BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NOS. 2003-WAS-006(a), 007(a), 008(a), 009(a), 010(a)

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

BETWEEN:	British Columbia Power and Hydro Authority Imperial Oil Limited BC Rail Ltd. City of Quesnel Shell Canada Products Limited	**APPELLANTS**
AND:	Regional Waste Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on March 10, 2003	

APPEARING:

For the Appellants:	
British Columbia Power and Hydro Authority	David Perry, Counsel
Imperial Oil Limited	Simon Wells, 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

STAY DECISION

APPLICATIONS

On January 22, 2003, Joe Negraeff, Regional Waste Manager for the Cariboo Region of the Ministry of Water, Land and Air Protection (the "Regional Manager"), issued Remediation Order OE-17312 (the "Order") to British Columbia Hydro and Power Authority ("BC Hydro"), BC Rail Ltd. ("BC Rail"), the City of Quesnel, Imperial Oil Limited ("Imperial Oil"), and Shell Canada Products Limited ("Shell"). The Order requires all of them to submit and implement a remediation plan to address contamination on several properties located on Quesnel Legion Drive, north of and adjacent to the Quesnel River in the City of Quesnel, B.C. (the "Site").

Between February 13 and 21, 2003, all of the persons named in the Order appealed the Regional Manager's decision, and requested a stay of the Order pending a decision on the merits of the appeals.

This decision addresses the Appellants' stay applications. These applications were conducted by way of written submissions.

BACKGROUND

The lands within the Site have been used for various industrial purposes since at least 1925. The Site includes part of a rail yard that has been in continuous use by BC Rail and its predecessor Pacific Great Eastern since at least 1925. The portion of the rail yard that is within the Site includes an area that was formerly leased to various other companies and operated as a row of petroleum bulk plants and a diesel powered generating plant. The Site also includes a public works yard that has been used for many years for servicing, repairing, and maintaining heavy equipment and vehicles for the City of Quesnel. In addition, the public works yard included a private fuelling depot with underground storage tanks that was operated by the City of Quesnel until the 1990's, when the fuelling works were found to be leaking.

There are three current owners of the lands within the Site:

- BCR Properties Ltd., an associated company of BC Rail, owns the part of the Site that is in Lot A, Town of Quesnel, Plan 23591 (Parcel Identifier: 008-457-581). This area was previously operated as a petroleum bulk storage and distribution plant.

- The City of Quesnel owns the part of the Site that is in Lots 1-6, Block 77, Town of Quesnel, Plan 17000 (Parcel Identifiers: 012-175-137, 012-175-145, 012-175-153, 012-175-161, 012-175-170, and 012-175-188). This area is currently developed as the City's public works yard, and was also previously operated as the vehicle fuelling depot using underground storage tanks.

- BC Rail owns the part of the Site that is in District Lot 7791, Cariboo District (Parcel Identifier: 015-669-084). Three petroleum storage and distribution plants and a diesel powered electric generating plant historically operated on leases within this portion of the Site. In addition, the City of Quesnel currently leases a portion of this area that was formerly occupied by the diesel powered generating plant.

Past lessees of the lands within the Site are:

- Shell, which leased a bulk petroleum plant site partly on the lands owned by BC Rail and partly on the lands owned by BCR Properties Ltd. from approximately 1934 until 1994;

- Quesnel Light and Water Company Limited, a predecessor of BC Hydro by amalgamation, which from approximately 1929 until 1957 or 1958 leased a portion of the land owned by BC Rail and operated the diesel powered

generating plant. The plant was located in the current location of the public works building, and there was an earlier power plant to the southeast of that building;

- Imperial Oil, which leased a bulk petroleum plant site on lands owned by BC Rail from 1925 to 1957; and

- Home Oil, which leased a bulk plant site from BC Rail from approximately 1930 to 1973. Home Oil also leased initially all, and then some, of the former Imperial Oil leasehold from 1958 until 1973. Home Oil was dissolved in 1977 and no longer exists. At the time of dissolution, it was a wholly owned subsidiary of Imperial Oil. As part of the dissolution process, Imperial Oil entered into an indenture agreement by which it assumed liabilities of Home Oil.

In its submissions to the Board, Imperial Oil acknowledges that it is a responsible person for the portion of the Site where it leased a bulk plant site from 1925 to 1957, but denies any liability for the past actions of Home Oil.

The Ministry of Water, Land and Air Protection or its predecessor (the "Ministry") 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. The report identified contamination in a portion of the Site that was leased by BC Rail and BCR Properties Ltd. for the purpose of operating a petroleum bulk plant. Subsequent investigations by Seacor confirmed that the contamination was migrating from the former Shell bulk plant towards the Quesnel River.

BC Rail subsequently retained Hemmera Resource Consultants Ltd. ("Hemmera") to investigate the remainder of the rail yard, and four additional sources of contamination were identified: the former bulk plants operated by Home Oil and Imperial Oil, the underground storage tanks and associated refuelling works in the public works yard, and the historic electrical generation plant.

In 1996 and 1997, excavations were undertaken in the portions of the Site formerly occupied by the Home Oil, Imperial Oil, and Shell Oil bulk plants, and the City of Quesnel's underground fuel storage tanks and works. However, the excavations did not delineate the extent of the soil contamination exceeding the commercial land use standards in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*").

In July 1998, the Regional Manager advised the parties that he was prepared to issue a remediation order to ensure remediation of the Site. After considering submissions from the parties, the Regional Manager issued a notice of preliminary determination of a contaminated site on November 13, 1998.

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.

On March 3, 2000, the Regional Manager sent a draft remediation order and a proposed amendment to his final determination to the parties for their review and comment.

On August 9, 2000, the Regional Manager sent a second draft remediation order and proposed amendment to his final determination to the parties for review and comment.

In November 2000, BC Rail, BCR Properties Ltd., Shell, the City of Quesnel, and BC Hydro (the "Voluntary Group") agreed to voluntarily undertake the first requirement of the proposed remediation order, which was to complete a detailed site investigation of the Site. Consequently, the Regional Manager held the proceedings concerning issuance of a remediation order in abeyance.

Seacor subsequently prepared two reports titled "Detailed Site Investigation" and "Supplemental Detailed Site Investigation" which were submitted to the Regional Manager in December 2001 and August 2002, respectively.

