



Environmental Appeal Board

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APPEAL NOS. 2001-WAS-011(a) & 2001-WAS-012(a)

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

BETWEEN:	Linda Geddes	APPLICANT
AND:	Alfred and Norma Penner Petro-Canada Limited	APPELLANTS
AND:	Regional Waste Manager	RESPONDENT
AND:	Husky Oil Operations Limited Mohawk Oil Company Limited Race Trac Fuels Ltd.	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Anderson, Chair	
DATE:	Conducted by way of written submissions, concluding on December 12, 2001	
APPEARING:	For the Applicant: Brenda A. McLuhan, Counsel For the Third Parties Husky Oil Operations Limited & Mohawk Oil Company Limited: Richard E. Bereti, Counsel	

PRELIMINARY ISSUE – APPLICATION FOR PARTY STATUS

APPLICATION

By a letter dated November 8, 2001, counsel for Linda Geddes requested that the Environmental Appeal Board (the "Board") add Ms. Geddes as a party to the above noted appeals or, alternatively, to the appeal by Petro-Canada Limited ("Petro-Canada"). Both appeals are against the May 22, 2001 decision of the Regional Waste Manager, Cariboo Region, Ministry of Water, Land and Air Protection, to issue Remediation Order ON-16880 (the "Order"). Counsel for Husky Oil Operations Limited ("Husky") and Mohawk Oil Company Limited ("Mohawk") opposes Ms. Geddes' application for party status.

This application was conducted by way of written submissions.

BACKGROUND

The Order addresses contamination at the Wildwood Gas Bar and 2 adjacent residential properties in Wildwood, B.C. The Gas Bar is located at 115 Hickory Road, on land legally described as Lot 11, Block C, District Lot 9834 and 12093, Cariboo District Plan 11353, except Plans 20762 and 30986 (the "Gas Bar"). The 2 residential properties are described, respectively, as Lot A and Lot B, District Lot 12093, Cariboo District, Plan 30986. Although contamination has been identified on these properties, the full extent of contamination is not yet known. The Order states that the contaminated site boundaries "will be determined once the full extent of contamination has been identified."

The Order states that the Gas Bar land is "characterized by petroleum related hydrocarbon contamination such as benzene, toluene and xylenes in groundwater exceeding the Drinking Water standard as described in the *Contaminated Sites Regulation* (B.C. Reg. 375/96)." In addition, the Order states that groundwater contamination characterized by benzene concentrations in excess of the Drinking Water standard is evident on the 2 adjacent properties. The Order further states that there "is an ongoing potential for adverse effects on human health" arising from the contamination.

Alfred and Norma Penner (the "Penners"), Petro-Canada, and Wildwood Swifty's Foods Ltd. ("Swifty's") are named in the Order as persons responsible for remediation. The Order requires these persons to submit a work plan for, and undertake, a detailed site investigation of the contamination. The results of the site investigation will be used to determine additional remediation requirements and the boundaries of the contaminated site.

On June 19, 2001, Petro-Canada appealed the Order. In its Notice of Appeal, Petro-Canada requests that it be removed from the Order, and that Race Trac, Mohawk, and Husky be added to the Order as persons responsible for remediation.

On June 21, 2001, the Penners filed a Notice of Appeal with the Board. They request that Mohawk be named a responsible person in the Order, and that the Penners be granted minor contributor status with respect to the remediation.

On June 26, 2001, the Board invited Husky, Mohawk, Race Trac, and Swifty's to participate as full parties in the appeals. Husky, Mohawk, and Race Trac accepted full party status. Swifty's did not reply.

The appeals are scheduled to be heard together from April 15 to 19, 2002.

Ms. Geddes owns and resides on land adjacent to the Gas Bar. Until early 2001, her domestic water was supplied by a well on her property. In January 2001, she noticed an odour in the water and stopped drinking it. In February 2001, she had her water tested and was told that it contained benzene. She then complained to the Ministry, and was advised not to use the water for any domestic purposes. Currently, her domestic water is supplied by tanker truck and stored in an above

ground tank. Petro-Canada paid for the installation of the tank and has been paying for water deliveries, on a “without prejudice” basis.

