BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E5
**Telephone:** (250) 387-3464
**Facsimile:** (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

**DECISION NOS. 2017-EMA-004(c) & 2017-EMA-012(b) [Group File 2017-EMA-G04]**

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

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| **BETWEEN:** | A/Deputy Director, Regional Operations Branch, and the Director, *Environmental Management Act* | **APPLICANTS (RESPONDENTS)** |
| **AND:** | Revolution Organics, Limited Partnership | **APPELLANT** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on November 15, 2017 | |
| **APPEARING:** | For the Applicants/Respondents: | Stephen E. King, Counsel<br>Fernando de Lima, Counsel |
| | For the Appellant: | Robert J.C. Deane, Counsel<br>Shelby Liesch, Counsel |

## PRELIMINARY APPLICATION

### APPLICATION

[1] On October 6, 2017, the A/Deputy Director, Regional Operations Branch, Ministry of Environment (the "Ministry") and the Director, *Environmental Management Act* (collectively the "Directors"), applied to dismiss portions of the appeals filed by Revolution Organics, Limited Partnership ("Revolution") on the grounds that:

(1) a portion of the appeals are out of time, and

(2) a portion of the appealable issues can be disposed of in this preliminary application.

[2] The Directors clarified in their reply submissions that the second ground is an attempt to have the appealable issues "bifurcated". They seek to have certain issues disposed of based on the written submissions made during this application, with any remaining issues under appeal to be decided during a subsequent hearing.

[3] Revolution submits that the application ought to be denied, and seeks an order for costs.

[4] This application has been heard by way of written submissions.

## BACKGROUND

[5] The application before the Board relates to two appeals filed by Revolution:

1. Appeal 2017-EMA-004, the original appeal, which was filed against a letter dated February 14, 2017, issued by Cindy Meays, A/Deputy Director with the Ministry (the "February 14 Letter"); and
2. Appeal 2017-EMA-012, which was filed against a September 1, 2017 letter issued by A.J. Downie, for the Director, *Environmental Management Act*, amending certain timelines set out in the February 2017 Letter.

*The original appeal: the February 14 Letter*

[6] The February 14 Letter was written in response to Revolution's August 4, 2016 application to the Ministry; specifically, Revolution applied to the Ministry for a permit that would authorize the introduction of waste into the environment for its existing compost operation located in the Lower Botanie Valley, approximately eight kilometres north of Lytton, BC (the "Facility"). Revolution submitted its application "under protest", as it was (and remains) of the view that its Facility does not discharge waste and that it already holds an approval for its Facility.

[7] The February 14 Letter advised Revolution of deficiencies or defects in Revolution's proposed public notice, and set out the applicable corrections and imposed timelines for posting a proper notice (referred to in the letter as the Environmental Protection Notice or EPN). The February 14 Letter states, in part, as follows:

> Application and Environmental Protection Notice
>
> …. The EPN that Revolution has submitted is not acceptable for the following reasons:
>
> – The EPN as revised by Revolution contains a reference in the second paragraph to Revolution having "already received an approval" for the facility. This is not accurate. …. The reference to Revolution's position of having already received an approval for the facility does not belong in the EPN and the ministry does not consider the EPN provided by Revolution to be an acceptable application for the purpose of the Public Notification Regulation ("PNR").
>
> – The EPN as revised by Revolution does not adequately reference the description, characteristics and volume of waste in accordance with PNR sections 2(1)(e), (f) and (g). The ministry's position is that the EPN must reference the waste discharge of up to 125,000

> wet tonnes of compostable materials per year. The discharge information must be included in the EPN in order to meet the requirements of section 2(1) of the PNR.

I have attached an EPN that addresses the above items and is acceptable to the ministry for the purpose of complying with the PNR and section 33 of the OMRR [*Organic Matter Recycling Regulation*].

In addition, please be aware that the ministry continues to review Revolution's permit application, and any permit that is issued will be based on all waste discharges (e.g. compostable materials, air contamination, effluent) that are applicable.

In your February 10 correspondence, you have also taken issue with the form of the EPN in that it is not the "actual application" form completed by Revolution which was submitted to the ministry on a "without prejudice" basis in August 2016. … if Revolution wishes to use the six-page long application form for the purpose of providing public notification, this would be acceptable to the ministry provided that the application contains the information required by section 2(1) of the PNR. The application submitted by Revolution to the ministry on August 4, 2016 (and dated August 8, 2016) on a "without prejudice" basis does not meet the requirements of section 2(1) of the PNR. In particular:

- Revolution states on page 1 of the application that the facility does not discharge any waste, which is inaccurate and would need to be removed; and
- There is no information provided on page 4 under the headings "discharge source and associated details", "rate of discharge" and "contaminants or parameters in the discharge", which must be filled in.