In a letter dated April 10, 2002, the Voluntary Group made an application pursuant to section 27.1(2)(b) of the *Act* that Imperial Oil be compelled to contribute a 20 percent share of the remediation costs that had been incurred by the Voluntary Group, which primarily consisted of Seacor's fees for preparing the detailed site investigation reports. Imperial Oil opposed this application.

In a letter dated October 3, 2002, the Regional Manager confirmed that Seacor's detailed site investigation reports adequately defined the nature and extent of the contamination at the Site, and the Regional Manager approved an extension of time for the Voluntary Group to submit a remediation plan.

On October 29, 2002, the Regional Manager advised the Voluntary Group that he would not order Imperial Oil to make a financial contribution to the remediation costs as requested by the Voluntary Group in April 2002.

The Voluntary Group subsequently advised that they were unwilling to continue voluntary remediation of the Site in the absence of an order requiring Imperial Oil to participate in, or contribute financially to, the remediation.

On January 22, 2003, pursuant to section 26.2 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*"), the Regional Manager issued the Order. All of the Appellants are named in the Order as persons responsible for remediation of the Site. The Order amends the final determination of a contaminated site dated February 19, 1999, and Appendix A of the Order contains a map showing the boundaries of the Site. The Order has two remedial requirements, which are summarized as follows:

1. The responsible persons must submit a remediation plan, with appropriate fees, to the Regional Manager by no later than February 28, 2003; and

2. The responsible persons must implement the remediation plan in accordance with the terms and conditions of its approval by the Regional Manager.

In his decision letter, the Regional Manager states as follows regarding his reasons for issuing the Order:

> The Voluntary Group subsequently advised they were not willing to continue voluntary remediation of the Site in the absence of an order requiring Imperial Oil to participate in or contribute financially to the remediation of the Site.
>
> I am therefore issuing the attached remediation order to protect the environment.
>
> …
>
> Imperial has consistently maintained that the Site as defined is overbroad and that the Site should be split into multiple smaller sites. I understand Imperial's position is based in part on its view that Imperial should not be held liable for contamination on portions of the Site which cannot reasonably be attributed to their past operations. This position has also been taken at times by the City of Quesnel and BCR/BCRP. However, I remain convinced that attempting to define and then remediate a number of smaller individual sites would hinder remediation. My view regarding breaking the Site into several smaller sites has been articulated in Draft [Remediation] Orders #1 and #2 and my previous correspondence with the parties. Defining surface boundaries of a co-mingled contaminant plume in groundwater underlying the Site is technically difficult, if not impossible… I remain convinced that a single, comprehensive remediation plan is the best means to ensure protection of the environment.

On February 13 and 17, 2003, respectively, BC Hydro and Imperial Oil filed separate appeals of the Order. On February 19, 2003, BC Rail and the City of Quesnel filed separate appeals of the Order. Finally, on February 21, 2003, Shell appealed the Order. In their Notices of Appeal, all of the Appellants requested a stay of the Order.

By letters dated February 18 and 24, 2003, the Board invited the parties to provide submissions on the stay applications.

On February 19, 2003, before the deadline for final submissions on the stay application had been reached, Imperial Oil requested an interim stay of the Order pending a decision on the merits of the stay applications.

In a letter to the Board dated February 25, 2003, the Regional Manager objected to Imperial Oil's application for an interim stay, and the Appellants' stay applications in general. In another letter of the same date, the Regional Manager advised Imperial Oil that he would not agree to a voluntary stay of the Order.

By a letter dated February 26, 2003, the Board granted an interim stay of the Order. In its decision letter, the Board noted that the Order allowed a 6-day period of time between the end of the 30-day appeal period and the deadline for

compliance with the Order. The Board found that, in fairness to the parties, an interim stay should be granted pending a decision on the merits of the stay applications.

Imperial Oil seeks a stay of the Order, including the remedial requirements and the amendment to the final determination that the Site is a contaminated site, pending a resolution of the appeals.

BC Hydro, Shell, BC Rail, and the City of Quesnel all seek a stay of that portion of the Order's requirement to implement a remediation plan. They do not seek a stay of the requirement to submit a remediation plan because a draft plan has already been completed.

The Regional Manager requests that the Board deny the stay applications.

Many of the parties also made lengthy submissions as to the vagueness and unfairness of the Order, the Regional Manager's intentions in issuing the Order, and the facts and circumstances surrounding the negotiations and proceedings that occurred before the Order was issued. The Panel finds that those submissions address matters that are more appropriately considered at the hearing on the merits of the appeal and have little relevance to the test for a stay application, set out below.

ISSUE

The sole issue arising from these applications is whether the Panel should grant a stay of the Order pending a decision on the merits of the appeals.

RELEVANT LEGISLATION AND CASE LAW

The authority of the Board to grant a stay under the *Act* is derived from section 48 of the *Act*, which provides:

> 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; [1994] 1 R.C.S. 311 (S.C.C.) (hereinafter "*RJR-MacDonald*", citing R.C.S.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

a. there is a serious issue to be tried;

b. irreparable harm will result if the stay is not granted; and

c. the balance of convenience favours granting the stay.

The Panel notes that the onus is on the Applicants to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court stated that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

Imperial Oil submits that the appeals raise serious issues. Imperial Oil argues that a triable issue in this case is whether a manager may define a contaminated site in a way that imposes liability on persons who would not otherwise meet the definition of responsible person under section 26.5 of the *Act*. Imperial Oil submits that the amended final determination that the Site is a contaminated site is over-broad and exceeds the Regional Manager's jurisdiction, because it purports to make Imperial Oil liable for remediation of lands for which it is not a responsible person. Imperial Oil notes that the Order defines several parcels of land as a single contaminated site, and submits that the Order makes persons who occupied only one of the parcels and who are not connected by any evidence to contamination on the other parcels, responsible for remediation of the other parcels.

Imperial Oil argues that another triable issue in this case is whether the Regional Manager erred in deciding to issue the Order in the absence of any environmental necessity to do so. Imperial Oil submits that the Order was not necessary to protect the environment or human health, and was an improper attempt by the Regional Manager to allocate responsibility for liability among potentially responsible persons.

