



Environmental Appeal Board

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DECISION NO. 2018-EMA-021(e) [Group File: 2018-EMA-G02]

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53

BETWEEN:	GFL Environmental Inc.	APPELLANT										
AND:	District Director, <i>Environmental Management Act</i>	RESPONDENT										
AND:	Michael Dumancic, Nathalie McGee, Meaghan Lyall, Margaret & Foster Richardson, Wendy Betts, David Frame, Carol Ann La Croix, Joss Rowlands, Shelley Lee, Barry Mah, Trish Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and Michael W. Betts	THIRD PARTIES										
AND:	City of Delta	THIRD PARTY										
BEFORE:	A Panel of the Environmental Appeal Board Brenda L. Edwards, Panel Chair Linda Michaluk, Member Reid White, Member											
DATE:	Conducted by way of oral and written submissions concluding on April 14, 2020											
APPEARING:	<table border="0"><tr><td>For the Applicant:</td><td>Gary A. Letcher, Counsel Andrea Akelaitis, Counsel</td></tr><tr><td>For the Respondent:</td><td>Gregory Nash, Counsel Alex Little, Counsel</td></tr><tr><td>For the Third Parties:</td><td></td></tr><tr><td>Resident Appellants</td><td>Margaret Richardson</td></tr><tr><td>City of Delta</td><td>Alyssa Bradley, Counsel</td></tr></table>		For the Applicant:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel	For the Respondent:	Gregory Nash, Counsel Alex Little, Counsel	For the Third Parties:		Resident Appellants	Margaret Richardson	City of Delta	Alyssa Bradley, Counsel
For the Applicant:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel											
For the Respondent:	Gregory Nash, Counsel Alex Little, Counsel											
For the Third Parties:												
Resident Appellants	Margaret Richardson											
City of Delta	Alyssa Bradley, Counsel											

INTERIM RELIEF APPLICATION #2**INTRODUCTION AND PROCEDURAL BACKGROUND**

[1] On August 1, 2018, Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver"), issued air quality management permit GVA1090 (the "Permit") to Enviro-Smart Organics Ltd., which is now GFL Environmental Inc. ("GFL"). The Permit, which was issued under both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008, authorizes GFL to discharge air contaminants to the air from its aerobic composting operation in Delta, British Columbia.

[2] GFL appealed various terms and conditions in the Permit and applied for a stay of two specific categories of those terms pending a hearing and decision on the merits of its appeal. On December 10, 2018, the (then) Chair of the Board denied the stay application: *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(a)). As a result, these terms and conditions remained enforceable according to the deadlines in the Permit.

[3] A group of concerned citizens also appealed the Permit but for different reasons than GFL's. These citizens are referred to as the "Resident Appellants" in this decision. Their appeals were joined with GFL's so the appeals could be heard together (collectively "the Appeals"). The Resident Appellants were also made Third Parties in GFL's appeal. The City of Delta is a Third Party in all the appeals.

[4] The hearing of the Appeals was originally set for 15 days commencing June 3, 2019. The hearing convened as scheduled from June 3-28, 2019. As it did not complete, the hearing reconvened from October 28-November 15, 2019 before adjourning. Following the adjournment, in November 2019, GFL brought an application for interim relief; specifically, it applied to adjust (vary) certain deadlines in the Permit from February 28, 2020 and March 1, 2020 to later dates (the "First Interim Application"). The Panel granted that relief on January 15, 2020 (see *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(d)) (the "First Interim Decision").

[5] The hearing of the Appeals reconvened from March 9-16, 2020 and was scheduled to continue the week of March 16-20th. However, on March 16th the Resident Appellants sought, and the Panel granted, an adjournment of the hearing due to health concerns related to the COVID-19 pandemic.

