Environmental
Appeal Board

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DECISION NO. 2017-EMA-011(a)

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

BETWEEN:	Director, *Environmental Management Act*	**APPLICANT (RESPONDENT)**
AND:	Thomas H. Coape-Arnold	**APPELLANT**
AND:	Pinnacle Renewable Energy Inc.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 26, 2017	
APPEARING:	For the Applicant:	Meghan Butler, Counsel Johnny Van Camp, Counsel
	For the Appellant:	Thomas H. Coape-Arnold
	For the Third Party:	Simon R. Wells, Counsel

PRELIMINARY APPLICATION

APPLICATION

[1] On September 27, 2017, Bryan Vroom, Delegate of the Director, *Environmental Management Act* (the "Director"), Environmental Protection Division, with the then Ministry of Environment (referred to in the parties' submissions as either the "Ministry" or the "MOE")[1], applied to the Board to "read-down" Ground 1 of the Notice of Appeal filed the Appellant, Thomas H. Coape-Arnold, and to strike Grounds 3 and 7 from the Notice of Appeal.

[2] The Appellant filed his Notice of Appeal against a July 10, 2017 decision of the Director to amend an existing air emissions permit (the "Amendment") held by Pinnacle Renewable Energy Inc. ("Pinnacle") for its woodpellet manufacturing plant (the "Plant") located in the community of Lavington, in the District of Coldstream, approximately 15 kilometres east of Vernon, British Columbia. Further information

[1] In 2017, the Ministry became the "Ministry of Environment and Climate Change Strategy"

about the original permit and the Amendment is provided in the background to this decision, below.

[3] This application has been conducted by way of written submissions.

BACKGROUND

The original permit

[4] In December of 2014, the Ministry issued the original permit #107369 to Pinnacle, allowing Pinnacle to discharge contaminants to the air from its new wood pellet manufacturing plant.

[5] In January of 2015, the original permit was jointly appealed by three members of the community: Geoffrey Nielsen, Kenneth Fiddes, and the Appellant in the current appeal, Mr. Coape-Arnold (the "2015 Appeal"). They appealed the original permit on various grounds, one of which was that the decision-maker failed to consider the emission of volatile organic compounds ("VOCs") from the Plant.[2] The Director applied to strike that particular ground of appeal, but the appeal was withdrawn and abandoned as a result of a mediation attended by all parties. Consequently, that application was never adjudicated by the Board.

[6] The terms and conditions of the mediated resolution of the joint appeal were set out in a June 17, 2016 Memorandum of Understanding, executed by all of the parties to that appeal (the "MOU"). Although the MOU resulted from a confidential mediation, the parties agreed that it would be a public document and the MOU makes that clear.

[7] According to the information before the Board, the Plant has been operating for approximately two years under the original permit, and its emissions have been subject to repeated testing.

The Amendment

[8] On an unknown date, Pinnacle applied to amend the original permit to discontinue the requirement that air be recirculated through the dryers. The Director explains that this amendment was requested "to address corrosion issues from the saturated moisture conditions in the air stream within the dryer, as well as a significant safety issue that presented a fire risk."

[9] On July 10, 2017, the Director granted the requested amendment, and added additional conditions/requirements on his own initiative.

[10] According to the Director, the key changes in the Amendment are as follows:

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[2] According to Wikipedia, "Volatile organic compounds are organic chemicals that have a high vapor pressure at ordinary room temperature. Their high vapor pressure results from a low boiling point, which causes large numbers of molecules to evaporate or sublimate from the liquid or solid form of the compound and enter the surrounding air, a trait known as volatility. …. VOCs are numerous, varied, and ubiquitous. They include both human-made and naturally occurring chemical compounds. Most scents or odors are of VOCs." (see https://en.wikipedia.org/wiki/Volatile_organic_compound_).

a. allow a change of works, including a single-pass instead of a double-pass biomass belt dryer, increased stack heights, and works described with greater specificity (Sections 2.1, 2.2, 2.3);

b. permit a doubling of the permitted rate of discharge (from 66 m^3/s to 132 m^3/s) from both biomass dryer stacks (Sections 2.1.1, 2.2.1);

c. decrease the characteristics of discharge from the baghouse stack from 15 µg/m^3 to 10 µg/m^3 of total particulate matter (Section 2.3.4)[3];

d. increase the maximum combined discharges of total particulate matter from all authorized works from 10.314 kg/hr to 15.480 kg/hr (Section 2.4);