Therefore, for the purpose of complying with the PNR and section 33 of the OMRR, the ministry would accept the attached EPN, or the six-page application form with the information properly completed in accordance with the above.

Timelines

In my letter of January 19, 2017, there were timelines included for compliance with public notification requirements. ….

… I have agreed to recalculate the timelines in my January 19, 2017 letter in accordance with the following (using the numbering in my January 19 letter):

> … [timelines set out].

All other requirements in my January 19, 2017 letter are unchanged and remain in force. Failure to comply with the requirements of the PNR and section 33 of the OMRR may result in compliance and enforcement action by the ministry.

[8] On February 16, 2017, Revolution filed a Notice of Appeal against the February 14 Letter and applied for an interim stay. In its Notice of Appeal, Revolution identified various errors of law and/or fact made by the A/Deputy Director, which are summarized as follows.

The A/Deputy Director erred by:

1. determining that the Facility does, or would, discharge waste for the purposes of the *Environmental Management Act* (the "*Act*") and the *Organic Matter Recycling Regulation*, B.C. Reg. 18/2002 (the "*OMRR*");
2. determining that Revolution does not hold an "approval" in respect of the Facility;
3. determining that Revolution's posting or publication of its application would not satisfy the posting, publication and notice requirements in sections 5 and 6 of the *Public Notification Regulation*, B.C. Reg. 202/94 (the "*PNR*");
4. directing that Revolution:
    i. may not post or publish the application it submitted for the purposes of the *PNR*;
    ii. may not refer to the past "approval" in the posting or publication for the purposes of the *PNR*;
    iii. must include an estimate of the volume of wet tonnes of compostable materials;
5. requiring the posting or publication to contain information that Revolution considers to be false or misleading in a material respect;
6. directing that Revolution post or publish a notice within deadlines that are unreasonable and impractical; and
7. determining that Revolution's failure or refusal to comply with the February 14 Letter may result in compliance and enforcement action.

[9] Upon receipt of the appeal, the Board asked for submissions on whether the February 14 Letter constitutes an appealable "decision" as defined in section 99 of the *Act*. The parties agreed to a voluntary stay of certain deadlines in the February 14 Letter while this jurisdictional issue was considered.

[10] In *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (2017-EMA-004(a), April 13, 2017), the Board concluded that the February 14 Letter contained some appealable decisions (the "Jurisdiction Decision"). Specifically, the Board found that the A/Deputy Director's imposition of requirements specifying the form and content of the notice under the *PNR* and the imposition of timelines under section 33(3) of the *OMRR* were appealable decisions under section 99 of the *Act*.

[11] In the first part of the application now before the Board, the Directors question whether the Board also found that the February 14 Letter contained appealable decisions on whether the Facility discharges "waste", and whether there was a "prior approval" for the Facility. If so, the Directors submit that those

decisions are beyond the Board's jurisdiction because they were first communicated to Revolution in a prior letter from the Ministry dated July 19, 2016 (the "July 2016 Letter"), and the 30-day appeal period has long since passed. This part of the application will be addressed under Issue 1, below.

[12] After the Jurisdiction Decision was issued, the A/Deputy Director consented to the interim stay remaining in place until the Board issued its final decision on the merits of the appeal or August 31, 2017, whichever occurs first.

[13] On May 2, 2017, after consultation with the parties, the Board scheduled a four-day oral hearing for the appeal of the February 14 Letter, commencing on October 23, 2017. The Board also set the deadlines for the exchange of expert reports and the parties' Statements of Points. Shortly thereafter, the Board also set a schedule for submissions on Revolution's application for a stay, given that the hearing and final decision would not be completed by August 31, 2017.

[14] On June 20, 2017, the Board denied Revolution's application for a stay, but ordered that the voluntary stay agreed to by the Director remain in place as initially agreed to by the A/Deputy Director (until August 31, 2017): *Revolution Organics, Limited Partnership v.* Director, *Environmental Management Act*, (2017-EMA-004(b), June 20, 2017).

[15] On July 28, 2017, the A/Deputy Director filed two expert reports which relate to whether the Facility has or will discharge leachate into land or water, and whether, among other things, the Facility has resulted, results or is likely to result, in the introduction of substances into the environment. On September 11, 2017, Revolution filed an expert report in reply containing the opinions of two experts.

