

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 6, 2013

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Cleanit Greenit Composting System Inc. and Kirstin Castro-Wunsch with respect to *Environmental Protection and Enhancement Act* Enforcement Order Nos. EO-2011/03-NR and Amendment No. 6 issued to Cleanit Greenit Composting System Inc. and Kirstin Castro-Wunsch by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Cleanit Greenit Composting System Inc. and Kirstin Castro-Wunsch v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development* (06 August 2013), Appeal Nos. 11-177 and 12-041-D (A.E.A.B.).

**PRELIMINARY MOTIONS HEARING
BEFORE:**

Mr. Eric O. McAvity, Q.C., Panel Chair;
Mr. Justice Delmar Perras (ret.), Board Chair;
and Dr. Dave Evans, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Ms. Denise Black, Board
Secretary; and Ms. Marian Fluker, Associate
Counsel.

SUBMISSIONS BY:

Appellants:

Cleanit Greenit Composting System Inc. and
Kirstin Castro-Wunsch, represented by Mr. Jim
McFadyen, Parlee McLaws LLP.

Director:

Mr. Jeff Toering, Director, Northern Region,
Operations Division, Alberta Environment,
represented by Ms. Shannon Keehn, Alberta
Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Enforcement Order under the *Environmental Protection and Enhancement Act* (EPEA) to Cleanit Greenit Composting System Inc. and Kirstin Castro-Wunsch (the Appellants). AESRD subsequently issued seven amendments to the Enforcement Order.

The Board received two Notices of Appeal from the Appellants, one objecting to the issuance of the Enforcement Order and the other objecting to the issuance of Amendment No. 6. The Board held a preliminary motions hearing to hear submissions on a number of preliminary matters, including whether the appeal of the Enforcement Order was moot and whether Amendment No. 6 can be appealed.

The Appellants acknowledged the Enforcement Order was now moot because all of the prescriptive clauses had been repealed and replaced by the seven amendments, in particular Amendments No. 6 and 7. Therefore, the Board dismissed the appeal of the Enforcement Order because it was moot.

The Appellants did not meet their onus of demonstrating to the Board that Amendment No. 6 was appealable under section 91(1) of EPEA. The Board found Amendment No. 6 did not suspend or cancel the Registration, and it did not stop any activity or operation. Even if the Board had made a determination that Amendment No. 6 was a new enforcement order, it was not appealable because it was not issued pursuant to section 210(1)(a), (b), or (c) of EPEA. Therefore, the Board dismissed the appeal of Amendment No. 6 for lack of jurisdiction.

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I. INTRODUCTION

[1] Alberta Environment and Sustainable Resource Development (AESRD) issued an Enforcement Order to Cleanit Greenit Composting System Inc. ("Cleanit") and Kirstin Castro-Wunsch (collectively, the "Appellants") to undertake steps to come into compliance with the Registration under which Cleanit operates. Cleanit operates a Class I Composting Facility in Edmonton, Alberta. AESRD issued seven amendments to the Enforcement Order. Amendment No. 6 repealed all of the conditions set out in the Enforcement Order except one clause. The final remaining clause was repealed in Amendment No. 7 at the request of the Appellants. The Appellants appealed both the issuance of the Enforcement Order and the issuance of Amendment No. 6.

[2] A number of preliminary and procedural issues were raised. The Board received and reviewed written and oral submissions from the Appellants and AESRD.

[3] The Appellants acknowledged the prescriptive clauses in the Enforcement Order have all been repealed and replaced and the only relevant sections of the Enforcement Order are the "whereas" clauses and, therefore, the appeal of the Enforcement Order was dismissed as it was moot.

[4] This decision also deals with whether Amendment No. 6 is appealable under section 91(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). Section 91(1)(e) of EPEA only allows appeals of enforcement orders if they were issued pursuant to section 210(a), (b), or (c). It was determined the clauses included in Amendment No. 6 are not appealable under section 91(1) of EPEA because Amendment No. 6 was not issued under section 210(1)(a), (b), or (c) of EPEA.¹ Therefore, the appeal of Amendment No. 6 was also dismissed.