e. require Pinnacle to report to the Director any unexpected condition that leads to an unauthorized discharge within 24 hours of the occurrence, instead of 60 hours, and, within 14 days, require a written report from a qualified professional that describes the root cause of the malfunction and remedial steps taken or planned (Section 3.2);

f. list the minimum requirements of Pinnacle's Fugitive Dust Control Plan to be prepared by a qualified professional, which is to be updated annually for inclusion in the annual report (Sections 3.6, 4.9(vi));

g. require an Air Episode Management Plan to be implemented when an air quality advisory is in effect for the local airshed, or when the $PM_{2.5}$ rolling average exceeds the applicable provincial air quality objective, which plan is to be updated annually for inclusion in the annual report (Sections 3.7, 4.9(vii));

h. provide greater specificity respecting the joint ambient air quality and meteorological monitoring program Pinnacle is required to participate in (Section 4.7);

i. increase the minimum requirements for annual reporting (Section 4.9); and

j. include other administrative changes that provide greater specificity and remove redundancies.

The Appeal

[11] On August 9, 2017, the Appellant filed his Notice of Appeal with the Board against the Amendment. He lists seven grounds for appeal, and provides a detailed explanation for each ground identified.

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[3] According to Wikipedia, "Particle pollution, also called particulate matter or PM, is a mixture of solids and liquid droplets floating in the air. Some particles are released directly from a specific source, while others form in complicated chemical reactions in the atmosphere." (see https://en.wikipedia.org/wiki/Particulate_pollution). PM_{10} is particulate matter 10 micrometers or less in diameter, $PM_{2.5}$ is particulate matter 2.5 micrometers or less in diameter.

[12] Under each ground for appeal, the Appellant also identifies the remedy that he seeks from the Board to address the problems identified in that particular ground.

[13] Of the seven grounds for appeal listed, the Director's application only relates to three: Grounds 1, 3 and 7. The Director argues that Ground 1 of the Appellant's Notice of Appeal titled, "Lack of Proper Consideration of Volatile Organic Compounds in the Process of Assessing the Amendment Application", should be "read-down" to make it clear that this ground only applies to any "increase" in "specific" VOCs resulting from the Amendment.

[14] The Director applies to strike Grounds 3 and 7 in their entirety. Ground 3 is titled "MOE Demonstrated Regulatory Negligence in Allowing the Applicant [Pinnacle] to Operate for One Year Plus in Direct Non-compliance with Permit 107369, and Allowing the Applicant to Proceed with Modification to Their Works in Advance of the Issuance of the Amendment". Ground 7 is titled, "Other Process Issues". The Director's arguments for striking these two grounds are set out in detail, below.

[15] The Appellant is not represented by counsel in these proceedings.

ISSUES

[16] The issues to be decided are as follows:

1. Should Ground 1 of the Notice of Appeal be read down?
2. Should Ground 3 of the Notice of Appeal be struck?
3. Should Ground 7 of the Notice of Appeal be struck?

RELEVANT LEGISLATION

[17] The Amendment was issued under section 16 of the *Environmental Management Act*, which states, in part, as follows:

Amendment of permits and approvals

16(1) A director may, subject to section 14(3) [permits], this section and the regulations, for the protection of the environment,

(a) on the director's own initiative if he or she considers it necessary, or

(b) on application by a holder of a permit or an approval,

amend the requirements of the permit or approval.

...

(4) A director's power to amend a permit or an approval includes all of the following:

(a) authorizing or requiring the construction of new works in addition to or instead of works previously authorized or required;

(b) authorizing or requiring the repair of, alteration to, improvement of, removal of or addition to existing works;

(c) requiring security, altering the security required or changing the type of security required or the conditions of giving security;

(d) extending or reducing the term of or renewing the permit or approval;

(e) authorizing or requiring a change in the characteristics or components of waste discharged, treated, handled or transported;

(f) authorizing or requiring a change in the quantity of waste discharged, treated, handled or transported;

(g) authorizing or requiring a change in the location of the discharge, treatment, handling or transportation of the waste;

(h) altering the time specified for the construction of works or the time in which to meet other requirements imposed on the holder of the permit or approval;

(i) authorizing or requiring a change in the method of discharging, treating, handling or transporting the waste;

(j) changing or imposing any procedure or requirement that was imposed or could have been imposed under section 14 [permits] or 15 [approvals].

...

(7) If a director amends a permit or approval, the director

(a) may require that the holder of the permit or approval supply the director with plans, specifications and other information the director requests, and

(b) must give the holder of the permit or approval notice in writing of the amendment and publish notice of the amendment in the prescribed manner.

...

