

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: May 13, 2021

CASE NO.:

11-155

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19

Appellants:	See Appendix 1 – Appellant List (11-155)
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Order issued to carry out work and provide financial assurance with respect to the Bowater Mercury Waste Disposal Site
Reference No.:	4345-8HFPHW
Property Address/Description:	Bowater Mercury Waste Disposal Site
Municipality:	City of Dryden
Upper Tier:	Kenora District
ERT Case No.:	11-155
ERT Case Name:	Grandmont v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

AbiBow Canada Inc.
AbitibiBowater Inc.
Abitibi-Consolidated Inc.
Bowater Canadian Forest Products
Inc.

Alain Grandmont
Pierre Rougeau
David J. Paterson
Jacques P. Vachon
William G. Harvey

Weyerhaeuser Company Limited

Counsel

Tyson Dyck

Zachary Silver and Alexandria Pike

Gabrielle K. Kramer

Director, Ministry of the
Environment, Conservation
and Parks

Nadine Harris and Justin Jacob

HEARD:
ADJUDICATOR:

April 27, 2021 by video conference
Hugh S. Wilkins, Member

DECISION

BACKGROUND

[1] On August 25, 2011, the Director, Ministry of the Environment, Conservation and Parks (“MECP”), issued Director’s Order No. 4345-8HFPHW (“Director’s Order”) regarding the Bowater Mercury Waste Disposal Site (“waste disposal site”) in the City of Dryden. The Director’s Order was appealed to the Environmental Review Tribunal (“Tribunal”) pursuant to s. 140(1) of the *Environmental Protection Act* (“EPA”). The Parties listed in Appendix 1 to this Decision are the appellants (“Appellants”).

[2] The waste disposal site was created in 1971 for the disposal of mercury contaminated waste resulting from the demolition of a mercury cathode chlor-alkali plant. The plant produced chemicals for bleaching paper. The process for producing these chemicals caused the plant’s buildings and equipment to become contaminated with mercury. With the dismantling of the plant, eight concrete cells containing mercury contaminated rubble, stabilized sludge, and equipment were buried at the waste disposal site between 1971 to 1981.

[3] Ownership of the waste disposal site has changed hands several times. It is currently owned by 4513541 Canada Inc., which is a corporation in receivership with no shareholders, directors, officers or employees. Past owners or companies associated with the waste disposal site include the Appellants AbiBow Canada Inc., AbitibiBowater Inc., Abitibi-Consolidated Inc., and Bowater Canadian Forest Products Inc., which are

predecessor companies of Resolute Forest Products Inc. and Resolute FP Canada Inc. (“Resolute Canada”). The Appellant Weyerhaeuser Company Limited (“Weyerhaeuser”) is also a past owner.

[4] The Director issued the Director’s Order in August 2011. It requires:

Item No. 1

- 4513541 Canada Inc. shall ensure that the Parties, including their employees, contractors, and representatives, are permitted access to the waste disposal site for the purposes of complying with this Order until otherwise notified by the undersigned Director.

Item No. 2

- Before dealing in any way with the waste disposal site, 4513541 Canada Inc. shall give a copy of this Order to every person who will acquire an interest in the waste disposal site as a result of the dealing.

Item No. 3

- By no later than September 2, 2011, the Parties shall submit to the undersigned Director, written confirmation of having retained a Qualified Consultant to prepare and complete all work specified in Item Nos. 4, 5, 6, 7, 8, 9, 10 and 11 of this Order. The written confirmation shall include the name and professional contact information for the retained Qualified Consultant.

Item No. 4

- Beginning no later than September 16, 2011, the Parties shall assess whether the southeast slope of the waste disposal site is eroding and whether the fence surrounding the waste disposal site is sagging or otherwise compromised.

Item No. 5

- The Parties shall report, in writing, the results of the inspection required by Item No. 4 of this Order, including the particulars of any malfunctions, deficiencies or corrective action to be taken, to the District Manager as soon as they become available and, in any event, no later than September 23, 2011.

Item No. 6

- The Parties shall initiate by September 16, 2011 and continue for the duration of this Order the following groundwater monitoring program:
 1. monitoring wells 1 to 10 shall be sampled during the spring freshet (May or June) and in the autumn (September or October);
 2. sampling shall include measurement of field parameters: pH, temperature, conductivity and water level;
 3. samples shall be analyzed for pH, conductivity, mercury and chloride.

Item No. 7

- The Parties shall report, in writing, the results of the sampling required by Item No. 6 to the District Manager as soon as they become available and, in any event, no later than thirty (30) days from the date of sampling.