Ms. Geddes seeks full party status on the basis that she is a “directly affected property owner” whose interests should be represented at the appeal hearing, and that she will make a valuable contribution to the appeals.

Husky opposes Ms. Geddes’ application for party status.

The Regional Waste Manager takes no position on the application.

The remaining parties provided no submissions on the application.

ISSUE

Whether the Board should grant Ms. Geddes full party status in one or both of these appeals.

RELEVANT LEGISLATION

Section 11(12) of the *Environment Management Act*, R.S.B.C. 1996, c. 118, provides that:

- 11** (12) In an appeal, the board or a panel
- (a) may hear any person, including a person the board or a panel invites to appear before it, and
 - (b) on request of
 - (i) the person,
 - (ii) a member of the body, or
 - (iii) a representative of the person or body,whose decision is the subject of the appeal or review, must give that person or body full party status.
- (13) A person or body that is given full party status under subsection (12) may
- (a) be represented by counsel,
 - (b) present evidence,
 - (c) where there is an oral hearing, ask questions, and
 - (d) make submissions as to facts, law and jurisdiction.

DISCUSSION AND ANALYSIS

Whether the Board should grant Ms. Geddes full party status in one or both of these appeals.

Ms. Geddes submits that she is directly affected by the appeals. Specifically, she submits that the issues to be decided in the appeals have a direct bearing on how quickly the contamination is remediated and her water supply is restored, if possible. She submits that there will be fewer responsible persons to pay for the remediation if either Petro-Canada or the Penners are successful in their appeals. She maintains that this could delay the completion of the detailed site investigation and the remediation, and could lead to the selection of less effective remediation methods for financial reasons. She submits that any of these outcomes will have a direct detrimental impact on her daily life and the value of her property.

Ms. Geddes further submits that, as a directly affected property owner, she will bring a unique perspective to the appeals. She submits that no other affected property owner has sought party status in the appeals, and it is important to hear from this group as they are innocent third parties for whom the protections in the *Waste Management Act* are intended. In addition, Ms. Geddes submits that she has observed operations at the Gas Bar since 1995, and could provide evidence respecting her observations, if it would be relevant to the appeal. She submits that her legal counsel may also contribute to legal arguments made at the hearing.

Husky submits that Ms. Geddes fails to meet the test used by the Board in *North East Aboriginal Trappers Society v. British Columbia (Ministry of Environment, Lands and Parks)*, [2001] B.C.E.A. No. 37 (QL) to determine whether an applicant should be granted full party status. In that case, the Board considered the following factors in deciding whether to grant party status:

1. Whether the applicant had a valid interest in participating in the appeal; and
2. Whether the applicant could be of assistance in the appeal, including whether it had relevant evidence to present, its expertise, whether there was any potential for delay or duplication as a result of the participation, and whether it had a unique perspective relative to the parties.

Husky's submissions address each of these factors. First, Husky submits that Ms. Geddes does not have a valid interest in the appeals. Husky argues that the subject matter of these appeals is who is responsible for cleaning up the contamination and mitigating its effects, and not whether the site will be remediated at all. Husky argues that Ms. Geddes, as an adjacent property owner, has no interest in those issues. Rather, her only concern is that the contaminated site and potential off-site effects are remediated to the Ministry's standards. Husky submits that the Regional Waste Manager has jurisdiction under the *Waste Management Act* to ensure that contaminated land is cleaned up or its effects mitigated, even if no responsible persons were available to remediate a site.