[6] The Chair of the Board convened a Case Management Conference with the Parties and the Panel Chair on April 7, 2020 to address challenges related to reconvening the hearing under the current COVID-19 restraints. A further Case Management Conference will be called by the Chair to further discuss the matter, in the upcoming weeks. The Chair has advised the Parties that the Board is working to making an electronic hearing platform available as soon as possible, so that the hearing can be completed despite the COVID-19 restraints on travel and gathering.

[7] Prior to the hearing adjourning on March 16, 2020, counsel for GFL advised the other Parties and the Panel that it anticipated bringing an interim application to

address deadlines under the Permit, as varied by this Panel in the First Interim Decision.

[8] On March 18, 2020, by Ministerial Order No. M073, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the Province under the *Emergency Program Act*, R.S.B.C. 1996, c. 111. The state of emergency was extended for a further 14 days on April 15, 2020. A series of ministerial orders have followed, including ministerial orders relevant to the operation of GFL facility as an “essential service”.

The New Interim Relief Application

[8] On April 1, 2020, GFL filed this second application for interim relief due to “the COVID-19 pandemic’s impact on the GFL construction and commissioning of the new, full-enclosed facility, state of the art biofilter (and its enclosure), and 15.4 meter stack” (collectively the “New Facility”). GFL requests a sixty-day extension of certain deadlines previously varied by the Panel in the First Interim Decision of January 15, 2020 (the “Date Extensions”). The deadlines approved by the Panel in the First Interim Decision are either April 30 or May 1, 2020, depending on the Permit term category (paragraphs 17-19 of the First Interim Decision).

[9] In light of the quickly approaching deadlines, the Panel has decided this second application on an expedited basis, and it should be read with this in mind. However, in making an expeditious decision, the Panel carefully considered all of the Parties’ submissions whether or not they are referred to in the decision. To the extent that facts and submissions may not appear in this decision, the Parties will need to refer to the record to verify relevant points.

BACKGROUND

[10] The background to the Permit has been thoroughly canvassed in the First Interim Decision and will not be repeated, in detail, here. In brief, GFL operates a turf and composting operation on 29 acres of farmland specifically zoned by the Corporation of Delta for composting operations (“the Facility”). The total property is approximately 57.4 hectares.

[11] The Facility holds a licence issued by the Greater Vancouver Sewerage and Drainage District to accept organic waste (largely from Metro Vancouver municipalities) to produce compost.

[12] The initial stage of the composting process at the Facility is carried out “using the aerobic pile method, within two large, free-span covered buildings” (i.e., not enclosed). Organic waste feedstock is piled onto the building’s concrete floor. An excavator or other means is used to turn the windrows as needed to optimize the primary composting process.

[13] There is no dispute that composting is an aerobic process, meaning that it occurs in the presence of oxygen. There is also no dispute that oxygen reduces the production of odorous air contaminants and, conversely, a depletion of oxygen can produce odours.

[14] When the Permit was issued, the Facility was an “open-air” operation.

[15] In August of 2017, GFL applied for a permit to authorize “the discharge of air emissions” from the composting Facility. A description of the composting operation and the emission sources were identified as part of the application.

[16] Following public consultation on the permit application, and after considerable discussion between GFL and the District Director (and staff at Metro Vancouver), in the spring of 2018, Metro Vancouver provided GFL with draft permits for comment. In response, GFL provided the District Director with a five-page set of “Proposed Criteria” for an air discharge permit that would allow GFL “to continue operating our composting business in the interim while we move forward in a timely manner towards fully enclosing our operations.”

[17] On August 1, 2018, the District Director issued the Permit. The Permit is effective for a term of five years, set to expire on September 30, 2023. It is 43 pages and contains prescriptive and detailed requirements for: operations; design and engineering plan approvals; and, 97 submission requirements including those for 13 plans and 15 types of ongoing performance/progress reports.

[18] GFL’s stated intention throughout the permit application and appeal process has been to upgrade the Facility. It first committed to constructing a new fully enclosed composting facility (i.e., the New Facility) by February 28, 2020¹, subject to the necessary government approvals to construct and operate the New Facility on an expedited basis.

