances" in both the soil and ground water.

In addition, Super Save hired AquaTerra to review the Remedial Action Plan. In a letter dated October 7, 2003 to counsel for Super Save, AquaTerra concluded that the Remedial Action Plan did not take into account adjacent property owners who may be affected by contamination from the BC Hydro Properties and Transport Canada property.

On May 31, 2004, Super Save filed a Notice of Appeal with the Board concerning the decision to issue the AIP. Super Save opposes the issuance of the AIP on three main grounds:

- prior to issuing the AIP, the Deputy Director failed to ensure adequate investigation of off-site impacts of the Remedial Action Plan and to investigate potential migration of contamination from the BC Hydro Properties;
- the Deputy Director erred in issuing the AIP in that he has not met requirements in the *Act* and the *CSR* to investigate the location and extent of contamination, including within the properties adjacent to the BC Hydro properties; and
- the Deputy Director did not provide sufficient notice to owners of property adjoining the BC Hydro properties of BC Hydro's application for an AIP and did not provide neighbours with sufficient opportunity for input on the application.

Super Save is seeking cancellation of the AIP, and an order directing the Deputy Director to investigate the off-site impact of the AIP or, in the alternative, an order amending the AIP to require investigation of off-site impacts for the purpose of including in the AIP a requirement to remediate any off-site contamination.

In its Notice of Appeal, Super Save also requested a stay of the AIP pending a decision on the merits of the appeal.

On June 1, 2004, the Board informed the Deputy Director, BC Hydro, and Ocean Construction of the appeal, and invited BC Hydro and Ocean Construction to participate in the appeal as third parties. The Board also requested that the Deputy

Director, BC Hydro, and Ocean Construction provide submissions on whether they would consent to a voluntary stay of the AIP.

On June 14, 2004, Ocean Construction accepted third party status and supported Super Save's request for a stay.

On June 15, 2004, BC Hydro accepted third party status, objected to the stay application, and submitted that the appeal should be dismissed on the basis that the Board lacks the jurisdiction to hear the appeal.

On June 16, 2004, the Deputy Director advised that he opposed a voluntary stay.

By a letter dated June 18, 2004, the Board invited submissions from all of the parties on the issue of the Board's jurisdiction to hear the appeal. The Board also stated that it would not consider the stay application until after it had reached a decision on the jurisdiction issue.

BC Hydro submits that the appeal should be dismissed because the Board does not have jurisdiction over the appeal.

Super Save and Ocean Construction submit that the Board has jurisdiction over the appeal.

The Deputy Director made no submissions on this application.

ISSUES

This application raises the following issues:

1. Whether Super Save is an "aggrieved person" for the purposes of section 44 of the *Act*.
2. Whether the issuance of the AIP is a "decision" for the purposes of section 43 of the *Act*.

RELEVANT LEGISLATION

The relevant provisions of the *Act* are as follows:

Definition of "decision"

43 For the purpose of this Part, "**decision**" means

- (a) the making of an order,
- (b) the imposition of a requirement,

- (c) an exercise of a power,
- (d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and
- (e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

Appeals to Environmental Appeal Board

- 44** (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

Other relevant legislation is cited in the discussion and analysis, below.

DISCUSSION AND ANALYSIS

- 1. Whether Super Save is an “aggrieved person” for the purposes of section 44 of the *Act*.**

Parties’ submissions

BC Hydro notes that section 44(1) of the *Act* states that “a person aggrieved by a decision of a manager, director or district director” may appeal a decision to the Board. BC Hydro submits that, in *Dave Stevens v. Regional Waste Manager*, (Appeal No. 2001-WAS-030, February 28, 2002), [2002] B.C.E.A. No. 9 (Q.L.) (hereinafter *Stevens*), the Board held that a person is aggrieved when:

... an order has been made that prejudicially affects [the person’s] interests.

BC Hydro submits that Super Save is not a person aggrieved by the issuance of the AIP. BC Hydro submits that, in order for Super Save to be aggrieved by the issuance of the AIP, the AIP must have a negative impact on Super Save. BC Hydro submits that a person seeking to appeal the AIP must be aggrieved by some aspect of the AIP, and must show that the AIP has caused harm that is prejudicial to their interests. BC Hydro submits that Super Save has not indicated any elements of the AIP that are prejudicial to its interests. Rather, BC Hydro submits that Super Save believes it is aggrieved by things that the Deputy Director has allegedly not done, including not consulting sufficiently and not incorporating concerns for off-site contamination into the AIP. BC Hydro argues that Super Save has not asserted that any aspect of the remediation process, including the excavation and temporary storage of soil, the use of a facility to pump and treat ground water, or the trucking of contaminated soil off-site, will cause it to suffer prejudice.

Furthermore, BC Hydro maintains that the removal of over 60,000 cubic metres of contaminated soil will significantly improve the environment, which will benefit not only the community in general but also adjacent land owners such as Super Save.