BC Hydro submits that the appeals raise serious issues. BC Hydro submits that the implementation requirements in the Order effectively require the responsible persons to do something that will be determined in the future; namely, implement a plan that has not yet been approved and will be subject to unknown terms and conditions. BC Hydro maintains that the requirement to implement a remediation plan that has not been approved is so vague that it renders that part of the Order void. BC Hydro submits that the potential invalidity of this requirement is a serious issue to be decided.

In its reply submissions, BC Hydro agrees with Imperial Oil that a serious issue is raised by their contention that the Site as determined in the Order is too large and results in minor contributors being forced to pay for remediation over areas with which they have no connection.

Shell, BC Rail, and the City of Quesnel did not expressly address this branch of the test.

Without prejudice to his right to refute the particulars in Imperial Oil's submissions, the Regional Manager acknowledges that the appeals generally raise serious issues.

The Panel finds that the issues to be addressed in these appeals are not frivolous or vexatious, and do not raise pure questions of law. The Panel finds that the appeals raise complex factual issues about the sources and migration of contamination at the Site, and raise issues about the reasonableness and legality of the Order. Specifically, the Panel notes Imperial Oil's concerns about the determination of the contaminated site and the liability for remediation of potentially responsible persons, and the other Appellants' concern that the implementation requirements are void due to vagueness.

Accordingly, the Panel finds that the appeals raise serious issues to be decided.

Irreparable Harm

Imperial Oil submits that it will suffer irreparable harm if the Order is not stayed as it applies to Imperial Oil, because compliance with the Order will involve enormous expenses that Imperial Oil will be unable to recover if the Order is set aside. Imperial Oil further argues that denying a stay will expose it to criminal prosecution and large fines for non-compliance with the Order, all of which constitute irreparable harm.

Specifically, Imperial Oil submits that compliance with the Order will cost millions of dollars, not including the costs associated with internal expert and administrative resources, and a significant proportion of those costs will be incurred immediately. Imperial Oil notes that, unlike the other persons named in the Order, it has not been working towards preparing a remediation plan over the past two years. Imperial Oil maintains that it will take many months for it to prepare a remediation plan. In support of those submissions, Imperial Oil provided an affidavit sworn by Adrian P. Michielsen, a geological engineer employed by Imperial Oil.

Mr. Michielsen's sworn statements concerning the estimated costs and timing for Imperial Oil to comply with the Order are summarized as follows:

Shell bulk plant and the area downgradient from the Shell bulk plant

- approximately $650,000 in the first 5 years for the design, installation and operation of a dual-phase extraction system.

- annual costs of over $120,000 per year for 20 years for monitoring, vacuum extraction of any free-phase hydrocarbons, and enhancements.

Home Oil bulk plant and the area downgradient from the Home Oil bulk plant

- initial costs of $15,000-25,000 for preparing a remediation plan and risk assessment.

- annual costs of approximately $90,000 per year for monitoring, vacuum extraction, and enhancements for the first 5 years, declining to $50,000 per year for monitoring over the next 15 years.

Former Imperial Oil leasehold and the area that Imperial is willing to remediate voluntarily

- initial costs of $15,000-25,000 for preparing a remediation plan and risk assessment.
- annual costs of approximately $25,000-30,000 per year for 20 years for monitoring, vacuum extraction, and enhancements.

BC Hydro area beside the former power plant

- initial costs of approximately $300,000 for remediation.
- annual costs of $75,000 per year for monitoring for the first 5 years, with decreasing monitoring costs for the next 15 years.

City of Quesnel works yard

- initial costs of $300,000-350,000 for design and installation of a soil vapour extraction and air sparging treatment system, plus annual operating costs of $100,000 over 5 years for that system.
- $700,000-850,000 for design and installation of a sheet pile barrier along the waterfront.
- $1-2 million for design and installation of a pump and treat facility, plus maintenance costs of $100,000-200,000 per year.
- Annual costs of $75,000 per year for monitoring over 20 years, plus annual costs of $20,000-30,000 per year for any vacuum extraction during the initial years.

Mr. Michielsen estimates that it would take approximately three months for Imperial Oil to prepare an effective remediation plan for the former Imperial Oil leasehold and the downgradient area that Imperial Oil is willing to remediate. He attests that additional investigations would need to be done during that time to fill in gaps in the testing done by Seacor. He further estimates that it would take many months or years for Imperial Oil to prepare an effective remediation plan for the entire Site, largely because further testing and detailed ground water modelling would need to be done near the river to ensure the viability of a barrier plan. He states that about six months would also be required to obtain more detailed data than is currently available to formulate a plan for the rest of the works yard, the Shell area, and the BC Hydro area.

Imperial Oil submits that it cannot recover its internal and “out of pocket” costs associated with complying with the Order, because the Regional Manager and the Crown are immune from liability for a wrongfully decided contaminated site or a wrongfully issued remediation order under section 28.6 of the *Act*. Additionally, Imperial Oil submits that even if it is successful in a cost recovery action under section 27(4) of the *Act*, it will be unable to recover all of its costs from other

responsible persons. Specifically, Imperial Oil maintains that it could not recover its costs associated with devoting staff and company resources to that lawsuit, nor would it recover most of its actual legal costs under the tariff set out in the rules of Court. Imperial Oil submits that these costs are a quantifiable, unrecoverable, and irreparable financial loss.

Imperial Oil submits that it will suffer irreparable harm if a stay is denied because Imperial Oil will be denied a meaningful remedy if it is forced to pursue an expensive and time consuming cost recovery action to be made whole, while the other responsible persons will benefit from a juridical advantage in their civil dispute with Imperial Oil. In support of those submissions, Imperial Oil cites *Re: Island Telephone Co.*, [1987] P.E.I.J. 114 (P.E.I.C.A.) at p. 6 (hereinafter *Island Telephone*). Further, Imperial Oil notes that it may not be successful in a cost recovery action, given the uncertainties of litigation, and this type of prejudice represents unquantifiable irreparable harm.

Finally, Imperial Oil argues that the absence of a stay will expose it, its employees, and its officers to prosecution, potential prison sentences, and fines for non-compliance with the Order, all of which constitute irreparable harm. Imperial Oil maintains that it is impossible for it to complete a remediation plan for such a complex site within one month, as was required under the Order before the Board issued the interim stay.