[19] GFL filed its Notice of Appeal with the Board on August 29, 2018. It appeals various terms and conditions in the Permit on the grounds that the District Director erred and exceeded his jurisdiction by including “unduly prescriptive and unnecessary requirements”.

ISSUES

[20] The sole issue to be decided in this application is, “whether the Panel ought to extend, for sixty days, Permit dates and authorizations previously varied by the First Interim Decision”.

DISCUSSION AND ANALYSIS

[21] After receiving GFL’s April 1, 2020 application for a sixty-day extension to various deadlines in the First Interim Decision, the Chair of the Panel wrote the Parties setting a schedule for submissions similar to the process that was followed for GFL’s First Interim Application.

[22] As we did with respect to GFL’s First Interim Application, the Panel has only summarized submissions from any given party, on any given issue, if those submissions are relevant, were provided within the timeframe for submissions set by the Panel and are not repetitious. As noted previously, all submissions were

¹ Amended to May 1, 2020 in the First Interim Decision.

considered, but given the speed with which this decision is needed to be responsive, parties should refer to the record for a full recitation of all evidence and submissions provided to the Panel.

Whether the Panel ought to extend, for sixty days, Permit dates and authorizations previously varied by the First Interim Decision.

GFL's Submissions

[23] GFL submits that the COVID-19 pandemic has had an impact on the ongoing operations of the Facility, and the construction and commissioning of the New Facility. For example, the operations of the Facility are now considered to be an "essential service" under the Local Authorities and Essential Goods and Supplies (COVID-19) Order, ("Ministerial Order M084"). Further, travel, cross-border travel and the conduct of commerce and daily life in Canada are now subject to further orders issued by both provincial and federal ministers. GFL submits that the orders affecting travel affect the construction and commissioning schedule for the New Facility.

[24] GFL submits that the Panel heard evidence during the hearing with respect to the equipment that is planned to be or is presently being installed in the New Facility, including: BDP-supplied agitators, a BacTee floor system, and a new covered biofilter with a 15. 4 metre stack. GFL submits that BDP is a New York based company and BacTee is based in North Dakota. The above-noted orders restricting travel will have an impact on the availability of both BDP and BacTee personnel to travel to the GFL facility to undertake installation, oversight and commissioning work for the agitators and the aeration system.

[25] GFL further submits that because of the timing of third party approvals related to the stack and a building to cover the 1.6 acre biofilter, the "ripple effect" of delays and project interruptions associated with the fabrication, installation, construction, and delivery of these project components will be compounded by the COVID-19 situation.

[26] GFL submits that it is "self-evident that all Canadian residents and businesses are experiencing disruptions and uncertainty" and, "in these extraordinary circumstances", the deadlines varied by the First Interim Decision ought to be "adjusted" for a period of sixty days (i.e., Panel-ordered dates of April 30, 2020 and May 1, 2020 would be varied to June 30, 2020 and July 1, 2020, respectively). GFL is committed to continuing to provide and meet the Permit requirements, as varied by the Panel, for reporting and record-keeping.

[27] GFL submits that this sixty-day relief will provide sufficient time for the emergency situation to subside, and for GFL to have the opportunity to identify and assess the impacts, and ripple effects, of emergency conditions on the construction and commissioning of the New Facility, while allowing for ongoing operation of the Facility as an essential service.

[28] GFL further submits that, no later than June 1, 2020, it will apply to the Panel for specific timeline relief consequent on identification and assessment of

timeline impacts on the construction project, even though the emergency conditions may not, by that date, have subsided.

The District Director's Submissions

[29] The District Director submits that, if GFL has *bona fide* reasons for requesting a further extension of dates and authorizations under the Permit, it ought to apply (with supporting evidence) to the District Director for a Permit amendment. An amendment application to the District Director would allow for an appropriate technical examination of the request and provide an opportunity to lessen any impacts from the application, while addressing GFL's needs. If dissatisfied with the District Director's decision, GFL could appeal the decision to the Board.

