



Environmental Appeal Board

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APPEAL NO. 1999-WAS-023(b)

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

BETWEEN:	City of Cranbrook	APPELLANT
AND:	Assistant Regional Waste Manager	RESPONDENT
AND:	Canadian Pacific Railway	THIRD PARTY
AND:	Arlene Ridge on behalf of the Fort Steele Residents	APPLICANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on August 2, 2002	
APPEARING:	For the Appellant:	James G. Yardley, Counsel
	For the Respondent:	Dennis Doyle, Counsel
	For the Third Party:	Robert Lonergan, Counsel
	For the Applicant:	Arlene Ridge

APPLICATION FOR PARTICIPANT STATUS

APPLICATION

This is an application by Arlene Ridge on behalf of the Fort Steele Residents (the "Residents") for participant status in the above-noted appeal for the purpose of providing information on the impact of the City of Cranbrook's ("Cranbrook") sewage lagoons on surface and groundwater sources.

The Board has the authority to grant participant status under subsection 11(12)(a) of the *Environment Management Act*, which provides as follows:

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

This application was conducted by way of written submissions.

BACKGROUND

The background to this appeal is as stated in the Board's May 10, 1999 decision on Cranbrook's application for a stay (see *City of Cranbrook v. Assistant Regional Waste Manager (Canadian Pacific Railway, Third Party)*, Appeal No. 99-WAS-23(a), May 10, 1999) (unreported)). For convenience, that background is re-stated here.

Specifically, the treated effluent from Cranbrook's aerobic sewage treatment system is pumped into two sewage lagoons located about 10 kilometres northeast of Cranbrook, in a narrow valley that extends southeastwards from the St. Mary's River. After storage in the lagoons, the effluent is disposed via spray irrigation on agricultural fields located primarily southeast of the ponds. This operation is authorized by Waste Permit PE-04148 (the "Permit"), issued to Cranbrook in 1975. Construction of the lagoons began in 1977, and they were first filled with treated sewage effluent in 1979.

Sometime in the early 1970's, Canadian Pacific Railway ("CPR") constructed tracks on the upper portion of the steeply sloping south side of the St. Mary's River valley.

From March to May of 1997, CPR experienced some instability at Mile 99 of the tracks, located approximately 5 miles north of Cranbrook's sewage lagoons which it took measures to address. CPR reports that in the fall of 1997, officials from the then Ministry of Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection) informed it that the instability of the track might be related to Cranbrook's sewage treatment system, and, in particular, the effect of the effluent lagoons on the flow of groundwater in the area. As a result, CPR retained the engineering firm Clifton Associates Ltd., to review the track instability problems and prepare a geotechnical report pertaining to the Cranbrook sewage facility and its impact on the local groundwater regime.

The Clifton report, completed on May 28, 1998, concludes that seepage from effluent lagoon #2 poses a risk to the stability of the tracks around Mile 99 when the elevation of the stored effluent in the lagoon reaches 824 metres above sea level and higher because it causes the reversal of the groundwater flow towards the tracks (rather than its natural direction away from the tracks). The Clifton report also concludes that the risk to the tracks can be mitigated by reducing the water level in lagoon #2 to a level below 824 metres above sea level.

On April 7, 1999, the Assistant Regional Waste Manager (the "Assistant Manager"), amended the Permit. The terms of the amendments are reproduced, in part, below:

1. Maximum Operating Level for Effluent Storage Lagoon #2

The permittee shall manage the water level in effluent storage lagoon #2 located approximately 3 kilometres south of Mile 99 Cranbrook Subdivision of the Canadian Pacific Railway so that the maximum water level in effluent storage lagoon #2 does not exceed an elevation of 824 meters above sea level.

2. Survey to Determine Elevation Above Sea Level

The permittee shall provide data confirming the water level in effluent storage pond #2 to the Regional Waste Manager on or before April 16, 1999.

3. Interim Effluent Storage Management Plan

The permittee shall submit an interim management plan for effluent storage to the Regional Waste Manager for approval on or before April 23, 1999. The plan shall contain details on how the water level in lagoon #2 will be maintained at or reduced to an elevation of 824 meters above sea level. The report shall contain a schedule for implementing the interim management plan.