Super Save submits that it is an aggrieved person, for the following reasons:

- its property has become contaminated by the migration of contaminants from the BC Hydro Properties;
- BC Hydro is a “responsible person” under the *Act* and, therefore, BC Hydro is responsible for remediating contamination within and beyond the boundaries of its own property;
- the *Act* and the *CSR* define a contaminated site by the location and extent of contamination, and not strictly by legal property boundaries;
- the Deputy Director decided that the boundaries of the BC Hydro Properties define the contaminated site, to the exclusion of Super Save’s property, despite substantial evidence that Super Save’s property is contaminated as the result of operations conducted on the BC Hydro Properties;
- section 60.1(1) of the *CSR* requires a responsible person who carries out a site investigation which discloses that contamination has migrated or is likely to migrate to a neighbouring site to give written notification to its neighbours. The fact that neighbours are to be notified of potential contaminant migration strongly supports that they are aggrieved persons where migration is likely to have occurred; and
- due to migrating contamination from the BC Hydro Properties, Super Save can not sell or re-finance its property on the open market, adding a serious financial dimension to the way in which Super Save is aggrieved by the AIP’s exclusion of its property and the AIP’s lack of a requirement for Super Save’s property to be remediated.

Super Save submits that the Deputy Director had the following information before he decided to exclude Super Save’s property from the scope of the AIP:

- a Detailed Site Investigation prepared for BC Hydro by Golder Associates, dated October 2001, which, Super Save submits, indicates that Super Save’s property has likely been significantly contaminated by coal tar which likely emanated from the BC Hydro Properties;
- the October 2003 report by AquaTerra that reviewed the Remedial Action Plan, and which, Super Save submits, would have caused a reasonable person to conclude that there was likely a migration of contaminants, in

particular coal tar, from the BC Hydro Properties to Super Save's property; and

- a January 2003 report by Franz Environmental Inc., which, Super Save submits: a) indicates that ground water flows from Super Save's property to the BC Hydro Properties; b) shows high concentrations of special waste on BC Hydro's border with Super Save's property; and, c) assumes those waste levels extend onto Super Save's property.

Super Save submits that the failure to include its property within the boundaries of the contaminated site that is addressed by the AIP, despite evidence that its property was likely contaminated by contaminants that originated from the BC Hydro Properties, results in Super Save's property not being remediated, and therefore, it is reasonable to consider Super Save to be a person aggrieved by the issuance of the AIP.

Ocean Construction submits that Super Save is a person aggrieved under section 44(1) of the *Act* because the AIP does not include a requirement for BC Hydro to remediate contamination on Super Save's property that may have migrated from the BC Hydro Properties. In addition, Ocean Construction submits that, given the flow of ground water under Super Save's property toward the BC Hydro Properties, the BC Hydro Properties may become re-contaminated from Super Save's property after remediation, potentially leaving Super Save open to ongoing liability. Ocean Construction maintains that BC Hydro's own environmental consultant has indicated that its properties may become re-contaminated from Super Save's property. Moreover, Ocean Construction submits that Super Save will be aggrieved by the work performed under the approved remediation plan because it will cause the emission of dust, vapour, noise and vibrations from the BC Hydro Properties, which may result in Super Save losing business and losing the enjoyment of its property.

In reply, BC Hydro argues that, even if Super Save's property has become contaminated as a result of contaminants that migrated from the BC Hydro Properties, that does not mean that Super Save is an aggrieved person under the *Act*. BC Hydro submits that Super Save would be equally aggrieved by both the Deputy Director's issuance or refusal of the AIP, and neither outcome would have resulted in Super Save's property being remediated by BC Hydro. BC Hydro submits that, if Super Save's grievance is the same regardless of the Deputy Director's decision, then Super Save cannot reasonably be said to be aggrieved by the issuance of the AIP.

In addition, BC Hydro notes that the only effects identified by Ocean Construction as resulting from the proposed remediation work are noise, vapour, dust and vibration. BC Hydro submits that none of those concerns are subject to directions from the Deputy Director in the AIP, and that such concerns fall outside of the approval process. Rather, BC Hydro argues that those concerns are more properly the matter of municipal by-laws.

Panel's findings

The test applied by the Board to determine whether a person is a "person aggrieved" under section 44(1) of the *Act* is "whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interests." In *Stevens*, the Board confirmed the applicability of that test to questions of standing under the *Act*.

In the present case, the Panel finds that, while Super Save may have a grievance, it is not one that directly arises from the content of the AIP, which prejudicially affects Super Save's interests. The Panel finds that, in issuing the AIP, the Deputy Director did not make a decision that prejudicially affects Super Save's interests. Rather, he made a decision that approves a plan to implement remediation on certain properties. While the Deputy Director may have been aware of the contamination on Super Save's property before he issued the AIP, he was not obligated to address that contamination in the AIP. Rather, he was required to consider whether he should approve the implementation of a proposed remediation plan for the BC Hydro Properties. The Panel finds that, by approving that plan, he did not prejudicially affect Super Save's interests.