[30] The District Director acknowledges that the COVID-19 pandemic and associated delays and interruptions "may justify an extension of due dates or authorizations", but submits that GFL has provided no evidence regarding the current status of the New Facility, nor any evidence justifying the Date Extensions. Specifically, the District Director submits that GFL has provided no evidence demonstrating that it is necessary for the suppliers' representatives to attend the site in person to complete the installation of their equipment, rather than providing their services remotely, e.g., by videoconference.

[31] The District Director submits that the Panel ought to require GFL to: provide a full and transparent report on the current status of the construction/commissioning of the New Facility and the reasons for the delays to date; identify anticipated further delays, the reasons for them, and steps taken by GFL to avoid such delays; identify the circumstances justifying the need for the extension and the consequences to its operations and customers if an extension is not granted; and, provide a timeline for the completion of the remaining stages of the New Facility. Further, the Panel should require GFL to describe any additional measures it proposes to take to protect the community during the extension period.

The Third Parties' Submissions

[32] The Resident Appellants acknowledge that, under Ministerial Order M084, GFL's operations at the Facility are an "essential service". The Resident Appellants further acknowledge that, when they asked for an adjournment on March 16, 2020, it seemed only proper to offer their agreement (in principal) to "the possibility of GFL requiring a further extension of the construction upgrade and testing of the [New Facility]". However, they want to make sure that GFL has an incentive to complete the New Facility as soon as possible.

[33] The Resident Appellants submit that, under section 11 of Ministerial Order M084, all suppliers, distributors and retailers within the Province must act to ensure the effective delivery of essential goods and supplies throughout the Province. The provisions of Ministerial Order M084, and the Ministerial Order Limitation Periods (COVID-19) Order ("Ministerial Order M086"), also made on March 26, 2020, will enable GFL to not only continue their day-to-day operations, but also "continue, uninterrupted, any on-going upgrading and improvements to their facility and

operations". As a result, the Resident Appellants question the necessity of the Date Extensions and ask that, if granted, it be the last such extension.

[34] Delta did not file any submissions with respect to this interim relief application.

GFL's rebuttal submissions

[35] GFL submits that the District Director failed to consider, in his submissions, section 16(3) of the *Act*. This section provides as follows:

- (3) If a permit or an approval is subject to conditions imposed pursuant to a decision made in an appeal to the appeal board under Division 2 [*Appeals under this Act*] of Part 8, those conditions must not be amended except
 - (a) by the appeal board, and
 - (b) after the appeal board has given the parties an opportunity to be heard on the question of whether the conditions should be amended.

[36] As the Date Extensions are limited to the operation of dates in the Permit that were varied by the Panel's First Interim Decision, section 16(3) of the *Act* makes clear that the dates must not be amended except by the Board. Accordingly, GFL has appropriately made its request to this Panel of the Board.

[37] GFL further submits that the current extraordinary circumstances further support the Panel's earlier determination that it, rather than the District Director, ought to decide issues such as the request for the Date Extensions as part of the ongoing appeal process (paragraphs 81-83, First Interim Decision).

[38] GFL submits that there is evidence before the Panel in respect of delivery and construction delays, which may be compounded by the COVID-19 pandemic. Ms. Hirvi Mayne testified that Metro Vancouver is aware, from Mr. King, that an electrical transformer will be required to service the blowers required to operate the aeration system for the covered biofilter, and then exhaust air from the biofilter to the stack at the New Facility. Ms. Hirvi Mayne further testified that, during her site visit in February 2020, Mr. King advised her that GFL was awaiting BC Hydro approval and information regarding the necessary transformer connection. GFL submits that these issues are compounded by the impact of orders providing guidance to construction sites operating during the current declared emergency and impacting travel into Canada. At present, it is unknown when this uncertainty will subside.

