Environmental Appeal Board

APPEAL N0. 96/23 - WASTE

In the matter of an appeal under section 26(1)(b) of the *Waste Management Act*, S.B.C. 1982, c. 41.

BETWEEN:	Nick Kootnikoff on behalf of Krestova Residents for Pure Water	**APPELLANTS**
AND:	Deputy Director of Waste Management	**RESPONDENT**
AND:	Stone Venepal (Celgar) Pulp Inc.; Pate A Papier Stone Venepal (Celgar) Inc. doing business as Celgar Pulp Company	**APPROVAL HOLDER**
AND:	Mark Hatlen	**APPROVAL HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Judith Lee, Vice Chair	
DATE:	Written submissions concluding on December 11, 1996	

APPEAL

This is an appeal from a decision of the Deputy Director of Waste Management dated August 23, 1996. In his decision, the Deputy Director refused to grant the Appellants an extension of time to file an appeal of approval AR-14334 (the "Approval"), authorizing the discharge of treated pulp mill sludge to the ground.

The jurisdiction of the Environmental Appeal Board to hear this appeal is found in section 26 of the *Waste Management Act* and section 11 of the *Environment Management Act.*

This appeal was conducted by way of written submissions pursuant to section 4(2) of the Environmental Appeal Board Procedure Regulation. The Appellants, Nick Kootnikoff and at least 70 other individuals from the Krestova Residents for Pure Water, provided lengthy submissions to the Board in relation to their application for an extension and regarding the merits of the appeal itself. Submissions were also received from the Respondent and the Approval holders, Celgar Pulp Company ("Celgar") and Mr. Mark Hatlen.

On November 28th and December 3rd, after the deadline for submissions, the Appellants submitted additional information. Although objecting to the submissions, the Respondent and Approval holders have provided their responses to the submissions. In making this decision, the Board has considered all of the additional submissions.

BACKGROUND

The Approval Holder, Celgar, has a kraft pulp mill located in the Creston Valley. As part of its development of options to re-use and recycle sludge, Celgar has pursued the promotion of effluent treatment sludge as a "soil amendment". The Appellants maintain this is an "experimental" process.

On November 10, 1995, Barry Wood, Assistant Regional Waste Manager, issued an Approval to Celgar, CITIC B.C. Inc., and Mr. Hatlen pursuant to section 9 of the *Waste Management Act*. The Approval authorized Celgar to discharge up to 100 tonnes of effluent treatment sludge from its kraft pulp mill onto 5 acres of farmland owned by Mr. Hatlen. The authorization was valid between November 10, 1995 and November 10, 1996. The approval letter addressed to the Approval Holders stated:

> "It is also the responsibility of the approval holder to ensure that all activities conducted under this approval are carried out *with due regard to the right of the third parties and comply with other applicable legislation that may be in force."* [emphasis added]

Visual monitoring for signs of leachate problems in and around the discharge site was required and a soil test was to be conducted in the summer of 1996.

Pursuant to Part 5 of the *Waste Management Act*, Mr. Wood's decision to issue the Approval was appealable to the Deputy Director within twenty-one (21) days of the date of Mr. Wood's decision, or approximately, December 1, 1995. The Respondent submits that Mr. Wood told the Approval Holders to notify any neighbours in the area about the Approval which the Approval Holders maintain was, in fact, done.

As no appeal was received during the appeal period, the discharge went ahead. On May 14, 1996, a single discharge of 80 tonnes of treated sludge was made to Mr. Hatlen's property.

Approximately seven months after the Approval was issued, in June of 1996, Mr. Kootnikoff wrote to the Deputy Director, on behalf of himself and other local residents (the Appellants), applying for an extension of time to appeal the Approval. An extension may be granted pursuant to subsection 27(3) of the *Waste Management Act* which states:

> (3) The director may extend the time for commencing an appeal to him either before or after the time [21 days] has elapsed.

In his letter, Mr. Kootnikoff stated that the Appellants had not been given notice of the Approval prior to or following its issuance. He stated that the Appellants had just become aware of the Approval and their right to appeal *after* the sludge was discharged to the Hatlen property. Mr. Kootnikoff stated further that the Appellants seek to appeal the Approval on the basis that insufficient testing was done prior to the issuance of the Approval and local residents are concerned that the sludge will negatively affect their properties, the ground water and domestic water supplies.