¹ Section 91(1)(e) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances: ...

(e) where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed may submit a notice of appeal...."

II. BACKGROUND

[5] On December 13, 2011, the Director, Northern Region, Operations Division, Alberta Environment (the “Director”) issued Enforcement Order No. EO-2011/03-NR (the “Enforcement Order”) under EPEA to the Appellants requiring them to take specific steps to ensure the composting facility comes into compliance with the Registration under which Cleanit operates.²

[6] On December 20, 2011, the Appellants filed an appeal of the Enforcement Order and requested a stay. The Board notified the Director of the appeal, requested a copy of the Director’s records (the “Record”), and canvassed available dates for a mediation meeting, preliminary motions hearing, or hearing. The Board asked the Director to respond to the Appellants’ stay request. The Board received the Director’s comments on the stay request on December 21, 2011. The Director requested the stay be denied, but if an interim stay was granted, that specific conditions should be included.

Section 210(1) of EPEA provides:

“Where in the Director’s opinion a person has contravened this Act, except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:

- (a) the suspension or cancellation of an approval, registration or certificate of qualification;
- (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
- (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;
- (d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 159, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;
- (e) specifying the measures that must be taken in order to effect compliance with this Act.”

² The *Activities Designation Regulation*, Alta. Reg. 276/2003, specifies those activities that require an approval, a registration, or a licence. Cleanit, a Class I Composting Facility falls under Schedule 2, Division 1 (e), which includes:

“the construction, operation or reclamation of a Class I compost facility that accepts not more than 20 000 tonnes of waste per year for composting....”

Section 5(2) of the *Activities Designation Regulation* states:

“The activities listed in Schedule 2 are designated as activities in respect of which a registration is required.”

[7] On December 21, 2011, after consulting with the Appellants and Director (the "Parties") on available dates, the Board notified the Parties that an oral preliminary motions hearing regarding the stay would be held on January 16, 2012.

[8] On December 22, 2011, the Appellants asked the Board to adjourn the oral preliminary motions hearing while discussions continued between the Parties. The Board cancelled the oral preliminary motions hearing and did not make a decision on the stay request.

[9] Between March 2, 2012, and June 29, 2012, the Director issued a series of amendments to the Enforcement Order.

[10] The Board received a copy of the Record on March 9, 2012, and a copy was provided to the Appellants on April 2, 2012.

[11] The Parties asked the appeal of the Enforcement Order be held in abeyance while discussions continued. Regular updates were provided to the Board.

[12] On January 8, 2013, the Director issued Amendment No. 6 (the "Amendment No. 6"). On January 16, 2013, the Appellants appealed the issuance of Amendment No. 6. On January 21, 2013, the Board acknowledged the appeal and notified the Director of the appeal. On January 24, 2013, the Appellants requested a stay of Amendment No. 6.

[13] On January 28, 2013, the Director requested the Board determine whether the issuance of Amendment No. 6 is appealable under EPEA.

[14] On January 30, 2013, the Board received submissions from the Appellants regarding the stay request. The Director responded on February 13, 2013, and a rebuttal submission was received from the Appellants on February 21, 2013.

[15] Submissions were received between February 6, 2013 and February 21, 2013, on the issue of whether Amendment No. 6 was appealable.

[16] On April 16, 2013, the Board notified the Parties that the stay was denied. The Board also notified the Parties that it required additional information to determine the issue of whether the issuance of Amendment No. 6 was appealable.