[16] On September 22, 2017, Revolution filed its Statement of Points and documents.

*The second appeal*

[17] In the meantime, on September 1, 2017, A.J. Downie for the Director, *Environmental Management Act*, issued a letter extending the timelines previously established by the February 14 Letter. Revolution filed an appeal of that letter and applied for stay of these amended timelines. A number of Revolution's grounds for appeal against the September 1st letter are identical to those in the original appeal, including (1) and (2), above (i.e., the Facility does not discharge waste and it holds a prior approval to operate).

[18] In his submissions on the stay, the Director applied to dismiss this appeal on various grounds, one of which was that this letter does not contain an appealable "decision". The Board denied the stay and the Director's application to dismiss the appeal in *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (Decision No. 2017-EMA-012(a), September 27, 2017). In this decision, the Board also held that this appeal would be heard at the same time as the appeal of the February 14 Letter.

[19] It is worthwhile noting that, although there are two appeals, the February 14 Letter contains the requirements of primary concern to Revolution: the September 1st amendment simply changes the dates for compliance.

*Events leading up to the subject Application*

[20] On September 27, 2017, the Directors proposed a further pre-hearing teleconference to discuss scheduling at the October 23, 2017 hearing. They were concerned that four days may not be enough time for the hearing given the total number of witnesses, including experts, that may be giving evidence. At that time, the Directors advised that they would "likely be calling in excess of 10 witnesses".

[21] On October 4, 2017, the Directors produced their witness list naming 23 witnesses to be called at the hearing.

[22] On October 5, 2017, a pre-hearing teleconference was convened. During the teleconference the growing witness list was discussed. In addition, the Directors advised that they intended to bring a preliminary application that may limit the scope of the appeal such that the hearing may be completed within four days (the subject application). The Board decided to postpone the October 23rd hearing and refrain from setting new dates until the Directors' application was heard and decided by the Board; however, the deadline for the Directors' Statement of Points remained.

[23] The Directors delivered their Statement of Points and documents as required.

*The Application*

[24] On October 6, 2017, the Directors delivered the subject application. They apply to dismiss portions of the appeals filed by Revolution on the grounds that:

(1) a portion of the appeals are out of time, and

(2) a portion of the appeals can be disposed of in this preliminary application.

[25] The first ground of the application relates to the Jurisdiction Decision. The Directors state:

> … it is not clear whether the Board concluded in the Jurisdictional Decision that the communication of the Director's opinion that 1) Revolution's facility discharges waste and 2) Revolution's facility does not have a prior approval, were appealable decisions under s. 99 of *EMA* [the *Act*].

[26] The Directors submit that, if they are appealable decisions, then the Board does not have jurisdiction to consider them in the present appeal because these "decisions" were first communicated to Revolution in the July 2016 Letter, when the Ministry advised Revolution as follows:

> …
>
> The Ministry's position is that the OMRR amendment applies to Revolution's compost facility, and that Revolution does not hold an "approval" in respect of the facility. As such, we will be expecting to receive an application for a permit in respect of this composting facility prior to August 8, 2016. Failure to submit an application as required by OMRR may be subject to compliance and enforcement action by the Ministry.

...

[27] The Directors submit that, if these are appealable "decisions", then the 30-day appeal period had long since expired and the following decisions originating in the July 2016 Letter are not properly before the Board:

1. That the *OMRR* amendment applies to Revolution's Facility, i.e., the Facility discharges "waste" for the purposes of the *OMRR*.
2. Revolution does not hold an approval in respect of the Facility.

[28] The Directors' second ground is an alternative argument; i.e., if the above-noted matters are not appealable "decisions", then the Board should decide the merits of these issues now. The Directors go on to provide detailed arguments in support of their position that Revolution's facility discharges "waste" into the environment, and that it does not have an existing approval to do so.

[29] The Directors submit that, if the Board agrees with their arguments and decides these issues now, the Board will not need to deal with whether Revolution's facility discharges "waste" in the form of "air contaminants" or "effluent" (leachate) during a hearing on the merits. Rather, the only issues to be dealt with by the Board thereafter would be questions related to public notice.

[30] The Directors note that, when hearing the remaining public notice issues, the Board would not need to hear from any of the four experts, and would not need to hear from 12 of their witnesses concerning exposure to air contaminants. In fact, the Directors submit that it is likely that the subsequent hearing on the remaining public notice issues could be done entirely by written submissions, thus saving the parties and the Board significant expense and time. Conversely, if the Board rejects the Directors' application, then an oral hearing with numerous witnesses, including four experts, will need to be rescheduled.