[18] The Board's powers on an appeal are set out in Part 8 of the *Environmental Management Act*. The relevant sections are as follows:

Appeals to Environmental Appeal Board

100(1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

...

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

APPLICABLE TEST FOR AN APPLICATION TO STRIKE

[19] The Director cites the Board's decision in *Cobble Hill Holdings Ltd. v. British Columbia (Ministry of Environment)*, [2014] B.C.E.A. No. 1 (Q.L.) [*Cobble Hill*], as the applicable test for an application to strike grounds for appeal.

[20] In *Cobble Hill*, the Board considered whether to strike certain grounds for appeal raised in appeals against a permitting decision made under section 14 of the *Act*. The Board first noted that its jurisdiction is derived from, and governed by statutes: it has no inherent jurisdiction. Therefore, in order to determine whether something is within its jurisdiction, the first step is to consider the relevant statutory provisions.

[21] The Board also adopted the test used by Canadian courts to strike claims. That is, claims should be struck only when it is "plain and obvious that the claim at issue cannot succeed". The Board explained why it chose this test, and how it would be applied at paragraphs 46-50:

> 46. ... statutory interpretation – particularly interpreting the limits of one's jurisdiction – is, unfortunately, not as simple as Cobble Hill appears to suggest. The language used in legislation is not always amenable to "black and white", "yes and no" answers. There are often many grey areas. In these circumstances, a proper interpretation may benefit from a factual context, evidence, and additional argument. In the context of an application to strike, it would be careless - and could result in significant unfairness - to strike a claim or a ground for appeal unless it is "plain and obvious" that such a claim or ground for appeal is not within the tribunal's jurisdiction.
>
> 47. Although the "plain and obvious" test establishes a high threshold to meet in order to succeed on an application, the Panel is of the view that the threshold should be high. In addition to the reasons provided above, during a preliminary application, neither the parties, nor the Board, have had time to fully comprehend the legislative framework and the implications of different interpretations of the legislation. There are occasions when evidence can be helpful to interpreting the "mischief" intended to be prevented by the legislation, the consequences of certain interpretations, as well as any technical meanings of words within a specialized area or context.

> 48. In addition, one of the reasons for the existence of administrative tribunals is to make the process more accessible to parties who are not represented by legal counsel. The threshold must be high to ensure that they have a chance to be heard on matters that are, arguably, within the tribunal's jurisdiction.
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> 49. With this latter point in mind, the Panel agrees with the philosophy adopted by the courts that a claim, in this case a Notice of Appeal, should be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies" (per *Speckling*).
>
> 50. Accordingly, the test to be applied on these applications will be whether, based upon a generous reading, it is plain and obvious that the appeal, or the ground for appeal, is beyond the statutory jurisdiction of the Board.
>
> [Emphasis added]

[22] The Board further explained the need for a generous reading of a ground for appeal in *Fitzpatrick v. British Columbia (Ministry of Environment)*, (Decision No. 2013-WAT-004(a)), [2014] B.C.E.A. No. 10 (Q.L.) [*Fitzpatrick*]. At paragraph 29, the Board states:

> 29. The Panel also notes that many of the paragraphs at issue contain multiple points and arguments, some of which are of debatable relevance. Unfortunately, the nature of an application to strike at this juncture forces a preliminary determination of relevancy. Given the potentially serious consequences to an appellant that may flow from the Board's decision on an application to strike (i.e., it can limit the scope of an appeal and the arguments to be made), as stated in *Cobble Hill*, the test establishes a high threshold and the paragraphs should be read "as generously as possible". To achieve the latter, the Panel will attempt to evaluate the main theme or thrust of the disputed paragraphs, rather than focusing on the minutiae, in order to determine whether it is plain and obvious that the paragraphs are beyond the Board's jurisdiction, or are clearly irrelevant to the appeal. If it is not plain and obvious that the paragraph should be struck, the Applicants' jurisdictional concerns, and their concerns with factual and legal relevancy, will have to be raised again and addressed in the usual way during the hearing.
>
> [Emphasis added]

[23] In *Pickford et al v. British Columbia (Ministry of Environment)*, (Group File 2016-EMA-G05, March 29, 2017); [2017] B.C.E.A. No. 19 (Q.L.), the Board summarized the test for an application to strike as follows:

> 118. In summary, as stated in *Cobble Hill*, a high threshold will be applied to an application to strike. Unless it is plain and obvious, on a general reading of a ground for appeal, that the Board does not have jurisdiction over the matter or that the ground is completely irrelevant to the subject of the appeal, the Board should hear the evidence and argument in a hearing of the

merits. An application to strike should only be granted in clear cases. If, from a jurisdictional perspective, a ground for appeal is "borderline", it would not be fair to strike it in a preliminary application: such matters must be determined at the hearing of the merits where all parties have an opportunity to present evidence and further explain their points.