On August 23, 1996, the Deputy Director rendered his decision refusing to grant an extension of time to file an appeal. He noted that the sludge had already been deposited on the Hatlen property, tilled into the ground and seeded with grass. He then went on to state:

> I do not consider it in the public interest to grant an extension to hear an appeal where the rights under the approval have already been fully exercised. Furthermore, to grant the relief being requested to remove the deposited sludge would likely cause an even greater economic and environmental impact than has resulted to date.

To address some of the Appellants' concerns, the Deputy Director made recommendations regarding future applications for a permit or approval to ensure that all adjacent property owners are notified in advance of any discharges taking place and that Celgar and the Regional Waste Manager keep in contact with the Ministry of Health, Mr. Hatlen and his neighbours to apprise them of any monitoring results from the area where the sludge was deposited.

The discharge to the Hatlen property has been a highly controversial issue for the community. A public meeting has taken place in an attempt to find a local resolution to the controversy caused by the discharge. It appears that the local residents' concerns were not alleviated through this meeting.

Mr. Kootnikoff filed a notice of appeal with the Environmental Appeal Board on September 11, 1996, on behalf of a group of local residents referred to as the Krestova Residents for Pure Water. The Appellants argue that the Deputy Director erred in refusing to grant the extension and that his decision should be reversed to allow them time to appeal the Approval. It is clear from their submissions that the Appellants believe that the sludge is polluting or will pollute the environment and should be removed from the site.

The Appellants allege this deposit was contrary to the federal Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulation 4(1) prohibiting release of any final effluent that contains any measurable concentrations of 2,3,7,8-TCDD or 2,3,7,8-TCDF, made pursuant to the *Canadian Environmental Protection Act*. The Regional Director General for Environment Canada confirmed the applicability of the regulation to Celgar.

Celgar asserted that the treated effluent did not contain any detectable amounts of those particular dioxins and furans.

The Regional Waste Manager confirmed the use of sludge compost as an alternative to disposing of mill effluent in our waterways, and that there are to date, no regulations that exist for application of pulp mill sludge though a policy is being developed.

The Appellants' concerns were that the Celgar pulp mill sludges may contain some measurable levels of toxic metals such as cadmium, dioxins and organochlorines which could contaminate nearby wells and drinking water supplies. It is alleged

that one half of the sludge, some 40 tonnes was not composted but raw sludge. Celgar asserted that levels of organochlorines were lower than testing results from the Appellants.

However, the Appellants did not contest Celgar's assertion that the Ministry of Environment, Lands and Parks had sampled three private residential drinking wells within the vicinity of the field and their water analysis showed levels within compliance with drinking water standards.

The Approval Holders did not dispute that there are at least three wells supplying domestic drinking water within 70 feet of the now deposited sludge including one that is about 18 feet from a well. Nor did the Waste Management branch dispute that when the approval was issued, they were unaware that there were wells in the area.

DISCUSSION

The Appellants are clearly within the class of people that the Legislature intended to give a right of appeal under the *Waste Management Act*. For the most part, they are neighbouring property owners who may be affected by the discharge of waste to the Hatlen property.

The notice requirements for approvals and permits under the *Waste Management Act* are located in the Public Notification Regulation, B.C. Regulation 202/94. This regulation does not require extensive advertising of applications for an approval. Rather, the Appellants' entitlement to notice, as set out in "Schedule A" to the regulation, states that notice is "as specified by a manager". In this case, the manager is said to have verbally instructed the Approval Holders to notify the neighbours of the Approval. Mr. Hatlen maintains that he kept the residents apprised of what he was doing throughout the entire process.

The Public Notification Regulation allows the manager to require additional notice where the method of notice provided for is not adequate or practical (section 4(3)). The regulation also requires detailed criteria be met with respect to the type of notice that must be given in certain circumstances.

The Appellants presented overwhelming evidence that they did not get verbal notice of the Approval. The Appellants' submissions included numerous letters from local residents and five affidavits from neighbouring property owners all stating that they were unaware of the Approval until the discharge took place. The only indication that the neighbours were given any prior notice of any discharge is found in the affidavit of Mr. Cecil Jmio who states that Mr. Hatlen informed him that he was going to deposit "fertilizer" on his land, which Mr. Jmio understood to be "standard commercial fertilizer".