[39] Further, Mr. King testified that, after the construction of the New Facility, GFL will require a multiple week commissioning period to complete the full start-up of the New Facility, including: commissioning the air treatment system and mechanical equipment; balancing the air system and biofilter; and seeding the biofilter. Mr. Card testified as to the unique features in the custom-design for the New Facility.

[40] GFL submits that it is not feasible to complete the multi-week installation and commissioning process for the proprietary equipment and systems at the New Facility by videoconference, without attendance at the site of both BDP and BacTee personnel. GFL submits that such an approach to commissioning could well put at risk the protection of the environment and the residents. It reiterates that this application for Date Extensions is to enable it to “identify and assess the impacts of the COVID-19 emergency on its construction and commissioning activities at the site”.

[41] In response to the Resident Appellants’ submissions, GFL submits that the Resident Appellants misunderstand Ministerial Order M084 and, specifically, section 11 of the order. GFL submits that the order applies only to supply chain issues in the Province and does not enable GFL to “continue, uninterrupted, any on-going upgrading and improvement to their facility and operations”.

[42] GFL agrees with the Resident Appellants’ submission that the current operations at the Facility—receiving and processing organic waste from Metro Vancouver municipal customers—are essential services and submits that, without the Date Extensions, the Facility will be required to shut down as of May 1, 2020.

[43] GFL submits that there is evidence before the Panel that GFL is committed to completing construction and commissioning of the New Facility on an expedited timeline and has made extensive progress on the construction of the project. GFL notes that the Panel has also heard evidence, however, that despite GFL’s commitment and ongoing efforts, timelines for complex construction projects, such as construction of the New Facility, get delayed by such things as weather and the fabrication, and supply, of components. Unprecedented events like the COVID-19 pandemic compound any such delays.

[44] Finally, GFL repeats the commitment in its April 1, 2020 application for Date Extensions to meet Permit requirements that relate to the current operations at the Facility, and which would accompany the requested Date Extensions.

The Panel’s Findings

[45] As the Panel noted in the First Interim Decision, the Board has the authority under section 15 of the *Administrative Tribunals Act* (the “ATA”) to make any interim order that it has the jurisdiction to make on a final basis:

43. We are satisfied that section 15 of the ATA, like section 16.1 of the *SPPA* [Ontario *Statutory Powers Procedure Act*], provides the Board and us with “a largely unfettered discretion” to make any interim order that it has the jurisdiction to make on a final basis, to ensure that the statutory rights it deals with are protected pending a final decision on the merits of the appeal. Understood in this way, we find that we have the authority to make interim orders under section 15 of the ATA and that the power is broader than the authority to stay all or part of a decision under appeal as provided for in section 25 of the ATA.

[46] What GFL now seeks is an extension to dates in the Permit that were previously varied by the Panel. GFL seeks the extension so it can better identify and assess the impacts of the COVID-19 emergency situation on its construction and commissioning activities at the site related to the New Facility. GFL will then bring an application for further relief once it is better informed as to the impacts of completing its construction and commissioning of the New Facility under the evolving COVID-19 situation.

[47] In response to the District Director's submission that GFL ought to have applied to him for a Permit amendment rather than bring its application to the Board, we adopt our reasoning in the First Interim Decision at paragraphs 81-83:

81. We also find that GFL is free to bring this Application, rather than seek an amendment of the Permit from the District Director (or pursue some other option, as suggested by the Resident Appellants). Although, at some point, it might have been appropriate to apply to the District Director for an amendment to the Permit for the changes that are the subject of the Application, the Panel agrees with GFL that it is now appropriate for the Panel to decide these issues as part of the appeal process. There is nothing in the *ATA* or the Board's Rules that prevents it from doing so. No persuasive authorities were provided in support of the District Director's position that GFL should have sought an amendment of the Permit, rather than interim relief from the Panel.