*Revolution's response to the Application*

[31] Regarding the Directors' "out of time" argument, Revolution submits that, in the Jurisdiction Decision, the Board did not find the A/Deputy Director's statements regarding waste and prior approval in the February 14 Letter were appealable "decisions". Moreover, Revolution submits that the Board expressly left the issues related to waste discharge and prior approval to be argued at the hearing of the merits.

[32] Regarding bifurcation of issues (1) and (2) from the remaining issues under appeal, Revolution submits that the Directors' application is "fundamentally flawed". In the Directors' legal arguments on the merits of these issues (whether the Facility discharges "waste" and whether it has prior approval), Revolution submits that the Directors rely upon assumptions of fact which are "wholly inappropriate" given that the ruling sought would summarily dismiss portions of the appeal on their substantive merits prior to the hearing. Revolution submits that the Directors have filed no evidence in support of the application and that it would be a violation of procedural fairness to consider the application when there is "no defined body of evidence to which Revolution can properly respond." This, Revolution submits, would offend procedural fairness and is not in the interests of justice."

[33] Finally, Revolution asks for its costs in relation to this application "payable forthwith and in any event of the cause, pursuant to section 47 of the *Administrative Tribunals Act*."

[34] Both parties provided detailed arguments and numerous authorities in support of their respective positions on this application, as well as affidavit evidence.

## ISSUES

1. Whether a portion of the appeal of the February 14 Letter is out of time?
2. Whether the Board ought to decide the merits of a portion of the appeals in this application?
3. Whether Revolution ought to be awarded its costs of the application?

## DISCUSSION AND ANALYSIS

### 1. Whether a portion of the appeal of the February 14 Letter is out of time?

[35] In their application, the Directors refer to the Jurisdiction Decision and then state:

> 11. However, it is not clear whether the Board concluded in the Jurisdictional Decision that the communication of the Director's opinion that 1) Revolution's facility discharges waste and 2) Revolution's facility does not have a prior approval, were appealable decisions.
>
> 12. It is the Director's contention that these were not decisions and the Director relies on her submissions to the Board dated 03/MAR/2017 [submissions made on the jurisdictional question of whether the February 14 Letter contained appealable decisions].

[36] The Directors then argue that, if the Director's opinion on these matters were appealable "decisions", then Revolution is out of time to challenge them because those decisions "had actually been made in the July 2016 Letter" and Revolution is out of time to appeal that letter; the 30-day appeal period expired in 2016, and the Board has no authority to extend the time to appeal.

[37] In contrast, Revolution submits that the Board's Jurisdiction Decision was not unclear and that the Directors' question and submissions under this heading are "nonsensical". Revolution argues that paragraph 87 of the Jurisdiction Decision is a "full and complete answer" to the Directors' question. At paragraph 87 of the Jurisdiction Decision, the Board states as follows:

> 87. Accordingly, with the exception of the timelines set by section 5(1)(a) of the *PNR*, the Director's decision to impose timelines under section 33(3) of the *OMRR*, and her decision to specify the form and content of the notice under the *PNR*, are appealable decisions. In making this finding, Revolution will be free to argue, as a preliminary

> matter during the hearing, that the Director had no authority to: (a) require it to post any of these notices as a permit was not required under section 3.1 of the *OMRR*; and (b) that the Director has no authority to specify the form and content of the notice under the *PNR*. [Revolution's emphasis]

[38] Revolution submits that, whether it requires a permit at all under section 3.1 of the *OMRR* is an issue that will be squarely before the Board at the hearing of this matter. [A permit is only required under section 3.1 of the *OMRR* if the Facility is, or will be, discharging "waste" as defined in section 1 of the *Act* and Revolution does not hold an approval for the Facility.] Revolution submits that the parties should proceed to the hearing on the merits where these issues may be addressed on a proper evidentiary record.

[39] Regarding the relevance of the July 2016 Letter, Revolution notes that this letter was issued before Revolution submitted its application for a permit in August of 2016, and did not contain an appealable "decision". Revolution submits:

> 39. … any opinions expressed at that time by the Director could have no legal or practical effect. They were classic statements of the Director's point of view, devoid of any regulatory force. …. In contrast, this Appeal concerns the [February 14] Decision, by which the Director's legally incorrect and factually-mistaken views were translated into express, concrete requirements imposed upon Revolution. The [February 14] Decision is qualitatively different from the July 2016 Letter. ….