BC Hydro submits that it will suffer irreparable harm if a stay is denied. BC Hydro notes that a contravention of the Order is a violation of the *Act* and is subject to fines of up to $300,000 per day. BC Hydro argues that the fact that the persons named in the Order are exposed to prosecution for non-compliance with the, as yet, unspecified terms and conditions of an approved remediation plan creates the prospect of irreparable harm. BC Hydro submits that it and the other persons named in the Order would incur unrecoverable legal costs to defend themselves, and BC Hydro would suffer damage to its reputation. BC Hydro submits that the unrecoverable legal costs and damage to its reputation arising from charges under the *Act* constitute irreparable harm.

In reply to Imperial Oil's submissions, BC Hydro submits that the costs of complying with a remediation order are not irreparable harm unless those costs will destroy an enterprise. In support of that submission, BC Hydro refers to the Board's previous decisions in *Imperial Oil Ltd. and South Pacific Development Ltd. v. Assistant Regional Waste Manager* (Appeal No. 2002-WAS-011(a), [2002] B.C.E.A. No. 52 (Q.L.) (hereinafter "*Imperial Oil*"), and *Atlantic Industries Ltd. and Michael Wilson v. Assistant Regional Waste Manager* (Appeal No. 2003-WAS-001, February 19, 2003) (unreported) (hereinafter "*Wilson*").

With respect to whether legal costs are recoverable in a cost recovery action, BC Hydro submits that in *O'Connor v. Fleck*, 2000 BCSC 1147 (hereinafter "*O'Connor*"), the legal costs attributable to seeking contribution from the defendants under the *Act* were awarded as a damages claim under the costs recovery action. In addition, BC Hydro notes that section 27(2)(c) of the *Act* states that for the purposes of section 27, "costs of remediation" include "legal and consultant costs associated

with seeking contributions from other responsible persons." Therefore, BC Hydro submits that the legal costs incurred in obtaining contribution from other parties and the cost of remediation are recoverable as damages in a cost recovery action.

However, BC Hydro agrees with Imperial Oil that the threat of prosecution for failing to comply with a vague remediation order creates a potential for irreparable harm. BC Hydro submits that the vagueness of the Order distinguishes the circumstances in the present case from those in *Alpha Manufacturing Inc. v. Deputy Director of Waste Management (BC Gas Utility Ltd. Third Party)*, (1997) B.C.E.A. No. 52 (Q.L.) (hereinafter *Alpha Manufacturing*), where the Board found that the possibility of prosecution in the event of a refusal to comply with a clear order did not constitute irreparable harm.

Shell did not expressly address whether it will suffer irreparable harm if a stay is denied. However, Shell submits that the implementation requirements in the Order are vague and unenforceable. Shell argues that it does not know what remediation requirements will be approved or when, and it does not know what terms and conditions will be imposed on it and the other responsible persons when the Regional Manager approves a remediation plan. Shell submits, therefore, that it cannot implement any remediation plan and cannot comply with that part of the Order, as currently drafted.

With respect to Imperial Oil's stay application, Shell submits that Imperial Oil will not suffer irreparable harm if a stay is denied. Shell submits that Imperial Oil has had ample time and opportunity to prepare a remediation plan, but has pursued a "do nothing, contribute nothing" strategy during the past seven years of proceedings before the Regional Manager, whereby Imperial Oil has denied its liability for remediation and refused to negotiate or work with the Voluntary Group. Shell argues that Imperial Oil is simply being required to do what the Voluntary Group has been doing since September 2000; namely, take responsibility for its contribution to the contamination at the Site, and spend money on remediating the Site. Shell submits that if Imperial Oil suffers a loss, this loss can easily be calculated and recovered in a cost recovery action.

Specifically, Shell argues that Imperial Oil had access to all of the reports prepared by Seacor and Hemerra and submitted to the Ministry before the detailed site investigation reports were filed. Shell submits that Imperial Oil received a copy of the detailed site investigation reports in January 2002, and retained Morrow Environmental Consultants Inc. ("Morrow") as early as May 2002 to review and critique those reports. Shell maintains that Morrow had access to boreholes and monitoring wells installed by the Voluntary Group, and conducted its own sampling in Spring 2002. Shell submits that Imperial Oil had access to the same data as the Voluntary Group, at no cost and without any effort on its part. Shell argues that Imperial Oil has made numerous submissions that reflect a detailed and sophisticated understanding of the Site, including an understanding of the Site's historical use by the Voluntary Group and Imperial Oil.

Shell maintains that Imperial Oil could have taken steps to complete any further delineation of the contamination that it felt was necessary, and present an

alternative approach to remediating the Site, but it chose not to, and instead relied on the Voluntary Group to meet Imperial Oil's responsibilities. Shell submits that Imperial Oil is a sophisticated multinational company with its own environmental engineering department and substantial resources, and during January through September 2002, there was nothing precluding Imperial Oil from reviewing the detailed site investigation reports, identifying what further delineation work was necessary, and undertaking the further delineation of the contamination that Imperial Oil required.

Shell further argues that the timelines for submitting and implementing a remediation plan were outlined in correspondence issued by the Regional Manager in September and October 2002 to the persons named in the Order, including Imperial Oil. Therefore, Shell maintains that if Imperial Oil was unwilling to work with the Voluntary Group, it should have started to develop its own remediation plan for the Site. Shell argues that Imperial Oil's claim that it will take up to one year to prepare a remediation plan is part of its overall strategy of delay.

Additionally, Shell argues that Imperial Oil could have participated with the Voluntary Group in the remediation, and if Imperial Oil felt that it paid too much, then it could have commenced a cost recovery action against members of the Voluntary Group.

The City of Quesnel submits that it will suffer irreparable harm if a stay is denied. It says that, until a remediation plan has been approved and the responsible persons have a chance to determine how to implement the plan, the implementation requirements in the Order are fundamentally unfair, prejudicial, and could cause irreparable harm to the City because the City may face liability for acts over which it had insufficient or no notice. Additionally, the City of Quesnel adopts the submissions made by Shell with respect to Imperial Oil's stay application.

BC Rail adopts the submissions of Shell, and adopts the submissions of the Regional Manager, which are summarized below, as they pertain to Imperial Oil's stay application.