82. The Permit is before the Panel and the delays in the appeal process are interwoven with the Board's practices and the conduct of the parties to the appeals. The Board (and this Panel) is the master of its own process and this extends to considering whether to grant interim relief under section 15 of the *ATA* or stays under section 25. The Panel has the jurisdiction to decide this matter and to do so within the context of the Board's appeal processes.

83. Further, even if GFL were to apply for a Permit amendment, it would retain a right of appeal to the Board if the application were denied. This would return the matter to the Board in any event. For all these reasons, the Panel is in the best position to decide the Application.

[48] As counsel will know, any request for relief pending the outcome of an appeal from the terms of a Permit (such as the request for the Date Extensions), requires an application to the Board under section 15 of the *ATA*. Procedural fairness dictates that the other parties to an appeal be given the opportunity to respond to any such request for relief. That is the process that we followed for GFL's First Interim Application, and it is the process that has been applied to GFL's current request for the Date Extensions. In sum, we consider GFL's April 1, 2020 request for the Date Extensions as an application for an interim order under section 15 of the *ATA*.

[49] The Panel considered the provisions of section 16(3) of the *Act* which indicates that the Panel, alone, should receive requests for amendments to interim

relief. We have concluded that the outcome of the request would have been the same, so have not addressed that provision further in this decision.

The Test for Interim Relief

[50] Although the Parties did not address the appropriate test to be applied to GFL's request for the Date Extensions, we have considered what test ought to be applied to the request. As we noted in the First Interim Decision at paragraph 57:

It bears emphasizing that an application for an interim order of a different nature, such as an order adding or otherwise varying terms in a decision under appeal or conveying a benefit on an interim basis, may not involve the *RJR-Macdonald* test. The test to be applied in any given application is a matter to be addressed by the panel in that case, based on the nature of the order requested.

[51] In the unique circumstances of the COVID-19 pandemic, we find that the appropriate test to apply to the present application is not the three-part "stay" test that we applied in the First Interim Decision; i.e., is there a serious issue to be decided, will there be irreparable harm if the stay is not granted, and whether the balance of convenience favours granting the interim order. We have reached this conclusion as the relief sought here is not a "stay" of provisions in the Permit pending the outcome of an appeal. Rather, it is purely a variation of interim relief already granted by the Panel given the current, unique circumstances surrounding the COVID-19 pandemic, circumstances which are not in dispute. In our view, the two-part test for interim relief we referenced in the First Interim Decision; i.e., is there an arguable case for which the Board is empowered to give a remedy and, if so, does the balance of harm favour granting the interim relief, better addresses the current situation.

Application of the Test

[52] We have first considered whether this relief is interim. We have considered the present state of emergency in the Province (a state that was further extended on April 15, 2020), and considered Ministerial Order M084 referencing the current operations at GFL as an "essential service". We have further considered GFL's commitment to bring a more informed and robust application by June 1, 2020. In these circumstances, the relief sought is truly interim as, if granted, it will allow GFL to continue providing the essential services of receiving and processing organic waste from Metro Vancouver municipalities, and other sources, for a further sixty days; otherwise, the current operations would need to cease effective April 30, 2020, and the New Facility would not be operational. Further, as we found in the First Interim Decision, this decision does not involve any final determination on the substantive issues raised in GFL's appeal. The hearing has not yet finished, in part, because of the March 16th adjournment.

[53] Second, we considered the Appellant's suggestion that this interim relief is unnecessary because of Ministerial Orders M084 and M086. We find that the Resident Appellants are mistaken in their assumption that the Date Extensions are

unnecessary because of these orders. The Resident Appellants argue that these orders enable GFL to not only continue their day-to-day operations, but also “continue, uninterrupted, any on-going upgrading and improvements to their facility and operations”.

[54] We find that Ministerial Order M086 deals with statutory time limits and is not applicable to this application.