DISCUSSION AND ANALYSIS

Application of the test to the disputed grounds for appeal

[24] As a preliminary point, the Panel finds that the clarification given by the Board in *Fitzpatrick* at paragraph 28, also applies to the present case:

> 28. As a preliminary point it should be clarified that, in making a decision on this application, the factual assertions set out in the Amended Appeal are not being accepted by the Panel as "the facts" simply because they are asserted in the Amended Appeal or are referred to in this decision. The factual assertions set out in the Amended Appeal will be the subject of evidence at the hearing, and may also be the subject of objections and contrary evidence at the hearing. Ultimately, the Hearing Panel will be required to determine the facts, their relevance to the issues, and apply the facts to the law in order to make a decision on the merits of the appeal.

[25] The Panel will now proceed to consider the Director's application with respect to the three grounds for appeal.

1. Should Ground 1 of the Notice of Appeal be read down?

[26] Ground 1 of the Notice of Appeal states, in part, as follows:

> 1. *Lack of Proper Consideration of Volatile Organic Compounds in the Process of Assessing the Amendment Application*
>
> - ...
> - ... There is no evidence that MOE has considered VOCs at all in the issuance and amendment of Permit 107369. At the very least a screening assessment should have been done to assess the potential health risks and nuisance odour impacts associated with cumulative emissions of VOCs from the Lavington Pinnacle facility and the lumber drying kilns at Tolko Lavington. The appellant and others in the Lavington community have experienced nuisance odour conditions in and around the community, particularly under stagnant air conditions. This odour is indicative of a build up of VOCs in the community. The Appellant is prepared to provide witness statements from such impacted persons.
> - VOCs are known to have negative human health impacts, be precursors for the creation of secondary aerosol particulate matter, and to cause nuisance odours. At no point in the process of original

issuance of Permit 107369 or amendment thereto were VOCs considered – this was a clear deficiency in process.

- *The Appellant asks that MOE and Pinnacle undertake a health and odour risk assessment for VOCs being discharged in the Lavington area, including consideration of background discharges from Tolko. The Appellant requests that the Board review this situation with respect to VOCs not being considered, and to Direct [sic] MOE and Pinnacle to undertake the work as described, and to amend the permit accordingly should VOCs be shown to have a measurable health or odour risk.*

  [Appellant's italics]

The Director's submissions

[27] The Director submits that the Board only has jurisdiction to hear and decide issues that relate to the Amendment; not the original permit. It notes that there is a 30-day appeal period, and that the 30-day period for filing an appeal of the original permit has expired. Consequently, the Appellant does not have standing to raise the issue of VOCs generally, as he attempted to do in the 2015 Appeal. Rather, any issues with VOCs must be limited to issues that arise as a result of the Amendment decision, as that is the only decision appealed within the 30-day appeal period. Accordingly, the Director submits that the Appellant's Ground 1 must be "read-down to address only the appellant's concerns relating to alleged increases in specific VOCs resulting from the Amendment, for which he will bear the onus of establishing." [Director's emphasis]

[28] In support, the Director relies upon the BC Court of Appeal's decision *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2017 BCCA 300 [*Unifor*], in which the Court affirmed at paragraph 40 that the appeal of an amendment must be narrowly focused on the particular impugned decision, and the specific issues arising therefrom:

> 40. …. An appeal of a decision does not lay an existing permit open to attacks at large. The appeal must be narrowly focused on the particular impugned decision.

[29] Further, the Director submits that, given that the 2015 Appeal was resolved by agreement of the parties, "raising the general issue of VOCs again does not promote the aims of the administration of justice, in particular, the goal of finality": *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, para 42; *Krist v. British Columbia*, 2017 BCCA 78, para 52).

Pinnacle's submissions

[30] Pinnacle agrees with the Director that the scope of this appeal must, at minimum, be read-down to limit the appeal to any alleged increases in VOC emissions arising from the Amendment. However, Pinnacle is of the view that it would be more appropriate in this case to strike Ground 1 in its entirety as beyond the Board's jurisdiction, than to read it down as suggested by the Director. It

submits that Ground 1, as it is presently worded, does not contain allegations that would support the proposed read down, does not seek relief that might flow from the proposed read down, and that the Director's revised wording actually "stretches" or "alters" Ground 1.