*The Panel's findings*

[40] The Directors state that "it is not clear whether the Board concluded in the Jurisdictional Decision that the communication of the Director's opinion that 1) Revolution's facility discharges waste and 2) Revolution's facility does not have a prior approval, were appealable decisions." The Directors then "contend" that these were not "decisions". The Panel agrees.

[41] The Board did not find that these were appealable decisions in the Jurisdiction Decision, nor was it necessary to do so. Revolution sought to appeal certain statements in the February 14 Letter. As a matter of jurisdiction, the Board had to decide whether the letter constituted, and/or any of its contents contained, an appealable "decision" under section 99 of the *Act*. In the context of this jurisdictional question, there was no reason to consider whether the Facility required a permit (whether it discharges waste or holds a prior approval) because that would be one of the ultimate questions to be decided on the merits of the appeal, assuming the Board had jurisdiction over the appeal. The ultimate question would be whether the appealable "decisions" have a proper legal underpinning.

[42] There is no doubt that a government decision-maker will believe that he or she has a lawful basis for making a decision. The Panel agrees with the Directors that a decision-maker interprets the legislation, forms an opinion about his or her legal authority, and makes a decision based on that interpretation and his or her assessment of the facts. In the present case, the decision-maker's interpretation of

the legislation and pertinent facts, whether in the July 2016 Letter or the February 14 Letter, does not become an appealable "decision" under section 99 of the *Act* simply because it forms the basis for the decision. Section 99 of the *Act* provides an exhaustive list of what constitutes a "decision" that may be appealed to the Board. Whether or not the basis of that interpretation is reasonable, is normally one of the main questions to be decided on the merits of an appeal. This case is no different.

[43] Accordingly, the Panel's response to the first two questions posed by the Directors is as follows:

- The Board did not make a finding on whether the Facility deals with "waste" nor whether there was an existing approval in the Jurisdiction Decision. These are questions relevant to the merits of the appeals: they are questions of mixed law and fact that go to the Directors' legal authority to make the decisions under appeal.
- As the Board did not find, and does not find, that they are appealable "decisions" under section 99 of the *Act*, the Directors' application to strike on the basis that Revolution is out of time to challenge them is denied.

## 2. Whether the Board ought to decide the merits of a portion of the appeals in this application?

[44] The Directors ask the Panel to adjudicate certain portions of Revolution's appeals first; portions of the appeal which, the Directors submit, do not require an oral hearing. They ask the Panel to decide grounds (1) and (2) of Revolution's appeal of the February 14 Letter (which were repeated in the appeal of the September 1st letter) as a preliminary matter, thus bifurcating the hearing on the merits. The grounds that they seek to have decided in this application are set out on page 4 of this decision, as follows:

1. The Directors erred by determining that the Facility does, or would, discharge waste for the purposes of the *Act* and the *OMRR*.
2. The Directors erred by determining that Revolution does not hold an "approval" in respect of the Facility.

[45] The Directors refer to Revolution's Statement of Points in which Revolution asserts that the Facility does not discharge "waste" because it does not emit air contaminants, and does not discharge effluent. The Directors submit that, apart from air contaminants and effluent, "there is also a discharge of waste in relation to the appellant's composting facility by the discharge of compostable materials to land and environment as part of the composting operation." It then provides detailed argument in support of its position that "the discharge of compostable materials to ground at the appellant's facility is an introduction of waste into the environment in the course of conducting a prescribed industry, trade or business, or is an introduction of waste into the environment produced by a prescribed activity or operation." As such, the Directors submit that Revolution requires a permit under section 3.1 of the *OMRR*.

[46] The Directors also provide a detailed alternative argument that the receiving pad and composting pads are unpermitted "works" as defined in the *Act*.

[47] Finally, the Directors provide detailed argument in support of their position that Revolution's Facility does not have an approval to operate.

[48] The Directors submit that this application is simply an attempt to resolve certain issues that do not require an oral hearing and which may reduce the scope of a potential oral hearing. They submit that this application raises "just the type of issues that can be disposed of without the significant resources expended in a full oral hearing."

[49] Regarding Revolution's concern with having a proper evidentiary foundation for the application, the Directors submit that Revolution is placing "too high a premium on the 'full appreciation' of evidence that can be gained at a conventional [hearing]".