Item No. 8

- The Parties shall initiate by September 16, 2011, and continue for the duration of this Order, the following surface water monitoring program:

1. surface water sample sites SW1 and SW2 shall be sampled during the spring freshet (May or June) and in the autumn (September or October);
2. sampling shall include measurement of field parameters: pH, temperature, conductivity and water level;
3. samples shall be analyzed for pH, conductivity, mercury and chloride.

Item No. 9

- The Parties shall report, in writing, the results of the sampling required by Item No. 8 to the District Manager as soon as they become available and, in any event, no later than thirty (30) days from the date of sampling.

Item No. 10

- By December 31, 2011, and on an annual basis thereafter, the Parties shall submit to the District Manager a site condition and water quality assessment report which shall, at a minimum, include the following information:
 1. an assessment of trigger values and any off-site contaminant migration from the waste disposal site;
 2. a site plan illustrating any waste disposal site features significant to the assessment of the waste disposal site impact;
 3. a location map illustrating the waste disposal site relative to nearby sensitive receivers;
 4. a map illustrating water table contours and surface water flow paths, stratigraphic cross-sections;
 5. tables containing all historical water chemistry and water level data;
 6. graphs illustrating historical water quality trends for chloride, conductivity and mercury;

7. an assessment to evaluate compliance with the applicable Reasonable Use Guideline;
8. recommendations for future monitoring;
9. field sampling protocols and the QA/QC measures used; and
10. a statement regarding the condition of the waste disposal site and a summary of required repairs.

Item No. 11

- The Parties shall correct any malfunctions or deficiencies described in Item No. 4 within thirty (30) days of the identification of the malfunction or deficiency, as the case may be.

Item No. 12

- By no later than 4 p.m. on October 1, 2011, the Parties shall deliver to the Director the sum of \$273,063.00 (CDN), payable to the Crown in right of Ontario, as financial assurance in respect of the waste disposal site.

Item No. 13

- The Parties shall ensure that their employees, contractors, agents and representatives take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements.

Item No. 14

- All times described in this Order are Central Standard Time. Failure to comply with a term of this Order by the date or time specified does not absolve the Parties from compliance with that requirement. The obligation to complete the requirement shall continue each day thereafter.

[5] All of the Orderees named in the Director's Order appealed the Director's Order, except for 4513541 Canada Inc.

[6] In November 2011, the Tribunal stayed the Director's Order's financial assurance items and it approved interim work requirements pending the outcome or final resolution of the appeals ("Interim Order"). Among other things, the Interim Order requires surface water and groundwater monitoring with sampling at ten groundwater well locations and two surface water locations twice each year and reporting on the sample results and analysis.

[7] In February and March 2021, the Parties informed the Tribunal that they had reached a proposed settlement of the appeals, which requires continuation of work at the waste disposal site, the payment of financial assurance to the MECP, and the revocation of the Director's Order.

[8] On April 27, 2021, the Tribunal convened a settlement hearing by video conference call at which it heard evidence and submissions in support of the proposed settlement.

Issues

[9] The issues to be addressed are whether the Tribunal should accept the proposed revocation of the Director's Order and dismiss the proceedings under Rule 202 of the Tribunal's *Rules of Practice and Practice Directions* ("Rules").

Evidence and Submissions

[10] In support of the proposed settlement, the Director filed the affidavit of Trina Rawn, which was affirmed on April 20, 2021. Ms. Rawn is the Director who issued the Director's Order. At the settlement hearing, she also provided oral evidence in response to questions posed by the Tribunal.

[11] Ms. Rawn stated that the Interim Order has been complied with to the satisfaction of the Director. She said this has resulted in the completion of several of the action items in the Director's Order, including:

- a. assessment of the fencing and the southeast slope required by Item No. 4 of the Director's Order;
- b. reporting and fence repairs required by Item Nos. 5 and 11 of the Director's Order; and
- c. carrying out of the remaining requirements under Item Nos. 1 to 11 and 13 of the Director's Order, including surface water and groundwater monitoring programs.

[12] Ms. Rawn stated that the proposed settlement consists of a two-year work plan, which would be carried out by Resolute Canada and paid for by Resolute Canada and Weyerhaeuser. Ms. Rawn stated that the main activities in the work plan are:

Activities 1 and 2

- the current groundwater and surface water monitoring programs in the Interim Order would be continued for approximately three years, with an additional surface water monitoring location included and more frequent reporting (annual, as opposed to once every two years);

Activity 3

- stormwater management improvements would be made in response to apparent infilling of ditches limiting effective flow/drainage at the waste disposal site, including repair work to ensure proper surface runoff, groundwater infiltration and efforts to prevent erosion and slumping. This work is important to ensure that appropriate conclusions can be drawn from the storm event sampling data collected (see Activity 7 below).