The Regional Manager submits that Imperial Oil has not demonstrated that it will suffer any irreparable harm if a stay is denied. The Regional Manager maintains that any costs that Imperial Oil may incur in complying with the Order, or in pursuing cost recovery, do not meet the legal test for irreparable harm. The Regional Manager submits that the cost recovery action created under section 27(4) of the *Act* provides Imperial Oil with a remedy to recover its reasonably incurred remediation costs from other responsible persons, and "remediation" is defined in section 1 of the *Act* to include site investigations and their analysis as well as preparing remediation plans. The Regional Manager submits that there is no evidence that the other responsible persons would be unable to comply with a cost allocation decision in Imperial Oil's favour.

The Regional Manager distinguishes the decision in *Island Telephone* on the basis that it involved an application for a stay of an order issued by the Public Utilities

Commission, and the governing legislation provided that any cost for which that agency would be responsible if the appeal succeeded would effectively be covered in part by the appellant telephone company. The Regional Manager submits that concerns about an appellant having to effectively pay its own damages are not present in Imperial Oil's appeal of the Order because if Imperial Oil was successful, its costs would be recoverable from the other responsible persons, and there is no evidence to suggest that any of them would be unable to comply with an allocation decision in favour of Imperial Oil.

The Regional Manager argues that the costs to Imperial Oil, be they administrative or legal, are by their very nature quantifiable and are not, therefore, irreparable in nature. The Regional Manager submits that any harm Imperial Oil may suffer if it is unable to fully recover its legal costs associated with a cost recovery action is too remote and is not directly attributable to the Order. The Regional Manager submits that irreparable harm in the context of a stay should be limited to the cost of complying with the Order, as the responsible persons may be able to arrive at a fair apportionment of the remediation costs, and even if litigation proceeds, the Court may award special costs under Rule 57 of the Supreme Court Rules.

With respect to Imperial Oil's claim that denying a stay would expose it to the possibility of criminal prosecution, the Regional Manager argues that the common law provides a defence to Imperial Oil, its employees, and its officers if it is truly impossible for it to comply with the Order. The Regional Manager further argues that the threat of prosecution should not be considered irreparable harm in the context of stay applications because this would allow parties to avoid remediation by delay. The Regional Manager notes that the Board dealt with this issue in *Alpha Manufacturing*.

In reply to the Regional Manager's submissions, Imperial Oil argues that *Island Telephone* stands for the proposition that a party will suffer irreparable harm if they suffer a financial loss from complying with an administrative order where they cannot recover from the decision-maker. Imperial Oil maintains that *Island Telephone* is not distinguishable simply because the exact nature of the unrecoverable loss is different in the present case. In addition, Imperial Oil distinguishes *Alpha Manufacturing* on the basis that, in the present appeal, Imperial Oil may be unable to comply with the Order because it does not know what is required of it under the Order, whereas *Alpha Manufacturing* involved an order that was clear and, therefore, non-compliance would have been deliberate.

In reply to BC Hydro's submissions, Imperial Oil submits that *O'Connor* does not stand for the proposition that legal costs in a cost recovery action have been awarded as actual costs. Imperial Oil notes that at paragraph 288 of *O'Connor*, the Court states that the plaintiff's "legal and consultant costs associated with seeking contribution from other responsible persons" under section 27(1)(c) of the *Act* had "not been sorted out", and "If necessary, this question will be referred to the registrar for assessment." Imperial Oil submits that the registrar only has jurisdiction to award costs under the tariff, and not to assess costs as damages.

In response to Shell (and by extension BC Rail and the City of Quesnel), Imperial Oil submits that Shell's submissions contain inaccurate assertions of fact about the history of the proceedings that are not supported by affidavit evidence.

Panel's findings

With respect to claim that Imperial Oil will suffer irreparable harm due to the cost of complying with the Order, if a stay is denied, the Panel notes that the remediation costs are quantifiable. In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR-MacDonald*, at page 341:

> "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.

While the final cost of implementing the Order will not be known until remediation of the Site is complete, the Panel notes that Mr. Michielsen has provided an estimation of the approximate cost of remediating the Site. Mr. Michielsen's evidence clearly shows that those costs are quantifiable. This then leads to the question of whether Imperial Oil's costs associated with complying with the Order cannot be cured, in that "one party cannot collect damages from the other", "one party will be put out of business", or where "one party will suffer permanent market loss or irrevocable damage to its business reputation."

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. In particular, the Panel notes that each of the persons named in the Order, including Imperial Oil, has a remedy for recovery of their "reasonably incurred costs of remediation" under section 27(4) of the *Act*. As noted by the Regional Manager, "remediation" is broadly defined in section 1 of the *Act* to include site investigations, "preparation of a remediation plan", "implementation of a remediation plan", and "monitoring, verification and confirmation of whether the remediation complies with the remediation plan." The Panel further notes that "costs of remediation" are broadly defined for the purposes of section 27 of the *Act*:

> **27** (2) *For the purpose of this section,* **"costs of remediation"** means *all costs of remediation and includes, without limitation*,
>
> (a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

...

(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.

[italics added]

Section 35 of the *Regulation* provides further guidance for the courts in determining what constitutes "reasonably incurred costs of remediation":

Compensation payable for actions under section 27(4) of the Act

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.

[italics added]

Thus, it is clear that any person who incurs costs in remediating the Site may seek to recover, without limitation, their "reasonably incurred costs of remediation", including "legal and consultant costs associated with seeking contributions from other responsible persons." The question raised by Imperial Oil is whether section 27(2) will allow it to recover its actual legal costs associated with seeking cost recovery.

The Panel finds that *O'Connor* provides little assistance in determining whether actual legal costs are recoverable under section 27(2)(c) of the *Act*, because the plaintiff in that case made claims for legal costs under both the terms of a lease and under section 27(2)(c). The Court expressly held that actual legal costs were not available as damages under the terms of the lease. However, the Court did not clearly turn its mind to the question of whether actual legal costs were available under the *Act*, stating that "the portion of the plaintiff's [legal] costs attributable to seeking contribution from the defendants under the *Act*, as opposed to his claim under the lease, have not been sorted out." The Court appears to have focused its reasoning on whether actual costs were available under the lease, and not on interpreting the meaning of "legal costs" for the purposes of a cost recovery action under the *Act*.