[17] In consultation with the Parties, the Board notified the Parties on May 1, 2013, that an oral preliminary motions hearing would be held on June 19, 2013, to hear arguments on the following issues:

1. Given that all of the substantive provisions of the Enforcement Order have been repealed, is the original appeal (EAB Appeal No. 11-177) moot? If the original appeal is moot, what is the effect on the new appeal (EAB Appeal No. 12-041)?
2. Is the Enforcement Order relevant to the Board's consideration with respect to the appeal of Amendment No. 6 (EAB Appeal No. 12-041)?
3. If the Enforcement Order is relevant to the Board's consideration, was the Enforcement Order appealable? How does the decision regarding whether the Enforcement Order was appealable affect the Board's jurisdiction with respect to the appeal of Amendment No. 6 (EAB Appeal No. 12-041)?
4. Where an enforcement order contains conditions issued pursuant to section 210(1)(a), (b), and (c), and conditions issued pursuant to section 210(1)(d) and (e), is the Board's jurisdiction limited to only dealing with the conditions issued pursuant to section 210(1)(a), (b), and (c), or can the Board deal with all of the conditions included in the enforcement order?
5. What issues included in the Notice(s) of Appeal should be considered at a hearing, should one be held?

[18] On June 7, 2013, the Board received submissions from the Parties.

[19] On June 19, 2013, the Board held an oral preliminary motions hearing in Edmonton, Alberta.

III. Enforcement Order

A. Submissions

1. Appellants

[20] The Appellants' position was that there remains a live controversy since the Enforcement Order was issued. The Appellants stated the intent of Amendment No. 6 and Amendment No. 7 was to replace or supersede the Enforcement Order. The Appellants acknowledged there is nothing left of the original Enforcement Order for the Board to adjudicate and, therefore, the appeal of the Enforcement Order is effectively moot.

2. Director

[21] The Director submitted the original appeal is moot because there are no substantive clauses left in the Enforcement Order and there is nothing left to be gained by continuing with the appeal of the Enforcement Order.

[22] The Director explained Amendment No. 6 essentially removed and replaced the requirements of the Enforcement Order and all preceding amendments thereby making the Enforcement Order irrelevant and an appeal of it moot.

[23] The Director explained the "Whereas" section of the Enforcement Order would be relevant as it sets out the foundation and facts that led to the issuance of the Enforcement Order.

B. Analysis

[24] Both the Appellants and the Director are in agreement the appeal of the Enforcement Order is moot. All of the conditions in the Enforcement Order have been replaced or deleted. As a result, there are no conditions from the Enforcement Order that the Appellants must comply with now. The Appellants must now meet the conditions set out in Amendment Nos. 6 and 7, not those set out in the Enforcement Order. The only part of the Enforcement Order that is relevant to the issues before the Board are the "Whereas" clauses. These clauses describe the facts that resulted in the Enforcement Order and seven amendments being issued. Even if the appeal of the Enforcement Order was heard, there are no clauses in effect that the Board could recommend that they be reversed or varied, because they have all been removed and replaced by the clauses in Amendment No. 6 and Amendment No. 7.

[25] Therefore, the Board dismisses the appeal of the Enforcement Order (Appeal No. 11-177) for being moot.

IV. Is Amendment No. 6 Appealable?

A. Submissions

1. Appellants

[26] The Appellants explained the material they accept at the facility includes food feedstock, paper waste, biosolids, yard waste, and liquid waste from car washes, hydro dig operations, and parking lot sumps.

[27] The Appellants stated the Enforcement Order was issued as a response to odour complaints to AESRD and a site characterization report completed by the Edmonton Waste Management Centre of Excellence. The Appellants said that, since the Enforcement Order was issued, they have made changes to the site and commissioned a series of reports. The Appellants confirmed they are taking steps to convert to a ground level, forced aerated static pile system to reduce odour created in the composting process.

[28] The Appellants explained the main source of odours was from material received from Strathcona County and the Town of Canmore, but Cleanit terminated the contracts with these municipalities to stop receiving the material that caused the odours.

[29] The Appellants stated that at the time Amendment No. 6 was issued, the total volume of material on the site was approximately 64,315m³.

[30] The Appellants said the cost of removing 66,000m³ of material from the site within the timelines set out in Amendment No. 6 would be prohibitive, since trucking expenses would be \$12.00 per cubic metre plus the fee to deposit waste at an approved waste management facility. The Appellants stated the costs to comply with Amendment No. 6 would financially cripple the facility.