[50] They further submit that the facts that they have set out in the application are sufficient for the Board's disposition of the specific issues raised, and that these facts are not in dispute. The Directors then list the "undisputed facts" and identify the documents in which those facts are found. The documents include the expert report tendered by Revolution for the hearing on the merits, and affidavits tendered by both Revolution and the Directors in relation to previous preliminary applications.

[51] As noted earlier, Revolution strenuously objects to the Board deciding these issues in this preliminary application.

*The Panel's findings*

[52] Although the Panel agrees that the Board has the power to split or bifurcate a hearing as a matter of procedure, there must first be an application to do so. In general, such an application will be granted when the parties consent or, in any event, have had an opportunity to comment on the appropriateness of that procedure. Splitting a hearing into two parts such that certain issues are decided first may be appropriate when the issues to be heard first are pure questions of law, or involve questions of mixed fact and law and the parties agree on the relevant facts.

[53] In the present case, Revolution objects to the bifurcation and does not agree with the Directors' assertion that the facts are "undisputed". Among other things, Revolution notes that the Directors obtained and filed two expert reports in support of their position that the Facility discharges "waste" in the form of air contaminants and effluent – the very issues that they now seek to have resolved summarily. Further, the Directors identified at least 10 witnesses who would be called to provide testimony on the issue of odour concerns, and two witnesses who would speak to the discharge of leachate. Revolution submits that the number of witnesses and experts that the Directors intended to call at the original hearing in order to establish that the Facility discharges "waste" and requires a permit, supports the need for a full oral hearing on all issues. Revolution submits that this

large number of witnesses does not support the Directors' current positon that these issues can be decided on a summary basis. The Panel agrees.

[54] The Panel is of the view that the Directors have "jumped the gun", by making their full submissions on these issues without Revolution's consent to this procedure, and without the Board first finding that such a procedure is appropriate in the circumstances. The Panel appreciates the Directors' desire to shorten the hearing and make the hearing process more efficient. However, this cannot be accomplished at the expense of procedural fairness, or when it may prejudice an appellant's ability to properly argue its case.

[55] The Directors submit that the facts that they set out in the application are not in dispute and are sufficient for the Board's disposition of the specific issues raised. The Panel is not satisfied that this is correct or that Revolution is placing "too high a premium on the 'full appreciation' of evidence that can be gained at a conventional [hearing]".

[56] As noted by Revolution, the Directors have tendered two expert reports that relate to the first issue of "waste", and Revolution has tendered an expert report authored by two experts in reply. This, alone, suggests that there is disagreement between the parties on at least some of the facts relevant to these issues. The disagreement between the parties on the relevant facts is further evident from the number of witnesses that the Directors intended to call in relation to one or both of the issues that are the subject of this application. Moreover, these two issues are not minor in the context of the appeals. If Revolution succeeds on one or both of these issues it may ultimately resolve both appeals: if the Facility has not, or will not, discharge waste, no permit is required. Similarly, if Revolution already obtained an approval for the Facility, a permit is not required. If no permit is required, no public notice is required.

[57] The Panel finds that, in light of Revolution's opposition to a bifurcation of the hearing, the importance of these issues to Revolution's appeals, and the lack of consensus on the facts underlying the issues sought to be decided in this application, the Directors' application must be denied. The issues identified as (1) and (2) in this application will be heard at the same time as the remaining issues, based upon a full evidentiary record.

[58] The Board will set a new hearing of the appeals in consultation with the parties. In keeping with the Directors' desire to reduce the time and expense of the hearing, the Panel encourages the Directors to reconsider the number of witnesses they require at the hearing in light of their submissions on this application.

### 3. Whether Revolution ought to be awarded its costs of the application?

[59] Revolution asks for its costs in relation to this application "payable forthwith and in any event of the cause, pursuant to section 47 of the *Administrative Tribunals Act*."

[60] In reply to Revolution's application for costs, the Directors submit that costs are not appropriate regardless of the result of its application, given that the

application was filed in good-faith and in an attempt to narrow the issues for a potential oral hearing and to enhance the efficiency of the appellate process.

[61] The Panel is not prepared to address an application for costs at this time. These appeals have already been subject to a number of preliminary applications, and the Panel is of the view that, rather than hearing a further application at this time, the focus ought to be on rescheduling and preparing for a hearing on the merits. Revolution may bring its application for costs at the conclusion of that hearing.

## DECISION

[62] The Board has considered all of the evidence and submissions provided by the parties, whether or not specifically reiterated herein.

[63] For all of the reasons set out above, the Board denies the Directors' applications. The appeals will proceed to a hearing on the merits.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

December 5, 2017