4. Long Term Effluent Storage Lagoon Capacity

Effluent storage lagoons must contain sufficient storage capacity to contain the design average daily effluent flow occurring outside the growing season, plus an allowance from an analysis of the cumulative volume needed for a reduced irrigation season due to at least 5 years of wet weather equivalent to rainfall or snow melt events with a 5-year return period. Average precipitation, seepage and evaporation must be accounted for in the calculation of storage pond capacity.

On or before May 31, 1999 the permittee shall submit a report to the Regional Waste Manager complete with calculations determining the effluent storage lagoon capacity using the above criteria...

5. Effluent Storage Lagoon Leakage

Effluent storage lagoons must be designed, operated and maintained to minimize effluent leakage. Any leakage must not aggravate or produce soil or bedrock instability or erosion elsewhere or impact ground or surface water quality. This section supercedes and replaces section 4(c) of the existing permit.

6. Monitoring and Operating Data

The permittee shall submit all monitoring and operating data as requested by the Regional Waste Manager.

On April 14, 1999, Cranbrook appealed the Assistant Manager's decision to amend the Permit. It seeks an order that the Permit amendment be cancelled. Alternatively, Cranbrook requests that the Permit be varied to increase the

permitted maximum operating level or that it be varied to delay the time for implementation. It also requested a stay of the Order, which the Board denied on May 10, 1999.

At the request of the parties, the hearing of this appeal has been adjourned on several occasions. The hearing is currently scheduled for October 22-25, 2002.

By letter dated May 1, 2002, the Residents applied to the Board for participant status in the appeal because of concerns that the Cranbrook Spray Irrigation operation is loading the groundwater in the area, specifically on the west side of the Kootenay River. The Residents stated that they wished to make a short presentation at the hearing, which would include the following:

- A brief history including an air photo [taken] before the lagoons were built and local knowledge of the water.
- A few minutes of video showing water pooling outside the lagoon dams.
- Information on the sites requested for testing.

The Residents attached to their request for participant status, a letter dated April 30, 2002. The letter was addressed to the Honourable Joyce Murray, Minister of Water, Land and Air Protection, requesting that the Ministry test and evaluate the surface and ground water in four locations, north and east of the Cranbrook Spray Irrigation Site, to determine whether the Site is impacting groundwater sources. The letter stated as follows:

The Canadian Pacific Railway has hired experts and has carried out tests that they believe show leaking from the lagoons has loaded the water table and caused damage to their tracks north of the lagoons. The local residents have observed that the surface water to the east has also been effected. The local residents who live either north or east of the lagoons and who all live closer to the lagoons than the CPR tracks, are concerned about the further effect on their wells. The residents are also concerned about the loading of the water table surrounding a regional solid waste site. The evaluation of this water is part of information the Environmental Appeal Board needs in order to make a wise decision. Residents can not afford, as the CPR did, to hire experts. I request that your ministry, on behalf of the people, and on the behalf of water protection, investigate the water.

By letter dated May 14, 2002, the Board stated that it was prepared to grant participant status to the Residents and allow them to make a brief oral presentation (one-hour maximum), subject to any objections from the parties. The Board noted that the standing of the Residents would be limited to presentation of the information as set out in the Residents' May 1, 2002, letter.

The Assistant Manager supports the Residents' application for participant status; Cranbrook opposes the application. The Board did not receive submissions on the application from CPR.

Cranbrook is opposed to the Residents participating in the appeal because Cranbrook does not believe that the issues of public health and water quality come within the scope of the appeal or are of concern to CPR or the Assistant Manager.

The Assistant Manager states that the Residents' concerns are relevant to the subject matter of the appeal. Specifically, the Assistant Manager notes that the Permit amendments were issued, in part, to protect water quality and the public health.

ISSUES

The procedure for determining whether a person should be invited to participate in an appeal hearing is set out in the Board's Procedure Manual as follows:

When deciding whether to invite a person to participate, the Board will consider whether the person is impacted or affected by the appeal, has relevant evidence to provide to the Board and any other factors, which are relevant in the circumstances.

Therefore, the Panel will consider the following:

1. Whether the Residents are impacted or affected by the appeal; and
2. Whether the Residents have relevant evidence to provide to the Board.
3. If it is decided that the Residents will be permitted to participate, the extent of that participation will then be determined.

DISCUSSION AND ANALYSIS

1. Whether the Residents are impacted or affected by the appeal.

This first question involves consideration of whether the applicant has a genuine interest in the subject matter of the appeal that would justify its involvement and/or whether it will be impacted or affected by the results in the appeal.