[55] Ministerial Order M084 is an order of a provincial minister (the Minister of Public Safety and Solicitor General for British Columbia) and, by necessity, addresses only intra-provincial activities. The order provides coordinated measures to ensure the effective delivery of essential goods and services “throughout the Province”. That is to say that the order ensures the supply chain of goods and services involving essential service providers within the Province (such as GFL’s current composting operation at the Facility). Without the order designating it as an essential service, GFL’s existing operations would, arguably, be shuttered from operating even now. We find that the order does not vary the Permit terms, including the terms providing for the cessation of operations at the Facility and the commencement of operations at the New Facility. Neither does it authorize the upgrading and improvement of existing businesses or the international travel of personnel to provincial businesses.

[56] Turning to the first part of the test (whether there is an arguable case), we previously assessed this in the First Interim Decision and found that GFL met this low threshold (paragraphs 94-95). Our conclusion has not changed in the context of the present application.

[57] The next part of the test considers whether the balance of harms favours granting the interim relief.

[58] We are troubled by the fact that while counsel for GFL provided submissions in support of the application, and further submissions in reply to the District Director and the Resident Appellants regarding the need for the Date Extensions, GFL provided very little evidence to support its application. We accept that it is “self-evident” that businesses in the Province, and indeed world-wide, are operating in extraordinary times due to the COVID-19 pandemic and, as a result, there may be (indeed likely are) existing and ongoing impacts on business’ day-to-day operations, and on construction projects. The Panel notes that neither the Resident Appellants, nor the District Director, dispute the likely impact from the COVID-19 situation on the Facility’s operations and construction of the New Facility. Indeed, the Resident Appellants acknowledged that GFL would likely need to bring this very application when they requested the most recent adjournment of the hearing because of their health concerns arising from the COVID-19 situation. The District Director also acknowledged the Resident Appellants’ concerns when they requested the adjournment and recognized the possible need for an amendment to the Permit due to COVID-19 in his submissions.

[59] The Panel acknowledges the Resident Appellants’ and District Director’s concerns regarding the “lack of evidence” in support of GFL’s application. However, there is evidence before the Panel, tendered during the hearing and referenced by GFL in its initial submissions, regarding delays in supply and installation related to

the construction of the New Facility. Counsel for GFL referenced the testimony in evidence from Mr. King and Mr. Card regarding the unique nature of the BDP and BacTee components of the New Facility. That said, it is not “self-evident” that GFL requires the in-person on-site attendance of BDP and BacTee personnel to complete its construction and commissioning of the New Facility, or that there is no workable alternative in these extraordinary circumstances.

[60] Counsel for GFL also referenced the evidence of Ms. Hirvi Mayne, and suggested that there may be further obstacles to the completion and commissioning of the New Facility because of delays in acquiring approval from BC Hydro for a transformer, and then having that transformer brought into service at the site. That may be the case, but it is not “self-evident”.

[61] In the ordinary course of events, we would have expected persuasive evidence of these, and any other actual obstacles (be they legal or circumstantial), that are, or are reasonably likely to, impact GFL’s ability to complete construction and commissioning of the New Facility in the time permitted (as varied by the First Interim Decision). We would also have expected details of the efforts that GFL has taken, and will continue to take, to address those obstacles. We would further have expected evidence to support a submission, such as GFL made, that completing construction and commissioning through the use of alternate technology (e.g., videoconferencing with the suppliers), and/or with the assistance of other qualified individuals (e.g., engineers or others under contract), “could well put at risk the protection of the environment and is not respectful of the residents”.