Following completion of any construction activities, the waste disposal site would be re-surveyed as necessary and an updated site plan and as-built drawings will be prepared (see Activity 6 below);

Activities 4 and 5

- additional down-gradient monitoring wells would be installed in the vicinity of the downgradient property boundary adjacent to the nearby industrial lagoon/aerated stabilization basin to assess the potential for offsite impacts and to determine the extent of any contaminant attenuation through the ground;

Activity 6

- a topographical survey would be completed at the waste disposal site that includes the waste mount, side slopes, ditches and erosional features in order to better understand the potential surface water flow paths. Upon completion of the survey and the stormwater management improvements described above, a summary report would be provided to the MECP discussing the work completed and conditions of the surface water layout, including a revised site plan;

Activity 7

- in addition to the semi-annual monitoring/sampling, surface water sampling would be conducted during storm events to assess potential contaminant pathways and to quantify any contaminants in surface water runoff; and

Activity 8

- to assess the potential for offsite migration of contaminants of concern (i.e. mercury and chloride) from groundwater, a loading assessment and groundwater model would be developed for the waste disposal site

incorporating the data collected during the monitoring period. The assessment would include a groundwater model to simulate the migration of any contamination from the source area in the waste disposal site to the offsite discharge areas in the vicinity of the nearby industrial lagoon/aerated stabilization basin. The surface water loading assessment would determine the total loads of chloride and mercury, if any, in surface water at the site. Following this work, a final report would be submitted to the MECP providing an interpretative assessment of the groundwater and surface water data collected as well as a discussion regarding the risk, if any, of offsite migration of chloride and mercury and any recommended mitigation and/or contingency measures.

[13] Ms. Rawn stated that MECP would ensure that a provincial officer's order is issued to 4513541 Canada Inc. (the current owner of the waste disposal site) to allow Resolute Canada and Weyerhaeuser and their contractors and consultants access to the waste disposal site and to undertake the proposed work plan.

[14] Ms. Rawn stated that within four months of completion of Activities 1 to 7 in the proposed work plan, Resolute Canada and Weyerhaeuser would provide the MECP with a final report and assessment and within three months of delivery of the report, the MECP, Resolute Canada, and Weyerhaeuser would meet to discuss next steps regarding future necessary work at the waste disposal site. She stated that the meeting may address:

- a re-assessment of the remaining "contaminating lifespan" of the waste disposal site;
- a review of the remaining long-term monitoring, maintenance and other work that is appropriate in light of the final report;
- a possible timeline to conclude such future work;
- a re-evaluation of the financial assurance needed;

- mechanisms for contributions of additional financial assurance or the return of financial assurance that is no longer required; and
- whether it is appropriate to relieve any of the Appellants from long-term responsibility for the waste disposal site.

[15] Ms. Rawn stated that the required financial assurance for the long-term maintenance and monitoring of the waste disposal site has now been recalculated to be \$598,436. This is more than twice the amount in the Director's Order. She stated that this recalculation was based on the MECP's financial assurance guide and current information. She stated that the Parties would ensure that the financial assurance held by the MECP for the waste disposal site will be fully funded to this amount by Resolute Canada and Weyerhaeuser.

[16] Ms. Rawn stated that for the time between the revocation of the Director's Order and the meeting of the Parties, the MECP agrees not to issue orders in respect of the waste disposal site to the Appellants or their respective directors and officers to carry out any additional work beyond that in the proposed work plan or to contribute additional financial assurance. She stated that this does not apply if they breach any of their obligations under the settlement, conduct themselves in a manner that exacerbates the parameters of concern at the waste disposal site, or cause or are likely to cause an offsite adverse effect. She stated that this commitment only applies until the meeting of the Parties after which there are no limitations on how the MECP may exercise its regulatory authority with regards to the waste disposal site, except as against the five Bowater Canadian Forest Products Inc. ("Bowater") director and officer Appellants (Alain Grandmont, Pierre Rougeau, David J. Paterson, Jacques P. Vachon, and William G. Harvey).

[17] Ms. Rawn stated that, under the proposed settlement, the MECP agrees to release the five Bowater director and officer Appellants from any civil or regulatory liability related to the waste disposal site or the presence or discharge of contaminants from it. She stated that it is her understanding that none of them have current

involvement with the waste disposal site and only one remains a director of Resolute Canada.

[18] Ms. Rawn stated that the implementation of the work plan by one or more of the Appellants would be without prejudice to any argument that they may have regarding whether they have or had charge, management or control over the waste disposal site property and associated undertakings.