[31] Pinnacle submits that both the Appellant's description of his concerns under this ground, and the broad relief that he requests, reflect the overreach of the Appellant's intentions relative to the Amendment. Specifically, it submits that, in Ground 1, the Appellant has not asserted that there has been, or will be, a change in VOC emissions as a result of the Amendment, let alone result in an *increase* in VOC emissions. Rather, the Appellant's focus is on VOCs generally, which were considered when the original permit was issued.

[32] Further, the remedy requested under Ground 1 does not target the Amendment; rather, the Appellant seeks a broad-based assessment of the impact of VOCs from the facility generally. Pinnacle states at paragraph 15:

> [Ground 1] is not targeted at setting aside or reconsidering the Permit Amendment, but rather the Appellant seeks an order directing a broad environmental assessment of the impact of VOC on a community that the Board has no power to grant. This is not relief that is readily "read down" to fit within the more limited jurisdiction of the Board to consider an appeal of a permit amendment.

The Appellant's submissions

[33] The Appellant emphasizes that VOCs was a ground for appeal in the 2015 Appeal and that, although the Director challenged the addition of VOCs as a ground in that appeal, the Board did not make a decision on that issue. He further notes that the MOU is silent on the question of VOCs, and submits that the question of VOCs was, therefore, "not extinguished through the MOU."

[34] However, the Appellant also agrees that it would not be proper to revisit the issuance of the original permit in the current appeal. Rather, in the context of the Amendment, he submits that it is permissible to assert that the VOCs should have been considered before that decision was made. The Appellant states:

> MOE has authorized a substantial increase in the permissible emissions of Particular Matter in the amendment …. I submit that VOCs and PM are concomitant pollutants associated with wood drying. In increasing the PM permit levels to the extent they did, the Ministry should have examined the concomitant or associated potential increase in VOC levels and their impacts. This question can certainly be adequately addressed within the context of the amendment to the Permit.

[35] In response to Pinnacle's submissions, the Appellant maintains that this ground of appeal regarding VOCs can be edited to support the applied for "reading-down", and should not be struck.

[36] In conclusion, the Appellant states:

> I therefore have no real concern regarding the defendant's [Respondent's] application to "read down" the issue of VOCs to be limited to the Amendment and to the generic class of substance called VOCs, as are controlled and charged for in MOE regulation. While evidence will be presented regarding specific VOCs arising from wood drying, the central issue here is the MOE's lack of consideration of this general class of regulated pollutant in the amendment of the [sic] Pinnacle's air permit. [Appellant's underlining]

Reply submissions

[37] The Director submits that, as the Appellant appears to agree with the application to read-down this particular ground, the application to read-down this ground ought to be granted.

[38] In reply, Pinnacle continues to express concern with the proposed reading down of Ground 1. Further, and more importantly, Pinnacle notes that the Appellant has not conceded or restated the scope of relief sought under Ground 1. It submits that the Appellant is still seeking a comprehensive general review of the impact of VOCs from the facility (and the Tolko facility) on the community generally; there is no focus on any specific VOC change resulting from incremental changes in the facility as approved in the Amendment. Thus, Pinnacle submits that this ground and remedy are not susceptible to reading down. Moreover, Pinnacle submits that the Appellant's remedy is beyond the Board's jurisdiction in this appeal.

The Panel's Findings

[39] The Director applies to read down Ground 1 to state as follows (words in bold are added by the Director):

> Lack of Proper Consideration of **increases** in **specific** Volatile Organic Compounds in the Process of Assessing the Amendment Application

[40] The Panel agrees with the Director that the Board's jurisdiction on this appeal is governed by the particular decision that was appealed within the 30-day appeal period. That decision is the Amendment.

[41] Further, the Panel agrees that an appeal of the Amendment does not invite a wholesale review of the original decision to issue the permit, nor the terms and conditions of that original permit. Accordingly, the Panel agrees that the grounds for appeal must relate to, and be limited to, the Amendment. The question is whether the Director's revised wording of Ground 1 ought to be adopted.

[42] Pinnacle argues that the Director's revised wording should not be adopted because, in essence, it puts words into the Appellant's mouth – words that do not appear anywhere in Ground 1 (i.e., he does not allege that the Amendment will increase VOCs). However, the Panel notes the following:

- the Appellant did not have the benefit of legal advice when he drafted his Notice of Appeal;

- he has agreed that it is appropriate to limit this ground to the Amendment; and
- his submissions on this application clarify that he believes there may be an increase in VOCs due to the new provisions regarding particular matter.