It is notable, however, that the Court awarded actual costs pursuant to the *Act* for consultant fees and expenses that had been *incurred* to that date, as the remediation was not yet complete and the defendant had argued that the plaintiff could not claim remediation costs that had not yet been incurred. In that regard, the Court stated:

> The words in the statute suggest that what is contemplated is the recovery of expenses that the owner has paid. The statute does not provide a right of recovery for costs to be incurred as well as costs incurred. It may be that the legislature wished to ensure that remediation steps are actually taken.

Thus, the Panel finds that the decision in *O'Connor* does not rule out the possibility that "legal costs" under section 27(2)(c) of the *Act* may include actual legal costs associated with seeking contribution from other responsible persons.

In any event, it is not clear from *RJR-Macdonald* that an alleged inability to recover all legal costs associated with seeking damages constitutes "harm… which cannot be cured… because one party cannot collect damages from the other." *RJR-Macdonald* involved an application to stay implementation of federal regulations pending final decisions on whether those regulations were *ultra vires* Parliament and violated the *Canadian Charter of Rights and Freedoms*. The applicant company provided affidavit evidence that compliance with the new regulations would cost the tobacco industry about $30 million as a result of having to redesign all of its packaging, if a stay was denied, and then having to return its packaging to its

original state if the regulations were subsequently overturned. There is no indication that the Court considered, or the applicant claimed, that the applicant would suffer irreparable harm as a result of an inability, or uncertainty over its ability, to recover actual legal costs associated with seeking damages if it succeeded in the merits of its appeal. The Court does not refer to actual legal costs at page 341, quoted above, where it lists examples of harm constituting irreparable harm.

The Panel has considered that the Court found that the applicant in *RJR-MacDonald* would suffer irreparable harm because "no body of jurisprudence has yet developed in respect of the principles that might govern the award of damages under s. 24(1) of the *Charter*," and that, in the present case, there is little jurisprudence in respect of principles that will govern the award of damages in cost recovery actions. However, the Panel finds that the circumstances in the present case are very different from those in *RJR-Macdonald*, because section 27 of the *Act* and section 35 of the *Regulation* expressly set out principles that will guide the award of damages in cost recovery actions. Therefore, while the Court held in *RJR-Macdonald* that "it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial," that is clearly not the case here. The *Act* provides clear direction as to the sorts of compensation that could be obtained in a cost recovery action.

With respect to Imperial Oil's submission that *Island Telephone* stands for the proposition that an applicant will suffer irreparable harm if they suffer a financial loss from complying with a wrongly issued administrative order where they cannot recover from the decision-maker, the Panel notes that there is no dispute that the Site is a contaminated site. Therefore, the responsible persons can seek to recover their "reasonably incurred costs of remediation" from other responsible persons under section 27(4) of the *Act*. There is no evidence before the Panel that any of the responsible persons would be unable to comply with an allocation decision in favour of Imperial Oil.

Furthermore, the Panel agrees with the Regional Manager that the circumstances in *Island Telephone* are distinguishable from those in the present applications because that case involved a legislative scheme in which any cost that the agency issuing the order would have to pay if the appeal succeeded would be partially covered by the appellant. Specifically, the Court held that the applicant would suffer irreparable harm on the basis that "since the Commission is exclusively funded by those industries over which it has jurisdiction, the end result would be that the Company would, in reality, be required to contribute to the payment of its own award for damages." In contrast, if Imperial Oil succeeds in its appeal of the Order, its reasonably incurred costs of remediation would be recoverable from other responsible persons.

With respect to the Applicants' claims that denying a stay would expose them to irreparable harm as a result of the possibility of criminal prosecution for failing to comply with the Order, the Panel agrees with the Regional Manager that the Board's reasoning in *Alpha Manufacturing*, as stated below, applies in this case:

> 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 and Imperial Oil attempt to distinguish *Alpha Manufacturing* from the present applications on the basis that the specific requirements for implementing remediation under the Order are not yet known. However, the Panel notes that the onus is on the applicants for a stay to establish that they will suffer irreparable harm if a stay is denied. In this case, the Applicants have provided no evidence that they will be financially or otherwise unable to implement a remediation plan, once approved. The Panel is not prepared to find that they would suffer irreparable harm on the basis of mere assertions or speculation by the Applicants that they may, in the future, be unable to comply with specific timelines or technical requirements that may be part of an approved remediation plan. In the absence of clear evidence of irreparable harm, the Panel is not prepared to accept that the Applicants may suffer irreparable harm on the basis that they "might" not be able to comply with the implementation requirements in the approved remediation plan.

Imperial Oil has provided affidavit evidence that it is unable to comply with the requirement to prepare a remediation plan for the entire Site within the original one-month deadline imposed in the Order. However, the Panel notes that the Voluntary Group has already prepared a remediation plan that they are prepared to submit to the Regional Manager once the interim stay is lifted. The Panel further notes that Imperial Oil may choose to participate with the other responsible persons in implementing that plan, once approved, without prejudice to its right to seek cost recovery. Therefore, the Panel finds that Imperial Oil has not established that it would suffer irreparable harm on the basis that it is unable to comply with the timeline for submitting a remediation plan.

Finally, Imperial Oil claims that it may suffer irrevocable damage to its business reputation if it is subject to a prosecution for failing to comply with the Order. The Panel finds that Imperial Oil has adduced no evidence to support that claim. Accordingly, Imperial Oil has not established that it will suffer irreparable harm on that basis.

For all of these reasons, the Panel finds that none of the Applicants have established that they will suffer irreparable harm if a stay of the Order is denied.

Balance of Convenience

The balance of convenience test requires the Panel to 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.

Imperial Oil submits that the balance of convenience weighs in favour of a stay of the Order as it applies to Imperial Oil. Imperial Oil argues that there will be no harm to the environment if a stay is granted in respect of Imperial Oil, and Imperial Oil's compliance with the Order is delayed for several months until the appeals are resolved, because Imperial Oil will still remediate the area within the Site for which it admits responsibility, as well as a further area for which it admits that it may possibly be liable. Imperial Oil maintains that it has "reluctantly" agreed to proceed with independent remediation of its former leasehold area, for which it admits liability, and to pursue "private" remediation of a defined area down-gradient from its former leasehold area which its consultant, Morrow, concludes could possibly have been contaminated by migration from its former leasehold, but for which Imperial Oil does not admit liability.