With respect to the second part of the test, Husky submits that Ms. Geddes does not claim to possess any technical or other expertise in relation to the determination of responsible person status under the *Waste Management Act*, and therefore cannot assist the Board as an expert. Husky further submits that, while Ms. Geddes claims that she “may” be able to offer relevant testimony as a witness, she provided nothing to support this contention. Husky notes that the Board found in *North East Aboriginal Trappers Society* that an applicant may provide relevant evidence as a witness of one of the existing parties, without being added as a party.

In addition, Husky argues that Ms. Geddes’ claim that she may be able to provide unique legal argument is untenable. Husky submits that the Notices of Appeal and related documents filed with the Board indicate on their face that counsel for the existing parties will fully argue all points of view at the hearing, and counsel for the Regional Waste Manager will defend both the Order and the environment.

With respect to unnecessary delay, Husky argues that any participation by Ms. Geddes will delay or extend the hearing. Husky submits that any submissions by Ms. Geddes will simply repeat or duplicate those presented by the other parties. Further, Husky argues that Ms. Geddes’ claim that the outcome of the appeals could lead to delays in the remediation has no bearing on whether she should be granted party status.

Finally, Husky argues that the question of whether an applicant can offer a unique perspective must be viewed in the context of what is relevant to the subject matter of these appeals, i.e. who should be named in the Order. Husky submits that Ms. Geddes brings no new relevant evidence or arguments to these appeals. The fact that she is an adjacent property owner does make her perspective relevant to the issues on appeal.

In reply, Ms. Geddes submits that she meets the test set out in *North East Aboriginal Trappers Society*. First, Ms. Geddes submits that she has a valid interest in the subject matter and outcome of the appeals. In particular, she has an interest in ensuring that the Order designates responsible persons who have sufficient resources to undertake the remediation. She submits that her property is the most directly affected in her neighbourhood, and she is the only property owner who cannot use her well at all. She submits that her complaint to the Ministry triggered the Ministry’s investigation of the Gas Bar. Further, she maintains that she lives with daily inconvenience as a result of the contamination, and any delay in the remediation will affect her daily life.

In addition, Ms. Geddes maintains that Petro-Canada would stop funding her water supply if it were no longer a responsible person, although Petro-Canada has not expressly stated so. She submits that paying for water herself would be an extreme hardship, and, therefore, she has a direct interest in the appeals. She concedes that her interest relates more directly to Petro-Canada’s status as a responsible person, but argues that it would be reasonable to grant her party status in respect of the hearing as a whole since the 2 appeals will be heard together.

With respect to the second part of the test, Ms. Geddes agrees that she is not a technical expert in relation to the determination of responsible person status. However, she submits that she need not meet every factor described in the second part of the test because the overall question is whether she can be of assistance in the appeals. In any event, she submits that she may seek to retain a hydrological or environmental expert, if necessary, after reviewing the appeal documents. She suggests that such an expert may be required to assess any hydrological data presented by other parties respecting the flow of contamination towards her property. Ms. Geddes submits that if she presented expert evidence, it would assist the Board in determining technical issues in the appeals.

With respect to Husky's concerns about duplication and unnecessary delay, Ms. Geddes submits that she is cognizant of the need to avoid the duplication of submissions, and she would only seek to offer evidence or argument on matters not covered by other parties. Further, although she seeks the right to introduce evidence, cross-examine parties, and make legal argument, she may not exercise all of those rights if granted full party status. Counsel for Ms. Geddes anticipates that her contribution to the appeals would be "somewhat limited."

Does Ms. Geddes have a valid interest in participating in the appeal?

In considering whether to grant Ms. Geddes full party status, the Panel has first considered whether Ms. Geddes has a valid interest in participating in either of the appeals. In considering this question, the Panel has reviewed the Appellants' Notices of Appeal to determine the types of issues raised by the appeals. All of the responsible persons named in the Order, except for Swifty's, contest their liability for remediation and request that another person or persons be named in the Order. However, the Panel notes that, even if a responsible person cannot be found or is not financially able to carry out remediation in the specified time frame, section 28.4 of the *Waste Management Act* provides authority for the government to undertake remediation at sites that are not otherwise being adequately remediated. Consequently, the Panel agrees with Husky that there is no issue concerning whether the site in this case will be remediated at all. Rather, a primary issue is who should be responsible for remediating the site. There may also be an issue with respect to whether the site can be remediated in the required time frame, depending, for instance, on who is named in the Order and their ability to undertake remediation.