[43] Regarding the latter, the Appellant states: "In increasing the PM permit levels to the extent they did, the Ministry should have examined the concomitant or associated potential increase in VOC levels and their impacts." Whether or not this is the case, is obviously something that the Appellant will have to establish at the hearing in order to make his case. However, the Panel finds that the word "increase" ought to be added to Ground 1, and the content of this ground must be read-down to relate to the Amendment only.

[44] The Director's revised wording of Ground 1 also includes the word "specific" to describe VOCs. It appears that the Appellant seeks to have different words added. He uses the words "generic class of substance called VOCs". It is unclear how these different descriptions will impact the evidence and argument that may be presented by the Appellant under this ground.

[45] Without understanding the implications of adopting the words "specific VOCs" or "generic class of substance called VOCs", the Panel will leave that descriptor out of the ground, and amend it by only adding the word "increase". If the parties disagree on the VOCs properly at issue, they will have an opportunity to address that issue during the hearing. Thus, Ground 1 is amended as follows:

1. Lack of Proper Consideration of <u>increases</u> in Volatile Organic Compounds in the Process of Assessing the Amendment Application.

[46] Regarding the remedy sought by the Appellant, the Panel appreciates Pinnacle's concerns with respect to its breadth. The Panel agrees that this remedy is overly broad and must also be read down such that it only applies to increases in VOCs resulting from the Amendment, increases which must be established by the Appellant during the hearing of his appeal. Even if Pinnacle is correct that this remedy cannot be "readily read down", this difficulty does not justify striking the ground, or the remedy, in their entirety.

[47] The Director's application to read down Ground 1, is granted.

2. Should Ground 3 of the Notice of Appeal be struck?

[48] Ground 3 of the Appellant's Notice of Appeal states:

> *3. MOE Demonstrated Regulatory Negligence in Allowing the Applicant to Operate for One Year Plus in Direct Non-compliance with Permit 107369, and Allowing the Applicant to Proceed with Modification to Their Works in Advance of the Issuance of the Amendment*
>
> [Appellant's italics]

[49] Under this ground for appeal, the Appellant provides the particulars of his concerns as follows.

[50] The Appellant states that the concern underlying this ground for appeal is one of "proper regulatory process". He states that, under the original permit, Pinnacle was required to install a second cyclofilter, but it has operated for over a year without having done so and the Ministry has not taken any enforcement action. The Appellant states that "there appears to have been a silent agreement between the Ministry and Pinnacle that they could operate without this cyclofilter." This concern with a lack of proper regulatory oversight was exacerbated by Pinnacle proceeding to modify its facility (changing the dryer stacks) before the Amendment was issued.

[51] The Appellant acknowledges that there may have been some legitimate reason for Pinnacle operating with only one cyclofilter, but this was never explained or "officially" authorized by the Ministry. He states, "This generates a suspicion of collusion between the Ministry and Pinnacle, or a sense that the Ministry was completely absent from doing their proper job." In his view, a proper regulatory process would require the permit to be clear in what was required, and changes to the permit or enforcement of the original terms would be the proper way to deal with this single cyclofilter issue.

[52] In terms of remedy, the Appellant states:

> The Appellant seeks clarification as to what happened in both the mentioned situations, and clarification as to whether necessary regulatory and legal process was indeed being followed. The Appellant asks the Board to direct MOE to follow appropriate legal protocols and timelines in accordance with best practices of other jurisdictions in relation to this matter.

The Director's submissions

[53] The Director submits that this ground of appeal plainly raises compliance issues that the Board has consistently held are outside of its jurisdiction to consider: *Harder v. British Columbia*, [2015] B.C.E.A. No. 6 [*Harder*], at paragraph 26; *Culos v. Director, Environmental Management Act*, [2017] B.C.E.A. No. 25 [*Culos*], at paragraph 125.

[54] In *Harder*, the Board states as follows at paragraph 26:

> In addition, the Panel finds that most, if not all, of the remedies sought by the Appellants appear to go beyond the scope of the Certificate, or beyond the Board's powers in an appeal of the decision to issue the Certificate under the [*Environmental Management*] *Act*. To the extent that the Appellants' concerns relate to the Certificate, or matters that are regulated by the *Act*, they are primarily matters of compliance and enforcement that are outside of the Board's jurisdiction. For example, the Appellants ask the Ministry to hold the Regional District accountable for compliance with the Certificate through inspections and monitoring, and they ask that the Regional District receive fines and penalties under the *Act* for breaching the Certificate. However, it is the Ministry, not the Board, that conducts inspections and is responsible for compliance and enforcement under the *Act*.