In reaching that conclusion, the Panel has considered the nature of the Deputy Director's discretion in issuing approvals in principle. Section 27.6 of the *Act* states as follows:

- 27.6** (1) On application by a responsible person, a manager may issue an approval in principle stating that a remediation plan for a contaminated site:
- (a) has been reviewed by the manager,
 - (b) has been approved by the manager, and
 - (c) may be implemented in accordance with conditions specified by the manager.

In light of those provisions, the Panel finds that an approval in principle authorizes a responsible person to implement a remediation plan submitted by that responsible person. In the present case, the AIP authorizes implementation of a remediation proposal set out in scenario 4 of the Remedial Action Plan. The Remedial Action Plan addresses the contamination on the BC Hydro Properties and the Transport Canada property. Although the Deputy Director has the discretion under section 27.6(1)(c) of the *Act* to include conditions in an approval in principle, there is no express statutory requirement for him to include conditions that are beyond the scope of the Remedial Action Plan, such as the remediation of adjacent contaminated properties that may or may not have been contaminated as a result of migration from the properties covered by the Remedial Action Plan.

Essentially, Super Save claims to be aggrieved by what is absent from the AIP and the Remedial Action Plan. Super Save is not aggrieved by anything that is in the AIP or the Remedial Action Plan, nor has it provided evidence or information indicating that it will suffer prejudice as a result of the remediation work that will be carried out. Furthermore, the Panel agrees with BC Hydro that, regardless of whether the Deputy Director decided to issue or refuse the AIP, Super Save's property would not have been remediated. A refusal of the AIP would have simply resulted in the Remedial Action Plan not being implemented. It would not have led to the remediation of Super Save's property.

With regard to Super Save's allegation that it should have standing because it is aggrieved by what is absent from the AIP and the Remedial Action Plan, the Panel notes that section 27.6(6) of the *Act* states that the Deputy Director "may issue an approval in principle... for part of a contaminated site." Therefore, even if Super Save's lands were contaminated by migrating contaminants originating from the BC Hydro Properties, the Deputy Director is not precluded from issuing an approval in principle for part of a contaminated site. In addition, the Panel notes that the power to issue an approval in principle must be considered in light of the purposes of Part 4 of the *Act*, which include the expeditious remediation of contaminated sites. The Panel finds that, even if Super Save's property was contaminated by migrating contaminants, refusing to issue the AIP until after Super Save's concerns are resolved would delay the remediation on the BC Hydro Properties and the Transport Canada property.

Additionally, there are policy reasons for restricting standing in appeals of AIP decisions. The Deputy Director's role is to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the *Act*, including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites. In cases such as this, where the AIP endorses a remediation plan that is the product of years of negotiations with government and amongst the owners of contaminated lands, appeals by persons who are not subject to the AIP or are not party to the remediation proposal may unreasonably delay the remediation of contaminated sites, and may discourage private parties from negotiating ways to remediate contaminated sites. Legitimate AIP's should not be frustrated by persons who have grievances that go beyond the terms and requirements of the AIP.

With regard to Super Save's claim that the BC Hydro Properties could be re-contaminated by Super Save's property after the BC Hydro Properties are remediated, the Panel notes that such concerns can be addressed as the remediation work progresses. In addition, the Panel notes that the AIP states as follows at page 2:

The provisions of this approval are without prejudice to the right of the ministry to make orders or to require additional remedial measures as the ministry may deem necessary in accordance with applicable laws

and nothing contained in this approval shall in any way restrict or impair the ministry's powers in that regard.

Thus, the Panel finds that, should circumstances change or new information arise in the future, the Deputy Director may exercise his discretion under the *Act* to require additional remedial action to address the contamination on Super Save's property. Furthermore, the Panel notes that, if Super Save remediates its property, and evidence establishes that the contamination on its property originated from the BC Hydro Properties, Super Save may apply to recover its reasonably incurred remediation costs from BC Hydro under section 27(4) of the *Act*.

Finally, the Panel notes that there is nothing in the AIP that precludes BC Hydro, Transport Canada, Super Save, and other interested parties from negotiating ways to coordinate the remediation of their respective properties.

For all of these reasons, the Panel finds that the AIP does not prejudicially affect Super Save's interests, and Super Save cannot properly be characterized as a "person aggrieved" by the AIP. Therefore, Super Save has no standing to bring the appeal, and the Board has no jurisdiction to hear the appeal.

Given the Panel's conclusion on this issue, the Panel need not consider whether the issuance of an approval in principle is a "decision" within the meaning of section 43 of the *Act*.

DECISION

In making this decision, the Panel has considered all of the evidence before it, whether or not specifically reiterated herein.

For all of the reasons set out above, the Panel finds that Super Save cannot properly be considered a "person aggrieved" by the decision to issue the AIP. Therefore, Super Save has no standing to bring the appeal, and the Board has no jurisdiction over the appeal.

Accordingly, the appeal is dismissed for lack of jurisdiction.

Alan Andison, Chair
Environmental Appeal Board

November 2, 2004