The evidence of the Appellants is compelling. The Board accepts their evidence that they were not given notice of the Approval or their ability to appeal the Approval prior to the discharge in May.

If, as he alleges, Mr. Hatlen said anything to the neighbours about the proposed discharge, the Board finds that it was not sufficiently detailed to adequately inform the neighbours of the nature of the discharge (i.e., treated sludge effluent).

In B.C. the rules of procedural fairness relating to notice are augmented by statutory provisions. The board accepts the former counsel for the Appellants' argument to the Deputy Director that the intent of the Public Notification Regulation is that local residents and property owners where an approval or permit will be issued receive sufficient notice of the application for and granting of any permit or approval. With such notice, a decision maker is more likely to get all the relevant information on these environmental matters, such as the existence of nearby drinking wells.

If such notice had been given, it is likely from the Appellants' submissions and their actions to date that they would have appealed the Approval within the statutory time frame. Once the Appellants were aware of the nature of the materials discharged to Mr. Hatlen's property and their ability to appeal the decision, they promptly appealed. Thus, the Board is satisfied that the Appellants have established an adequate reason for their delay in filing an appeal.

When exercising discretion under section 27(3), the Board finds that it is also relevant to consider any prejudice that would be suffered if the extension is granted. This is to be balanced against any prejudice that would be suffered if the extension is not granted and what, if any, environmental impacts would result from granting an extension of time.

In this regard, the Board agrees with the Deputy Director that the fact that the Approval has been fully exercised is an important consideration.

The Approval Holders have relied upon the validly issued Approval and have fully exercised their legal rights under the Approval. The evidence is that the sludge has been mixed with the top soil and is now fully covered with grass. No further deposits can be made as the Approval has expired.

It is further alleged that the prejudice to the Appellants, should the extension be refused, is minimal. The Respondent points out that the powers of a Deputy Director on an appeal are to confirm, vary or rescind the decision appealed from, or make any decision that could have been made by the manager and that the Deputy Director considers appropriate in the circumstances. As the rights under the Approval have been fully exercised and, as of November 10, 1996, the Approval has expired, there is nothing to confirm, vary or rescind.

With regard to concerns about environmental impacts the Board has considered the comments from the Medical Health Officer that the aquifer in the area is shallow and, therefore, is more vulnerable to contamination. Although he recommended that the 100 foot setback required in the sewage disposal regulation be considered, his opinion was that the risk of contamination from the single application was minimal.

If the Appellants could establish that the sludge is polluting or will pollute the soils or the local water supply, the appropriate remedy available to deal with the situation would be in the nature of a pollution abatement or pollution prevention order under sections 22 and 22.2 of the *Waste Management Act* respectively. The essence of the Respondent's argument is that, as these orders are available outside of the appeal process, the Appellants will not suffer any prejudice if the extension request is denied: the test for issuing a pollution abatement or pollution prevention order is the same, whether in an appeal or outside of an appeal. The Appellants' would have to provide sufficient evidence of a risk to the environment or human health for an order to be issued.

However, *the approval has expired.* Further, even if the board granted an extension of time, the appeal were heard and granted to the Appellants, there is on the balance reasonable evidence that the environmental impact of the single application of deposited sludge has been minimal and its removal may cause a greater environmental impact than leaving it in place.

DECISION

The Board finds that it cannot grant an extension of time to appeal and confirms the decision of the Deputy Director to refuse an extension of time.

However, on the grounds of procedural fairness and the importance of safeguarding potable water, it varies his decision by requiring that both Celgar and the Regional Waste Manager must keep in contact with the Ministry of Health, Mr. Hatlen and his neighbours and make available to them all monitoring results from the area where the sludge was deposited within 30 days.

The Board further confirms the Deputy Director's recommendation that on any future applications for approval or permit to deposit pulp mill sludge, the Regional Waste Manager must require the applicant to give notice in writing of said application to adjacent property owners, and to publish notice of any issued approval or permit.

The appeal is dismissed.

Judith Lee, Vice Chair
Environmental Appeal Board

April 7, 1997