[55] In *Culos*, the Board found as follows at paragraph 125:

> As was the case in his earlier appeals to the Board in relation to the CCLF [Cache Creek Landfill], Mr. Culos' main concern with the Operational Certificate relates to the potential for leachate from the Landfill Extension to contaminate groundwater and, ultimately, the Bonaparte River. As pointed out in the Director's submissions, the Operational Certificate does not permit groundwater contamination. On the contrary, significant mitigative measures have been imposed by both the EA Certificate and the Operational Certificate to ensure such contamination does not occur. In the event that contamination does occur, however unlikely that may be, the contamination would be a matter of future compliance and enforcement; it is not a reason for the Operational Certificate to be rescinded at this juncture (*Harder*).

[56] Accordingly, the Director submits that this ground ought to be struck in its entirety.

Pinnacle's submissions

[57] Pinnacle submits that it was not obliged under the original permit to install and operate all of the equipment allowed under that permit; rather, the original permit only regulates the operations that are installed.

[58] Pinnacle further notes that the Appellant is not seeking an order or determination that the cyclofilter should be installed, or that it is needed for the facility to operate properly. Rather, he seeks "clarification" on what happened and a direction from the Board. Pinnacle submits that this relief is beyond the Board's jurisdiction.

The Appellant's submissions

[59] The Appellant submits that "the fact that a permit was issued which was not complied with, and no action taken, calls into question the technical competency behind issuance of the original permit and/or the rigour of MOE compliance action and/or some form of unwritten agreement between the permittee and MOE."

[60] As he is not represented by counsel, the Appellant states that he is not in a position to provide a response on whether the Board has jurisdiction over this ground. However, regardless of whether or not Ground 3 is within the Board's jurisdiction, the Appellant states that, to maintain public confidence in the Ministry, "it would be helpful to have a compliance assurance plan built into the new amended permit". Specifically, something that explains what the Ministry will be doing to ensure that the facility is in full compliance with the amended permit on an ongoing basis. Accordingly, if the current phrasing of Ground 3 is not properly within the Board's jurisdiction, he suggests that Ground 3 be rephrased to capture his concern as "the Ministry failed to require a compliance assurance plan within the Amendment".

Reply submissions

[61] In reply, the Director argues that the Appellant appears to be making an application to amend his Notice of Appeal to include the lack of a "compliance assurance plan", rather than addressing the Director's application to strike. He submits that the Appellant's request should not be considered at this time, because it has not been properly raised in response to this application, and Pinnacle must be given an opportunity to make submissions on this request.

[62] Pinnacle replies that the Appellant's concern underlying this ground does not relate to the Amendment. Further, Pinnacle submits the Appellant is really asking the Board to act as a commission of inquiry; i.e., to obtain explanations from the Ministry regarding the ongoing administration of permits. This is not the function or jurisdiction of the Board and, therefore, this ground for appeal is clearly outside of the Board's jurisdiction.

The Panel's Findings

[63] The Panel agrees that there is nothing in this ground for appeal that relates to the Amendment. Even giving this ground a generous reading, the main thrust or theme of the ground is on the original permit and a concern that the Ministry did not enforce the terms and conditions of that permit.

[64] Further, the Appellant is seeking a remedy of "clarification", which is more appropriately obtained from the Ministry itself, and requesting the Board to direct the Ministry to follows the best practices of other jurisdictions which, as suggested by Pinnacle, is more in the nature of a commission of inquiry, not an appellate tribunal.

[65] In any event, the wording of Ground 3 and the Appellant's explanation for the ground, all relate to concerns with the original permit and the Ministry's decision, or lack of a decision (regulatory negligence), to enforce the terms of the original permit. As the Panel found in the previous issue, the Board's jurisdiction is limited in this appeal to issues related to the Amendment. Thus, considering the terms of the original permit and whether they were, or ought to have been followed or enforced by the Ministry, are not matters that are within the Board's jurisdiction to address in the context of this appeal. As the Board has previous found in *Harder* and *Culos*, whether the Ministry should conduct an investigation, or pursue enforcement actions, are beyond the Board's jurisdiction. The Board's powers under section 103 of the *Environmental Management Act* are related to the decision under appeal only.

[66] The Panel finds that, on a generous reading, this ground for appeal is plainly and obviously beyond the Board's jurisdiction.

[67] Although the Appellant suggests that Ground 3 be rephrased as "the Ministry failed to require a compliance assurance plan within the Amendment", this new wording is not simply a reading down of the original ground, it is in the nature of an amendment to the Notice of Appeal. If the Appellant wishes to amend his Notice of Appeal, he may do so outside of this application. Any objections or applications in relation to such an amendment will be considered, as required.