The Notices of Appeal also raise questions concerning the origins and migration of the contamination at the Gas Bar. In their Notice of Appeal, the Penners submit that there were insufficient grounds for the Regional Waste Manager to conclude that the contamination of the adjacent residential properties was transmitted by operations at the Gas Bar. Similarly, Petro-Canada argues in its Notice of Appeal that there is insufficient information available about the migratory pattern and pathway of the contamination to link it to any activities by Petro-Canada at the Gas Bar.

Based on its review of the Notices of Appeal, the Panel finds that Ms. Geddes has a valid interest in the issues raised by the appeals. In addressing questions with respect to the origins and migration of the contamination, the Board may reach conclusions about whether and when Ms. Geddes' well became contaminated as a result of activities at the Gas Bar. Ms. Geddes clearly has an interest in those matters. Ms. Geddes also has an interest in the issue of who is named as persons responsible for remediation, and particularly whether Petro-Canada remains named in the Order. Ms. Geddes' domestic water supply has been adversely affected by contamination that appears to have originated from the Gas Bar, and any remediation measures taken pursuant to the Order may ultimately affect her ability to resume using her domestic well. As such, she has an interest in ensuring that the Order names responsible persons who have sufficient resources to complete the detailed site investigation and further remediation measures within the time frame specified by the Regional Waste Manager. In addition, the Panel accepts that the outcome of Petro-Canada's appeal may affect its continued funding of her current domestic water supply.

Next, the Panel has considered whether Ms. Geddes can be of assistance in these appeals, including whether she has relevant evidence to present, whether she may offer any relevant expertise, whether there is any potential for delay or duplication as a result of her participation, and whether she has a unique perspective.

Can Ms. Geddes be of assistance in these proceedings?

The Panel considered whether Ms. Geddes may be able to provide evidence or argument that would be relevant to the issues raised by the Appellants in their Notices of Appeal. As noted above, the Notices of Appeal indicate that evidence concerning the origins and migration of the contamination may be presented, and that legal arguments concerning the determination of responsible persons under the *Waste Management Act* may be made. The Panel finds that the Regional Waste Manager is in a position to defend the Order and ensure that the remediation of the Gas Bar and the adjacent residential properties occurs as quickly as possible. The Regional Waste Manager is also in a position to provide technical submissions in response to any technical submissions by the Appellants or other parties, and to cross-examine any expert witnesses appearing for those parties. However, the Panel finds that Ms. Geddes may be able to offer relevant evidence concerning the contamination of her well and her observations of activities at the Gas Bar. Although any relevant personal testimony that Ms. Geddes could offer may be presented as witness evidence on behalf of another party, the Panel notes that there is no indication to date that any of the existing parties intend to call Ms. Geddes as a witness. Consequently, the Panel finds that Ms. Geddes may be able to offer relevant evidence that would assist the Board, and that may not be presented unless she is granted the right to call her own witnesses.

The Panel has also considered whether Ms. Geddes has a unique perspective that would assist the Board in deciding the issues in the appeal. The Panel notes that Ms. Geddes is an owner of land that has been seriously affected by the type of contamination described in the Order, and is the only affected landowner seeking to

participate in the appeals. In addition, the Panel notes that it was Ms. Geddes' complaint to the Ministry that led to the investigation which resulted in the Order. Finally, the Panel notes that Ms. Geddes may have a unique perspective as a neighbour who has observed operations at the Gas Bar. As such, the Panel is satisfied that Ms. Geddes may assist the Board by bringing a unique perspective to the appeal hearing.