[31] The Appellants explained the system they are transitioning to is a forced aerated static pile system. The Appellants stated that as a result of terminating its customer contracts to comply with the limit of receiving only 20,000 tonnes of material per annum, the Appellants received virtually no revenue in November and December 2012 and suffered reduced revenue throughout 2012. This impacted the Appellants' implementation of the forced aerated static pile

system, and implementation of the new system is contingent on the continuation of the Registration.

[32] The Appellants argued it would be unreasonable if Cleanit was required to breach contracts it has made with municipalities if the aerated static pile system is not fully operational by March 1, 2013.

[33] The Appellants explained they will maintain a total amount of material on the site of no more than 58,333m³ by December 2013, which allows for: (1) a buffer of the amount of material received on the site; (2) the time the material must remain on site to be processed and to mature; (3) leftovers recycled from the previous composting cycle that are needed for the forced static pile aeration system; and (4) a reasonable time to sell the finished compost.

[34] The Appellants submitted the facility is not causing harm to the environment.

2. Director

[35] The Director submitted the Board does not have the jurisdiction to hear the appeal of Amendment No. 6. The Director noted section 91 of EPEA sets out the circumstances in which a person may submit a Notice of Appeal, but none of the sections state that a person can file an appeal where the Director issues an amendment under section 212 of EPEA.

[36] The Director noted section 91 of EPEA contemplates that some amendments are appealable, but the Legislature decided not to include a right of appeal when the Director issues an amendment of an enforcement order, as opposed to an approval. The Director noted that, in order for the Board to have jurisdiction to hear an appeal, the legislation must provide for it, but in the case of an amendment of an enforcement order, such as in the case for Amendment No. 6, the Board does not have jurisdiction to hear the appeal.

[37] The Director argued Amendment No. 6 was not an enforcement order and was not issued pursuant to section 210 of EPEA. The Director submitted that even if the Board considered Amendment No. 6 was issued pursuant to section 210, the Board still lacks jurisdiction to hear the appeal.

[38] The Director noted section 91(1)(e) of EPEA sets out the types of enforcement orders that may be appealed.

[39] The Director submitted Amendment No. 6 does not suspend or cancel the Appellants' Registration, but the requirements under Amendment No. 6, if it was an enforcement order, fall within sections 210(1)(d) and (e) and are not appealable under section 91(1) of EPEA.

[40] The Director stated Amendment No. 6 does not order the stopping or shutting down of any activity or thing permanently or for a specified time. The Director submitted the intended effect of Amendment No. 6 is to ensure that composting can occur on the site indefinitely in an environmentally responsible manner and within the regulatory requirements. The Director explained that, without removing a significant amount of material, the current amount of material on the site plus accepting an additional annual input of 20,000 tonnes of material, the long term operation of the composter in an environmentally responsible manner would be unlikely.

[41] The Director explained the maximum operational capacity of the site is 28,571m³ of material at any one time, but at the time Amendment No. 6 was issued, there was 64,315m³ of material, not including the one to two metres of compost base that is spread across the entire site which amounts to an additional 6,000 to 7,000m³ of material. The Director noted that under the Appellants' Registration, they are allowed to accept another 28,571m³ during 2013. The Director stated that if none of the material is removed off the site, there would be an estimated 84,600 to 88,600m³ of material on site. Amendment No. 6 requires the removal of 66,000m³ of material to bring the total amount of material on site to within the estimated maximum operational capacity.

[42] The Director noted the Appellants intend to abandon the static pile method in favour of operating a ground level, forced aerated windrow system, the same kind as required in Amendment No. 6. The Director stated the Appellants expressed the need to remove a significant amount of material, 33,000m³ of material, to make room for the forced aerated windrow system.