Imperial Oil further argues that until the stay applications arose, the Regional Manager did not behave in a manner that suggested that he considered the Site to present an imminent threat to the environment, because proceedings concerning these lands have been ongoing with the Regional Manager for seven years, and he has repeatedly given extensions to the Voluntary Group while they were pursuing voluntary remediation of the Site. Imperial Oil accepts that there is one area of current concern within the Site, where BTEX[1] hydrocarbons are entering the Quesnel River at the City works yard. However, Imperial Oil argues that the Regional Manager has known about this since he received the first detailed site investigation report in late 2001, and has not treated it as an urgent concern. Further, Imperial Oil submits that there is no evidence before the Regional Manager indicating that Imperial Oil is responsible for that contamination, on a balance of probabilities.

Even if there is an urgent threat to the environment, Imperial Oil submits that the balance in favour of Imperial Oil is not affected because it will take at least a year for Imperial Oil to prepare its "parallel" remediation plan, whereas the other parties have been working on a remediation plan for the entire Site for over two years. Imperial Oil argues that there is no reason why the other persons named in the Order cannot continue with remediation on their portions of the Site, pending a decision on Imperial Oil's appeal, as those persons are under no financial disability. Consequently, Imperial Oil maintains that denying a stay of the Order as it pertains to Imperial Oil will not assist in meeting any urgent threat to the environment that may exist.

BC Hydro submits that the balance of convenience favours granting a stay of the implementation requirements in the Order because there is no urgency to comply with terms and conditions that are presently unknown. BC Hydro argues that a stay cannot harm the environment given that the Regional Manager has not provided any explicit remediation requirements.

Shell submits that Imperial Oil has, by its inaction, benefited from the significant costs incurred by the Voluntary Group as a result of not having to spend money on

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1 Benzene, toluene, ethylbenzene and xylenes are components of gasoline and are used as indicators of the presence of gasoline contamination.

remediating the Site for two and one half years. Shell maintains that a stay would reward Imperial Oil for a deliberate strategy of delay and denial of responsibility. Shell argues that Imperial Oil should not benefit from further delay on its part.

Further, Shell submits that if any other person named in the Order receives a stay of part or all of the Order, then in fairness, the stay should apply to all persons named in the Order.

The City of Quesnel submits that the balance of convenience favours granting a stay of the implementation requirements until a reasonable period of time after a remediation plan for the Site has been approved and the City is advised of specific implementation terms. The City of Quesnel submits that this would give the responsible persons an opportunity to consider the specific terms of implementation, and determine the means of implementation or consider whether a further remedy is required. The City of Quesnel submits that a reasonable termination date for a stay would be two weeks after receiving notice of the terms and conditions of implementation of the remediation.

Additionally, the City of Quesnel adopts the submissions made by Shell with respect to Imperial Oil's stay application.

The Regional Manager submits that the balance of convenience favours denying a stay. He maintains that given the number of parties to the appeals and the number of expert witnesses likely to be called at a hearing on the merits of the appeals, it is unlikely that the appeals will be decided in a short time frame. The Regional Manager submits that any further delays in planning and implementing the remediation of the Site would cause significant irreparable harm to the environment, given that in December 2001, the detailed site investigation reports identified a contaminant plume extending into the Quesnel River, which is commonly recognized as an important fishery resource. The Regional Manager maintains that since that time, his efforts to have remediation carried out at the Site on a voluntary basis have been persistent, but it now seems that voluntary action is unlikely to continue without Imperial Oil's involvement. The Regional Manager submits that he refrained from issuing a remediation order until progress with voluntary remediation efforts ended.

With respect to the applications by Shell, BC Hydro, BC Rail, and the City of Quesnel regarding implementation of an approved remediation plan, the Regional Manager submits that the applications should be refused. He argues that those Applicants' submissions are premature because the obligation to implement a remediation plan does not crystallize until a plan has been filed and approved by the Regional Manager. Once the Regional Manager sets the terms and conditions of the plan's approval, there will be no vagueness or uncertainty, and the responsible persons can file a separate appeal of the decision to approve the plan. The Regional Manager argues that the balance of convenience test must be satisfied based on the present terms of the Order, and not based on contingencies or possible future events that may affect the parties' positions.

Alternatively, if the Board finds that uncertainty with respect to the remediation plan is a compelling reason to issue a stay, then the Regional Manager submits that a stay should operate only until the Regional Manager approves a remediation plan. The Regional Manager submits that immediate implementation following approval will avoid additional risks to the environment pending a decision on the merits of the appeals.

Finally, the Regional Manager notes that in a letter dated December 6, 2002, the Voluntary Group advised that a final remediation plan would be submitted to the Ministry by February 25, 2003, if a remediation order were issued. The Regional Manager submits that installation of treatment systems could occur as early as Spring 2003, if a stay is denied.

BC Rail adopts the submissions of Shell, and adopts the submissions of the Regional Manager as they pertain to Imperial Oil's stay application.

In reply, BC Hydro agrees with Imperial Oil that the Site, as defined in the Order, is too large, too complex, and involves too many parties. BC Hydro submits that the threat to the environment caused by hydrocarbons entering the Quesnel River should be addressed by clean-up directed at the source of the hydrocarbons entering the River, while other contaminants at the Site which may be having an environmental impact should be dealt with through remediation plans that deal specifically with those impacts.

In response to the other Applicants' submission that if Imperial Oil receives a stay then all of the persons named in the Order should, in fairness, be subject to that stay, Imperial Oil argues that it is in a completely different position from the other Applicants and there is no legal doctrine requiring that those parties should receive a stay simply because Imperial Oil receives one.

Imperial Oil further argues that the fact that the other Applicants acknowledge that they are ready to deliver a remediation plan buttresses Imperial Oil's argument that it is not necessary to require Imperial Oil to prepare a remediation plan in order to protect the environment. Imperial Oil maintains that it should not be criticized for not being in a position to deliver a remediation plan, given that Imperial Oil has consistently contested any obligation to remediate the entire site over the past 7 years, and has, accordingly, not expended the money necessary to prepare a remediation plan for lands for which it does not accept responsibility. Imperial Oil reiterates that it has reluctantly agreed to remediate its former leasehold area and, on a without prejudice basis, a further area that its experts concede it may have contaminated.