With respect to duplication and unnecessary delay, the Panel notes that counsel for Ms. Geddes is aware of the need to avoid any unnecessary duplication of evidence and argument, and states that her participation in the appeals is expected to be somewhat limited. Although Ms. Geddes is unable to specify the extent to which she would ultimately seek to participate, the Panel is satisfied that Ms. Geddes' participation will not result in the hearing being unduly lengthened. In the event that there is duplication of evidence by Ms. Geddes, there are procedural options available to the hearing panel to address this during the hearing. Accordingly, the Panel finds that participation by Ms. Geddes can be of assistance to the panel hearing the appeals, and will not unduly prejudice the existing parties.

To what extent should Ms. Geddes be allowed to participate in the appeals?

Under its enabling legislation, the Board is granted broad discretion to determine whether a person should be allowed to participate in a hearing, and to determine the extent of that participation. Under section 11(12)(a) of the *Environment Management Act*, the Board "may hear any person, including a person the board or a panel invites to appear before it...". As well, under section 11(13), a person or body that is given full party status under subsection (12) may be represented by counsel, present evidence, where there is an oral hearing, ask questions, and make submissions as to facts, law and jurisdiction. Thus, only full parties may exercise all of the rights listed in section 11(13), and the Board may limit the involvement of persons who are not granted full party status to the extent that the Board considers reasonable.

It is a key component of natural justice and the duty of fairness that a person who may be affected or prejudiced by the decision of an administrative tribunal has a right to be heard. In this regard, the Panel notes the decision of the British Columbia Supreme Court in *Turnagain Holdings Ltd. v. Environmental Appeal Board et al.*, 2001 BCSC 795. The Court held that the Board erred in failing to find that the Deputy Director of Wildlife had breached the duty of fairness to Turnagain Holdings Ltd. ("Turnagain") by failing to allow it the right to call evidence and cross-examine witnesses at a hearing before the Deputy Director. The hearing was concerned with whether a guide outfitter's certificate should be cancelled and his licence suspended for committing contraventions of the *Wildlife Act*. Through a contractual arrangement, the guide outfitter held the certificate in trust as an agent for Turnagain, which had made a significant investment in the certificate and the related guiding territory. The Deputy Director was aware of the contractual arrangement, and knew that any decision affecting the certificate could be detrimental to Turnagain. Prior to the hearing, Turnagain requested party status. The Deputy Director denied party status, but allowed a representative of Turnagain

to appear as a witness. The Deputy Director concluded that the guide outfitter had breached the *Wildlife Act*, and as a result, decided to cancel the certificate and suspend the licence.

On appeal to the Board, counsel for the guide outfitter and Turnagain argued that the Deputy Director's refusal to allow Turnagain a right to be heard had breached the rules of natural justice. The Board rejected this argument on the basis that the purpose of the hearing was to consider the guide outfitter's legal rights, and the hearing should have proceeded without undue interference from those who did not have a legal right to be part of the disciplinary hearing. However, on judicial review, the Court held that Turnagain had a direct interest in the matter, and the refusal to allow Turnagain to call and cross-examine witnesses was "tantamount to denying an interested party the right to make full answer and defence." Despite these findings, the Court dismissed the petition on the basis that substantial prejudice would result to the Province if the relief sought was granted, due to the petitioner's delay in commencing the application.

Based on this decision of the Court and all of the factors discussed above, the Panel is satisfied that Ms. Geddes should be granted full party status in these appeals. This is particularly so given that Ms. Geddes' property rights have been directly affected by the type of contamination described in the Order, and may be affected by the outcome of the appeals. However, in the interests of ensuring that the proceeding is not unduly delayed, the Panel cautions Ms. Geddes to restrict her submissions to the issues raised in the appeals, and refrain from duplicating or repeating the evidence and legal arguments provided by other parties.

DECISION

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

For the reasons provided above, Ms. Geddes' application for full party status in these appeals is granted.

Alan Andison, Chair
Environmental Appeal Board

January 10, 2002