[43] The Director stated that, even though the Appellants argued it will cost some unstated amount of money to comply with Amendment No. 6, the Appellants did not provide any evidence to support this and, even if they did, the Board should give more weight to the plain reading of Amendment No. 6, which does not ask the Appellants to stop or suspend composting.

The Director expected the activity of composting would continue during and indefinitely after the implementation of Amendment No. 6.

[44] The Director explained Amendment No. 6 requires any waste accepted onto the site as of March 1, 2013, be composted using only the aerated windrow system. The Director questioned how this could be interpreted as shutting down or ordering the cessation of the Appellants' activities when the Appellants stated the static aerated windrow system is the method of composting the facility is implementing.

[45] The Director acknowledged Amendment No. 6 requires the implementation of one aerated windrow one month prior to the Appellants' stated target date of April 2013. The Director submitted the requirements included in Amendment No. 6 were reasonable and, given the Appellants' stated goals, cannot be construed to mean the Director ordered the Appellants to breach their contracts and stop accepting or processing waste.

[46] The Director submitted Amendment No. 6 looks towards the future when the site will be a well-functioning facility. The Director said that nothing in Amendment No. 6 directly, indirectly, or impliedly, orders otherwise, and it does not order the cancellation or suspension of the registration, nor the stopping, shutting down, or cessation of any activity. According to the Director, since Amendment No. 6 does not order any of the items contained in section 210(1)(a), (b), or (c) of EPEA, there are no grounds for appeal and, therefore, the Board does not have jurisdiction to hear the appeal. The Director requested the appeal be dismissed.

3. Rebuttal Submission

[47] The Appellants submitted the issuance of Amendment No. 6 is, in substance, a new enforcement order, because it deleted, canceled, or repealed 18 of the 19 clauses of the Enforcement Order and all of the amendments. The Appellants argued that even though the Director stated Amendment No. 6 was issued under section 212 of EPEA, it does not mean the purpose and intent was not to, in effect, cancel a registration or permanently shut down the composting facility, or require the Appellants to cease operation of all or a portion of its operations, all of which fall under section 210 (1)(a), (b), or (c).

[48] The Appellants argued Amendment No. 6 requires them to take further substantive steps with the inevitable consequence of reduced revenues or increased expenditures with the risk of putting the Appellants out of business.

[49] The Appellants noted the inclusion of the expiry date effectively canceled the Appellants' Registration, but with Amendment No. 7, the expiry date has been removed.

B. Analysis

[50] Before the Board makes a determination of the supplemental questions asked, it must first determine whether it has the jurisdiction to hear the appeal of Amendment No. 6. The Appellants argued Amendment No. 6 was effectively a new enforcement order whereas the Director argued that, under EPEA, he has the authority to amend an enforcement order and there are no limitations on how or to what extent he can make the amendments.

[51] Section 91 of EPEA specifies the decisions made by the Director that can be appealed to the Board. The only section that refers to an enforcement order is section 91(1)(e), which provides an appeal can be filed by the person receiving such an order under section 210(1)(a), (b), or (c). There is no right of appeal of an amendment to an enforcement order. It is clear from the legislation that the legislators put their minds as to what types of amendments can be appealed. Section 91 allows appeals of amendments to licences, approvals, reclamation certificates, and environmental protection orders. However, amendments to enforcement orders were not included in the list of appealable decisions.

[52] The Board's jurisdiction is derived from its enabling legislation. If an appeal right is not included in the legislation, the Board cannot hear the appeal. If Amendment No. 6 is truly an amendment, then there is no right of appeal.

[53] Based on section 91(1)(e), in order for the appeal to be properly before the Board, the Board has to find Amendment No. 6 is in fact a new enforcement order and that at least one of the provisions in Amendment No. 6 falls within section 210(1)(a), (b), or (c) of EPEA. Both of these requirements must be met.

[54] The Appellants argued Amendment No. 6 was a new enforcement order issued pursuant to section 210 of EPEA. If the Board took the position that Amendment No. 6 is a new

enforcement order, it must still fall within section 210(1)(a), (b), or (c) before it is a valid appeal. In order to fall within these sections, Amendment No. 6 would have to result in the suspension or cancellation of the registration, stop an activity permanently or for a specified period of time, or cease the operation of an activity.