In reply, Shell argues that the Regional Manager should never have issued the implementation requirement because it is vague and unclear, and there is nothing to implement until a plan has been approved. Therefore, this part of the Order is premature and should be stayed.

Shell further replies that Imperial Oil's submissions confirm its intention to not file a remediation plan and, instead, to unfairly rely on the other responsible persons. In

this regard, Shell argues that Imperial Oil should not be granted a "free ride" at the expense of the other persons named in the Order. In support, Shell refers to the Board's previous findings in *Wilson*.

In reply to Imperial Oil, BC Rail agrees with Shell and the Regional Manager that Imperial Oil has, for some time, been in the same position as the other responsible persons. Alternatively, BC Rail submits that, if the Board finds that Imperial Oil is not in the same position as the other persons, then that is entirely due to Imperial Oil's "do nothing, contribute nothing" strategy, and BC Rail maintains that Imperial Oil should not benefit from such a strategy.

The Panel has reviewed all of the submissions and has concluded that, if a stay is granted, the potential risk to human health and the environment and the public interest outweighs the potential harm to the Applicants' interests, if a stay is denied. The Panel finds that if the stay is denied, the Applicants will be subject to the obligations under the Order and the costs associated with the Order. In balancing the respective harms that may flow from granting or denying a stay, the Panel has already concluded that the Applicants have not proven that they will suffer irreparable harm, as defined in *RJR-MacDonald*, if a stay is denied.

The Panel notes that the Regional Manager made the Order in accordance with his statutory mandate to protect the environment. The Regional Manager made the Order after reviewing the detailed site investigations and determining that the contamination poses risks to human health and the environment. Therefore, the Panel finds that there is a presumption that the Order protects the public interest in remediating the Site, and granting a stay would be contrary to that public interest.

Indeed, there is no dispute that there is contamination on the Site and that the contamination is in need of remediation. In particular, the Panel accepts that there are legitimate concerns with regard to migration of contaminants into the Quesnel River. None of the Applicants disputed that the detailed site investigation reports indicate that hydrocarbons are entering the Quesnel River, which is a fish-bearing river. Even Imperial Oil accepts that there is one area of "current concern" within the Site, where BTEX hydrocarbons are entering the Quesnel River. Although Imperial Oil claims that there is no evidence indicating that Imperial Oil is responsible for that contamination, on a balance of probabilities, the Panel finds that any questions concerning the sources of or liability for contamination at the Site are to be dealt with when the Board considers the merits of the appeals, and not in the context of these preliminary stay applications.

With respect to the Applicants' request to stay the implementation requirement in the Order on the basis that this requirement is vague and the responsible persons will have no or insufficient notice of what they will be required to do once a plan is approved, the Panel agrees with the Regional Manager that the obligation to implement a plan does not crystallize until a plan is approved. Further, once a plan is approved, there will be no vagueness or uncertainty concerning the remediation requirements and any timelines that must be met.

The Panel also agrees with the Regional Manager that given the number of parties to the appeals, the complexity of the technical issues raised by the appeals, and the number of expert witnesses likely to be called at a hearing on the merits of the appeals, it is unlikely that the appeals will be decided in a short time frame. Given the public interest and environmental concerns identified above, these time considerations weigh in favour of denying a stay of the Order.

With respect to Imperial Oil's claims that the environment would suffer no harm if Imperial Oil does not file a remediation plan or contribute to the costs of remediating the Site because the other responsible persons have already prepared a plan and are able to carry out the remediation, the Panel notes that similar arguments were made in *Wilson*. In that case, the Board held as follows in considering the balance of convenience:

> As noted in previous matters before the Board, the fact that the history of the site suggests that other responsible persons will continue to remediate the site does not serve as a justification for other named responsible persons to reject their obligations under the remediation order. This was one of the arguments made in the matter of *South Pacific*. South Pacific was seeking a stay against a remediation order and argued that remediation of the site would continue because Husky Oil and Imperial Oil were committed, experienced, and financially able to undertake remediation efforts. The Third Parties argued that given South Pacific's history with the site, it would be unjust to grant it a 'free ride' on the efforts of Imperial Oil and Husky Oil pending a resolution of the appeals. The Board concluded that remediation by Husky Oil and Imperial Oil was not a sufficient reason to grant a stay to South Pacific. Similarly, it would be unfair to point to remediation efforts by Beazer and CNR as a sufficient reason to excuse Mr. Wilson from undertaking remediation efforts. Given the extensive costs of remediation borne by the Third Parties thus far, fairness would dictate that they not continue to bear the entire cost of remediation of the site.

The Panel finds that this reasoning applies similarly to the present application by Imperial Oil. It would be unfair to find that the remediation efforts by the Voluntary Group provide a sufficient reason to excuse Imperial Oil from undertaking or contributing to remediation efforts. Given the costs of remediation borne by the Voluntary Group so far, fairness would dictate that they not continue to bear the entire cost of remediating the Site. Although Imperial Oil indicates that it may prepare a "parallel" remediation plan, the Panel notes that allowing a stay of the Order for up to a year so that Imperial may prepare such a plan would cause further delay in initiating clean-up of the Site, and may lead to an unnecessary duplication of effort. The Panel has already noted that Imperial Oil may participate in the remediation of the Site without prejudice to its right to seek contribution from any member of the Voluntary Group through a cost recovery action. Imperial Oil's right to seek cost recovery will not be prejudiced if a stay is denied. The Panel finds that any inconvenience Imperial Oil may suffer as a result of having to comply with the Order, if a stay is denied, does not outweigh the potential harm to the

environment and the public interests, as represented by the Regional Manager, if a stay is granted.

Furthermore, for these reasons provided above, the Panel finds that the potential harm to the interests of the Regional Manager outweighs any potential harm to the interests of the Applicants, including Imperial Oil.

Accordingly, the Panel finds that the balance of convenience weighs in favour of denying a stay of the Order.

DECISION

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

For the reasons provided above, the Panel finds that the applications for a stay of the Order are denied.

However, the Panel notes that the requirement in the Order that the responsible persons submit a remediation plan, with appropriate fees, to the Regional Manager by February 28, 2003, has already passed. Accordingly, the Panel now orders that the Order be amended to require that the remediation plan and fees be submitted by April 7, 2003.

Alan Andison, Chair
Environmental Appeal Board

March 21, 2003