[62] That said, we are operating in extraordinary circumstances. Courts and tribunals, like commercial businesses, are adapting in real time to the need to continue to operate during this state of emergency and its immediate aftermath. This has meant, and likely will continue to mean, that whether and how decision-making bodies operate will continue to evolve to ensure that urgent matters are addressed in an orderly way. At present, courts and tribunals are issuing notices to legal professionals and the public regarding their processes. By way of example, we note that the BC provincial and superior courts recently notified the legal profession and the public that the courts will conduct some proceedings by videoconference, and will accept unfiled and unsworn affidavits in support of certain applications². Indeed, the Board is currently considering alternatives to our normal in-person hearing to conclude the hearing of evidence in the Appeals from the Permit. We have approached this application in the same spirit of willingness to adapt and adjust our ordinary expectations in this extraordinary time. Our willingness to accept GFL’s submissions and the limited evidence before us in these unique circumstances ought not to be misunderstood. The existence of a pandemic does not mean that it will be sufficient, going forward, to merely “request” changes to the Permit, including Date Extensions. A thoroughly reasoned application supported by evidence will be required.

² <https://www.bccourts.ca/index.aspx>; See also <https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP%2019%20COVID-19%20Suspension%20of%20Regular%20Court%20Operations.pdf>

[63] Having said all of the above, and applying the two-part test for interim relief, we find that, based on GFL's submissions and the limited evidence in support of those submissions, there is an arguable case that the Date Extensions are necessary and appropriate in these unique circumstances. We further find that the balance of harm favours granting the relief sought so that the essential services provided by GFL to Metro Vancouver municipalities, and others, will not cease as of May 1, 2020. We find that it would be contrary to the public interest, in a pandemic, to shutter an "essential service" provider where, as here, there is some evidence that disruptions and delays to the construction and commissioning of the New Facility are occasioned because of restrictions flowing from the very pandemic which required the designation of the operation as an "essential service". However, we also find that it is in the public interest, and in the interest of fairness to the Resident Appellants, that the construction and commissioning of the New Facility continue and be completed as soon as reasonably possible.

[64] We note that the hearing adjourned on March 16, 2020 and GFL has continued to operate during the intervening time. We expect that GFL will have also continued with construction of the New Facility during that intervening time. We find that granting GFL's request for the Date Extensions will provide a further sixty days for GFL to identify, assess and develop a plan to address the impacts of the COVID-19 emergency situation on the construction and completion of the New Facility.

DECISION

[65] For the reasons provided above, GFL's application for the Date Extensions is granted subject to the condition that GFL submits, no later than June 1, 2020, a further application for interim relief (the "Third Application for Interim Relief") which addresses and provides the best available evidence in support of:

- a) the current state of construction and commissioning of the New Facility and the timeline for completion of construction and commissioning and readiness to commence operations at the New Facility;
- b) the reasons for delays in construction and commissioning of the New Facility since the Appeals adjourned on March 16, 2020;
- c) any anticipated further delays in construction and commissioning of the New Facility including:
 - i. identified and reasonably foreseeable obstacles (including—but not limited to—travel restrictions, third party approvals, and availability of materials, equipment or personnel) to the ongoing operations at the Facility, the timely cessation of operations at the Facility, and commencement of operations at the New Facility (as provided for in the Permit and varied by this Panel of the Board);
- d) all steps taken—and to be taken—to address, in a pragmatic and timely manner, and considering the circumstances existing at the time of the application (including any ongoing state of emergency), the anticipated

further delays, including the identified and reasonably foreseeable obstacles described in c); and

- e) the consequences for GFL, its customers, and the general public (including the Resident Appellants) if the relief is not granted.

[66] Should there continue to be a provincial state of emergency when GFL submits its Third Application for Interim Relief (due on or before June 1, 2020), we are prepared to consider unfiled and unsworn affidavits or letters from the Parties attesting to the truth of facts not already in evidence in the Appeals, and referenced by counsel or representatives in their submissions.

[67] If GFL does not submit its Third Application for Interim Relief by June 1, 2020, the remaining Parties are at liberty to bring an application before the Panel for relief, including an application for costs.

"Brenda L. Edwards"

Brenda L. Edwards, Panel Chair
Environmental Appeal Board

"Linda Michaluk"

Linda Michaluk, Member
Environmental Appeal Board

"Reid White"

Reid White, Member
Environmental Appeal Board

April 23, 2020