The Residents submit that the Permit amendments that are the subject of the appeal, deal with more than just the stability of the CPR tracks. The Residents submit that they should be allowed to participate in the appeal because seepage from the lagoons and the irrigation spray program is affecting surface and groundwater sources and creates an ongoing risk to the health of local residents. They point out that Cranbrook states in its Notice of Appeal that "all lagoons" have leakage. The Residents are concerned about the extent to which that leakage affects the water table.

The Residents further note that there are wells providing drinking water to families located between the lagoons and the seepage occurring on the CPR tracks. They believe that the stability of the tracks and the Residents' concerns are linked. In the circumstances, the Residents submit that they have an interest in the appeals sufficient to warrant their participation in the hearing process.

The Panel notes that the Permit amendments specifically mention effects on ground and surface water. Therefore, given the possibility of seepage from the lagoons and the irrigation spray program impacting surface and groundwater sources used by the Residents, the Panel finds that the Residents have a valid interest in the subject matter of this appeal.

2. Whether the Residents have relevant evidence to provide to the Board.

The Residents submit that they will be of assistance in this appeal because they have relevant evidence to provide to the Board with respect to the impacts on ground and surface water and the public health, caused by the lagoons.

The Residents note that Cranbrook' Notice of Appeal states that "Cranbrook says that "the sewage lagoons have operated without problem for a number of years...." The Residents believe that there have been problems with the sewage lagoons, which the Residents would like to present to the Board. Further, in its Notice of Appeal, Cranbrook takes issue with the inclusion of section #1 of the amendment alleging that "there is no evidence that has been provided of a technical nature that would indicate that a change in the maximum elevation is necessary for the protection of the environment." The Residents would like to provide to the Board with "some history and observations that relate to the health of the environment" in their presentation.

The Residents note that CPR will present evidence that seepage from the lagoons has caused instability under its tracks. The Residents presentation will focus on the impact of the seepage on surface and groundwater in the area.

The Assistant Manager submits that the Residents should be granted participant status because their concerns are relevant to the subject matter of the appeal. He says that the Permit amendments in question were not to deal exclusively with the stability concerns of CPR. He submits that the Permit amendments also require a plan for reducing effluent storage levels in the lagoon and minimizing effluent leakage so as not to cause erosion or impact ground or surface water quality.

Cranbrook submits that the Residents concerns deal with public health and water quality, which are not at issue in the appeal. Cranbrook also submits that to adequately address the issues of water quality and public health, the City would have to do additional testing and preparation.

The Panel has considered these submissions and is satisfied that the Residents may have evidence that is relevant to the appeal. Given their local knowledge of surface and groundwater, the Residents have a relevant perspective that may be of assistance to the Panel in the appeal. However, the Panel notes that the Residents

are not experts in environmental or sewage or water quality issues. What the Board stands to gain from the participation of the Residents is a local perspective on the impacts of the lagoons on water and water quality in the area. The Panel finds that this goes to Cranbrook's challenge to the inclusion of section 5 of the Permit amendments dealing with effluent leakage impacting ground or surface water quality and its challenge to the appropriateness of the issuance of the Permit amendments generally.

Accordingly, the Panel finds that the information sought to be presented by the Residents may be of some assistance to the Board.

3. To what extent should the applicant be allowed to participate in the appeal.

Under section 11(12)(a) of the *Environment Management Act*, the Board has a broad discretion to invite any person to appear before it. In so doing, the Board may limit the involvement of that person to the extent that the Board considers reasonable. In this case, the Panel has concluded that the Residents should be given a limited opportunity to be heard at the hearing of the appeal.

The Panel is satisfied that the Board will benefit from the Residents' participation in the appeal. However, the Residents' participation is limited as follows. The Residents will not be given the opportunity to make an opening or closing statement, nor the right to cross-examine the witnesses tendered by the other parties to the appeal. The Residents will be limited to making a one-hour presentation. The one-hour presentation will be limited to the presentation of the information as set out by the Residents in their May 1, 2002 letter to the Board.

In accordance with the Board's letter of May 14, 2002, the Residents' Statement of Points and any documents that the Residents wish to rely on must be tendered to the Board and all parties by October 2, 2002.

DECISION

The application of the Residents for participant status is granted. The Residents may participate on a limited basis as described above.

Alan Andison, Chair
Environmental Appeal Board

August 20, 2002