

Environmental Appeal Board

APPEAL NO. 97-WAS-10(c)

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

BETWEEN:	John Keays	APPLICANT
AND:	Assistant Regional Waste Manager	RESPONDENT
AND:	MacMillan Bloedel Paper Limited	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	

STANDING OF THE APPLICANT BEFORE THE BOARD

On August 1, 1997 the Respondent, Assistant Regional Waste Manager, issued Amended Permit PA-03149 under the *Waste Management Act* to the Permit Holder, MB Paper Limited. The Amended Permit authorizes the discharge of air from the Permit Holder's, Powell River Division pulp and paper mill located in Powell River, B.C.

By letters dated August 19 and 22, 1997 John Keays filed an appeal against the Amended Permit. By letter dated September 29, 1997 the Permit Holder challenged Mr. Keays right of standing to bring an appeal under the *Waste Management Act*. A similar challenge was made against an appeal brought by Paddy Goggins against the same decision. The Board received submissions from all parties on the issue of standing and on November 17, 1997 issued its decision denying standing to Mr. Keays. Mr. Goggins right to standing was upheld.

In its decision, Appeal No. 97-WAS-10(a), the Board gave the following reasons for denying standing to Mr. Keays:

There is no indication that he lives close enough to be considered a "person aggrieved". Further, Mr. Keays indicates that he wishes to appeal on behalf of others affected by the Amended Permit: i.e., the unborn – who he says will remain unborn if "we sterilize our children" – and the cod in the Strait of Georgia – which are said to be affected by the emissions.

Although Mr. Keays points to the *Finlay* case as being authority for his participation in the appeal on behalf of himself and others, the Board disagrees. In *Finlay*, the Supreme Court of Canada extended public interest standing to the administrative field as long as the applicant

meets certain specified criteria. However, the power to grant public interest standing is derived from the court's inherent jurisdiction. The Board derives its powers from statute; it has no inherent powers. Therefore, the Board is constrained by the standing provisions set out in the relevant statutes. In this case, the relevant statute is the *Waste Management Act*.

Based on the submissions presented, the Board finds that Mr. Keays has not shown that he is a "person aggrieved" as required by the *Act*.

The Board granted standing to Mr. Goggins as it was satisfied that he was a person aggrieved as he lived approximately 2.5 kilometres from the mill site and his children attend a school that is approximately 1 kilometre from the mill site. The Board stated, "In cases dealing with the discharge of contaminants to the environment, it is the Board's view that residency and proximity to the discharge site are highly relevant to an assessment of whether a person is "aggrieved".

On November 30, 1997 Mr. Keays wrote to the Board and requested that the Board reconsider its decision to deny him standing. In his letter Mr. Keays advised that he resides approximately 10 kilometres down wind from the mill site and that his children attend the same school as Mr. Goggins children.

By letter dated December 1, 1997 counsel for the Permit Holder objected to the application for reconsideration, because, "In our view, the Board has already rendered its decision regarding Mr. Keays' standing and it would be inappropriate for the Board to reconsider the issue."

By letter dated December 10, 1997 the Board wrote to the parties advising that it had concluded that it was appropriate to reconsider Mr. Keays' standing and invited submissions from all parties on the matter. By a further letter dated December 18, 1997 the Board set a schedule for receipt of submissions from the parties. The Board is now in receipt of submissions from all parties.

ISSUE

Does John Keays, have legal standing to file an appeal under section 44(1) of the *Waste Management Act*.

Section 44(1) reads as follows:

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. [emphasis added]

REVIEW OF SUBMISSIONS

On December 23, 1997 counsel for the Permit Holder submitted that the Board should uphold its earlier decision and dismiss Mr. Keays appeal for lack of standing. In particular counsel submits that Mr. Keays has failed to show that he is a "person aggrieved" under section 44 of the *Waste Management Act*.

Counsel submits that the "unsubstantiated statement" that Mr. Keays lives 10 kilometres downwind from the mill site is an insufficient basis for the Board to conclude that he is a "person aggrieved." Counsel asserts that the Board must have actual, credible evidence before it can reasonably conclude that a proposed appellant is aggrieved by a decision. According to counsel proximity to a source of pollution is inadequate to reach such a conclusion. "The Board ought to have reliable independent data, such as, in the case of air emissions, wind data, before it makes a determination of standing."

By letter dated December 24, 1997 the Assistant Regional Waste Manager advised that he had no further comments on the issue of John Keays' standing to appeal.

Counsel for Mr. Keays provided a submission dated December 30, 1997 confirming that Mr. Keays resides approximately 10 kilometres downwind from the mill site and that Mr. Keays children attend a school which is approximately 1 kilometre from the mill site. Counsel submits that on this basis the Board should apply the same test as it did for Mr. Goggins when it considered his standing to appeal the same permit. Finally, counsel submits that Mr. Keays and his family will have to breathe the contaminants that a government decision will allow to be emitted to the air and that he has tremendous knowledge of the local environment. For these reasons he concludes that Mr. Keays should be granted standing in this matter.

DISCUSSION

The Board has now had an opportunity to consider these submissions and adopts the same reasoning that it did in its earlier decision in which it considered the standing of both Mr. Keays and Mr. Goggins. In that decision, *Goggins and Keays v. Assistant Regional Waste Manager et al* (Environmental Appeal Board, Appeal No. 97-WAS-10(a), November 17, 1997), the Board considered the test for standing as stated in *Metalex Products Ltd. v. Deputy Director of Waste Management and Gerry Wilkin* (Environmental Appeal Board, Appeal No. 96/17(b), April 24, 1997). The Board notes that the test for standing under the *Waste Management Act* has been amended from "person who considers himself aggrieved" in *Metalex* to "person aggrieved" in *Goggins*. The Board has considered this legislative amendment and is satisfied that proximity to a source of contamination or pollution is a valid consideration under both tests for standing. In *Metalex* the Board considered the stricter "person aggrieved" test as follows:

The courts have interpreted the phrase 'a person aggrieved' as, "a person who has a genuine grievance because an order has been made which prejudicially affects his interests".

In *Metalex*, the Board found that a person who lived approximately 75 kilometres from the subject mine site, allegedly contaminated by slag material from a lead smelter, could not "reasonably" fear for the safety of his air, water, soil or livelihood. However, in that case, the Board did accept that those residents who lived "near" the mine site and who feared for the safety of their air, water, soil, or livelihood, had standing to appeal. The Board found that these people were "clearly aggrieved persons under the *Waste Management Act*."

The Board has reviewed all of the submissions and is satisfied that in this case Mr. Keays does live close enough to the mill site and that his children attend school within such a close proximity of the mill site that he has legitimate concerns about air emissions from the mill. Mr. Keays like Mr. Goggins has a "genuine grievance" as a decision has been made which could reasonably affect his rights and interests. The Board accepts that Mr. Keays is a "person aggrieved" under the *Act*, and, therefore, has standing to appeal.

DECISION

The Board, therefore, finds that Mr. Keays has standing to appeal the Amended Permit. The earlier decision of the Board in Appeal No. 97-WAS-10(a) is accordingly reversed as it pertains to Mr. Keays only.

Toby Vigod, Chair
Environmental Appeal Board

January 6, 1998