[19] Ms. Rawn stated that nothing in the proposed settlement purports to exempt Resolute Canada or Weyerhaeuser from any obligations imposed under environmental legislation in respect of any actions either of them carry out under the proposed settlement and nothing in the settlement or release constitutes a commitment by the Minister of the Attorney General not to prosecute any person or entity under applicable environmental legislation.

[20] Ms. Rawn stated that the proposed settlement and the revocation of the Director's Order is in the public interest and consistent with the purpose and provisions of the *EPA* in that:

- the proposed settlement brings the appeals to a close and avoids lengthy and complex litigation requiring significant public and private resources;
- the settlement provides for updated financial assurance for the waste disposal site, where previously the MECP held no financial assurance for it;
- the work plan updates and expands upon the work items in the Director's Order and requires the collection of additional information and additional assessment to determine the potential, if any, for offsite discharge of contamination, which will further the MECP's understanding of the conditions at the waste disposal site and inform the scope of any further future work;

- the proposed settlement does not unduly fetter the authority of the MECP to take future regulatory actions as may be warranted to ensure the waste disposal site does not pose a risk to the environment or human health;
- with the exception of the five Bowater director and officer Appellants, the MECP is not prevented from taking any future regulatory actions that may be warranted with respect to the waste disposal site following the meeting of the Parties, and the release of the five directors and officers represents a minimal impact on the ability of the MECP to exercise its regulatory authority in respect of the waste disposal site as those individuals are not expected to have any future involvement with the site; and
- the proposed settlement creates a process for the MECP, Resolute Canada, and Weyerhaeuser to continue discussions regarding the long-term maintenance, monitoring and other work that may be required at the waste disposal site without resorting to litigation.

[21] Based on this, Ms. Rawn stated that she is satisfied that the proposed revocation of the Director's Order is consistent with the purpose and provisions of the *EPA*, is in the public interest, and is protective of the natural environment and human health.

Analysis and Findings

[22] Under Rule 198, where the Director proposes to revoke an order, which is the subject matter of a proceeding, the Director must notify the Tribunal, other Parties, Participants, and Presenters of the proposed revocation. A pre-hearing conference was held for these proceedings on March 26, 2021 at which no requests for status were made. There are no Participants or Presenters and no other viable Parties in these proceedings (4513541 Canada Inc. is in receivership and has no shareholders, directors, officers or employees) beyond those that are party to the proposed settlement. The Tribunal finds that the notification requirement in Rule 198 is satisfied.

[23] Under Rule 202, the Tribunal must consider whether a proposed revocation of an order is consistent with the purpose and provisions of the relevant legislation and whether it is in the public interest. The relevant legislation here is the *EPA*. The purpose of the *EPA*, as set out in its s. 3, is to provide for the protection and conservation of the natural environment. The provisions in s. 18 of the *EPA*, under which the Director's Order was issued, are to prevent or reduce the risk of a discharge of a contaminant into the natural environment and to prevent, decrease or eliminate an adverse effect that may result from the discharge of a contaminant. Upon considering the relevant legislative provisions and the public interest, the Tribunal has the discretion under Rule 202 to either continue with the proceedings or to dismiss them.

[24] Based on Ms. Rawn's uncontradicted evidence, the Tribunal finds that the proposed revocation of the Director's Order is consistent with the purpose and provisions of the *EPA* and is in the public interest. The proposed settlement continues and expands upon the work required under the Director's Order and sets out a pathway for continuing monitoring, sampling, and maintenance at the waste disposal site. It provides funding through financial assurance to ensure that these activities are continued, sets out a process for continuing discussions on future steps, and ensures the application of the polluter pays principle. The Tribunal finds that these measures and actions will help ensure the protection and conservation of the natural environment. The Tribunal finds that the proposed revocation of the Director's Order is in the public interest and that the proceedings should be dismissed.

[25] Subsequent to the settlement hearing, the Director informed the Tribunal on May 12, 2021, that the MECP had received the required financial assurance from Resolute Canada and Weyerhaeuser.

ORDER

[26] The Tribunal directs the Director to revoke the Director's Order and orders that the proceedings are dismissed.

*Director Directed to Revoke Director's Order
Proceedings Dismissed*

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

Appendix 1 – Appellant List (11-155)

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Appendix 1**Appellant List**

Appellant Name	File No.
Alain Grandmont	11-155
AbitibiBowater Inc.	11-156
AbiBow Canada Inc.	11-157
Abitibi-Consolidated Inc.	11-158
Bowater Canadian Forest Products Inc.	11-159
Pierre Rougeau	11-160
David J. Paterson	11-161
Jacques P. Vachon	11-162
William G. Harvey	11-163
Weyerhaeuser Company Limited	11-175