[68] For the reasons above, the Director's application to strike Ground 3 is granted.

3. Should Ground 7 of the Notice of Appeal be struck?

[69] Ground 7 states as follows:

> 7. *Other Process Issues*
>
> - Documents were removed from the public MOE database for no apparent reason, and were only restored on July 17, 2017 following request from the Appellant. This action by MOE conveys the impression that persons potentially interested in this application were being denied access to important information at the time of issuance of the permit.
> - *The Appellant asks the Board to review the document posting processes employed by MOE and to direct MOE to employ best practices in ensuring public access to permit related documents*.
>
> [Appellant's italics]

The Director's submissions

[70] The Director notes that, even if the Ministry took an administrative step to remove documents from its public website, doing so "plainly and obviously" bears no relevance to the Amendment. The Director submits that there is no requirement anywhere for such documents to be posted to, or to remain on, the Ministry's website.

[71] Further, the Director submits that there is no indication on the face of the Notice of Appeal, that the Appellant was personally aggrieved by this removal. In fact, the Appellant asked the Ministry to re-post the documents, which it did. Thus, this ground ought to be struck.

Pinnacle's submissions

[72] Pinnacle adopts the Director's submissions.

The Appellant's submissions

[73] The Appellant submits that procedural matters are critically important to procedural fairness and "open delivery" of public services. He states that this point is germane to the public's access to proper redress under the appeal provisions of the *Environmental Management Act*. He urges the Board to consider this ground in some manner and to some degree. He states:

> I will never know if a decision to continue to withhold documents from my view is prejudicial to my appeal. If the Board has some discretion into examining procedural matters that bear upon the Procedural Fairness aspects of its powers, then I would simply ask that it look briefly into this matter,

> whether in the context of this Appeal or through some other avenue open to it. I would appreciate knowing the outcome of such investigation. Surely there must be some written procedural standard that MOE must follow in providing public access to permit related documents.

Reply submissions

[74] In reply, the Director submits that the Appellant has conflated the significance of documents that he says were removed and subsequently restored to the Ministry's website in July 2017, with the effect it might have on him if documents are not publicly posted by the Ministry in the future. Such speculation does not render the Appellant aggrieved or prejudiced for the purposes of this appeal. The Director further notes that the procedure established for the public to access government documents is under the *Freedom of Information and Protection of Privacy Act*.

[75] Pinnacle supports this position and submits that the proper remedy to address the Appellant's concerns is through correspondence with the Ministry.

The Panel's Findings

[76] The Panel agrees that there is nothing in this ground for appeal that relates to the Amendment. Even giving this ground a generous reading, the main thrust or theme of the ground is on the documents posted on the Ministry's website, and the length of time they ought to remain there. While this may well be a matter of general public interest, it is not a matter that properly falls within the scope of this appeal.

[77] The Panel finds that, on a generous reading, this ground for appeal is plainly and obviously beyond the Board's jurisdiction.

[78] If an appellant seeks an investigation into the fairness of government practices or procedures there are other agencies with this mandate, such as the Office of the Ombudsperson.

[79] For all of the reasons above, the Panel finds that, on a generous reading, this ground for appeal is plainly and obviously beyond the Board's jurisdiction.

Additional Matters

[80] The Panel notes that, in its submissions, Pinnacle advises that it "reserves the right" to apply to dismiss certain issues on the merits, regardless of the Board's decision on the application to strike. The Appellant submits that any application that Pinnacle intends to make, ought to be done in a timely manner and seeks the Board's direction on this matter.

[81] Given that the hearing has now been scheduled for February of 2018, the Panel expects that any preliminary applications that Pinnacle wishes to make will be filed in a timely manner. Pinnacle is represented by experienced counsel and the

Panel is of the view that it need not provide any direction on timelines for future applications.

[82] The Panel also notes that the Appellant made an application for document disclosure within his submissions. The Board's Rule 16 requires a person seeking documents to request voluntary disclosure before making an application to the Board. Although a party to an appeal seeking government documents is not required to make their request under the *Freedom of Information and Protection of Privacy Act*, there is a legal test applicable to the production of documents in the context of an appeal: the documents must be relevant to an issue in the appeal, and the documents must be in a person's possession or control (section 34(3)(b) of the *Administrative Tribunals Act*).

[83] In light of these requirements, the Appellant must resubmit his request for document production to the parties in accordance with the Board's Rule 16.

DECISION

[84] In making these decisions, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

[85] The Director's application to read down Ground 1, and to strike Grounds 3 and 7, is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

November 6, 2017