[55] In a plain reading of the clauses of Amendment No. 6, the Director is not ordering the facility to close for any period of time nor to stop accepting wastes providing the amount of waste on the site does not exceed 20,000 tonnes. The intent of Amendment No. 6 is to guide the Appellants to ensure the facility is operating according to the limitations set in the Registration.

[56] Amendment No. 7 removed the expiry date of the Registration. The Board notes Amendment No. 7 was issued at the request of the Appellants. Therefore, there is nothing that indicates the Director intended to cancel or suspend the Registration.

[57] The Appellants explained they intend to start operating a forced aerated windrow system to compost the material. Amendment No. 6 specifies that waste accepted after March 1, 2013 must be composted using this method. It is clear the Appellants determined the forced aerated windrow system would be effective to deal with the waste material it accepts, so the Director is not requiring the Appellants to stop their operations. The Appellants can still accept waste material, but the method of composting would change. There is no limitation on how the material already on the site can be composted. Based on the conditions in Amendment No. 6, the facility will be able to operate using two different composting systems for a period of time; waste accepted after March 1, 2013 must be composted using the forced aerated windrow system while existing waste material received prior to March 1, 2013, can be composted using the old method until the new system is fully operational. The Board understands there will be limited existing material on the site that will be composted using the current composting method since Amendment No. 6 requires the removal of 6,000m³ of material monthly from the site during the first 11 months of 2013.

[58] The Board appreciates Amendment No. 6 requires a large amount of waste material will have to be removed from the site. However, the Appellants explained they intended to remove a large amount of the material in order to construct the forced aerated windrow system. Although the Appellants argued the cost of removing the material could

impact their financial situation, this cannot be a significant factor in the Board's decision given the intent of Amendment No. 6 is to have the Appellants come back into compliance with the Registration under which Cleanit operates. There was no evidence brought forward to indicate the extent of how Amendment No. 6 would impact the Appellants financially.

[59] It is clear Amendment No. 6 does not require the facility to stop an activity for any period of time. The Appellants explained that, under Amendment No. 6, they were required to stop accepting waste material for a period of time during 2012. However, to operate under the Registration, there is a limit on the amount of waste material that can be accepted annually in order to keep the volume of waste material within the limits of the Registration. It is the Appellants responsibility to ensure contracts entered into by the Appellants take into account the limits stipulated in the Registration.

[60] Amendment No. 6 does not suspend or cancel the Registration, nor does it stop any activity or operation. Even if the Board had made a determination that Amendment No. 6 was a new enforcement order, it is not appealable because it was not issued pursuant to section 210(1)(a), (b), or (c) of EPEA. Therefore, the Board dismisses the appeal of Amendment No. 6 (Appeal No. 12-041) for lack of jurisdiction.

[61] As the Board has determined Amendment No. 6 is not appealable under section 91 of EPEA, the Board does not have to determine whether Amendment No. 6 was a "new" order.

V. Other Matters

[62] As the Board has dismissed Appeal No 11-177 for being moot and Appeal No. 12-041 for not being within the Board's jurisdiction, the Board finds it unnecessary to consider the other matters before it. Even though the Board is not determining the issue on whether Amendment No. 6 is a new enforcement order, the Board recognizes this may be a viable argument in certain circumstances where the extent and nature of the "amendments" constitute, in effect, a new enforcement order.

VI. DECISION

[63] The Board dismisses the appeal of the Enforcement Order for being moot and the appeal of Amendment No. 6 for not being within the Board's jurisdiction.

Dated on August 6, 2013, at Edmonton, Alberta.

"original signed by"
Eric O. McAvity, Q.C.
Panel Chair

"original signed by"
D. W. Perras
Board Chair

"original signed by"
Dr. Dave Evans
Board Member