Province of British Columbia

Environmental Appeal Board

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APPEAL NO. 99-WAS-30

In the matter of an appeal under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Alpha Manufacturing Inc. Burns Industrial Park Ltd., Fauna Landfill Ltd. Burns Developments Ltd. and Burns Developments (1993) Ltd.	**APPELLANTS**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
AND:	Corporation of Delta	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair Dr. Robert Cameron, Member Ken Maddox, Member	
DATE:	January 17 & 18, 2000	
PLACE:	Richmond, B.C.	
APPEARING:	For the Appellants: Ernst Bauer For the Respondent: Joyce Thayer, Counsel For the Third Party: Michael C. Woodward, Counsel	

APPEAL

This is an appeal by Alpha Manufacturing Inc. ("Alpha"), Burns Industrial Park Ltd. ("Burns Industrial"), Fauna Landfill Ltd. ("Fauna"), Burns Developments Ltd. ("Burns Developments") and Burns Developments (1993) Ltd. ("Burns 1993") against a May 20, 1999, decision of the Assistant Regional Waste Manager (the "Assistant Manager") to issue Pollution Abatement Order OR-16001 (the "Order"). The Order requires the Appellants to remove demolition waste dumped at an unauthorized site. The subject lands are within the Corporation of Delta ("Delta"). Accordingly, Delta was granted third party status in these proceedings.

The Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 44 of the *Waste Management Act* (the "*Act*"). Section 47 of the *Act* provides the Board with the power to confirm, reverse, or vary the decision being appealed, send the matter back, or make any decision that the person whose decision is appealed could have made and that the Board considers appropriate under the circumstances.

The Appellants seek an order rescinding the Order. Alternatively, they seek to have the Order cancelled against Fauna and Burns Industrial. In the further alternative, they request that the Board suspend the operation of the Order until all current charges against the Appellants under the *Act* have been determined.

Both the Assistant Manager and Delta request that the Order be upheld in its entirety.

BACKGROUND

This appeal involves approximately seven acres south of a landfill located at 8662 River Road, in Delta, B.C. (the "Southern Extension"). The landfill is located on several parcels of land in a peat bog known as Burns Bog. To the north of the landfill is River Road, which runs adjacent to the Fraser River. The Southern Extension is legally described as the Remainder of Parcel "D" of D.L. 437, Group 2, New Westminster District Explanatory Plan 2515. It includes an area referred to as the "southern finger", which extends south from the main body of the Southern Extension.

The Appellants are companies that operated the entire landfill or own land on which those operations took place. Eleonora Anderson is a director and officer of all five Appellants and Ernst Bauer is an officer of Fauna, Burns Industrial, and Burns Developments.

In April 1987, Alpha was issued Waste Management Permit PR-7707 (the "Permit") by the Ministry of Environment, Lands and Parks (the "Ministry"). The Permit authorized the discharge of 900,000 m^3 of inert demolition and land clearing debris, such as wood, asphalt, concrete and excavation soils, onto land with the legal description of Lot 4, Plan 6284, District Lot 131, Group 2, New Westminster District. On March 8, 1988, the Permit was amended to allow the discharge of refuse to lands legally described as the Remainder Part of District Lot 131, Plan 11347, Lot 1, Lot 2, Lot 3, Lot 4, R5, R6, R7, Plan 6284 and R.A. of Plan 2035, all of District Lot 131, Group 2, New Westminster District.

In November of 1993, Alpha began landfilling on the Southern Extension. A road easement through Lots 3 and 4 of the permitted area provided access to the Southern Extension. Access was regulated by a gate at the entrance to this road.

Following a complaint from Delta, the Ministry issued an order to Alpha on December 1, 1993, to cease landfilling on the Southern Extension. The Ministry was concerned that the landfilling operations on the Southern Extension were outside of the Permit boundaries. Landfilling operations on the Southern Extension ceased at that time.

On April 7, 1994, the Regional Waste Manager issued a Pollution Prevention Order and a Pollution Abatement Order, requiring Alpha to cease discharging waste, to propose corrective measures, and to implement pollution prevention measures on the Southern Extension, including removal of the waste deposited at the Southern Extension. Alpha appealed the Regional Waste Manager's decision to the Board. Among Alpha's grounds for appeal was the contention that the Southern Extension was part of the permitted landfilling area.

Subsequently, on January 10, 1996, the Minister of Environment, Lands and Parks cancelled the Permit.

On July 30, 1996, the Board dismissed Alpha's appeal (*Alpha Manufacturing Inc.* v. *Deputy Director of Waste Management (Corporation of Delta, Third Party)*, Appeal No. 94/48 – WASTE) (unreported). The Board held that the Southern Extension was outside of the Permit boundaries, and that the placement of 55,000 m^3 of demolition waste on the Southern Extension constituted pollution as it substantially altered the environment. The Board left it to the Ministry's discretion to determine whether the waste on the Southern Extension should be removed, and whether this would have a greater impact on the environment than partially removing the materials or leaving them in place.

On May 20, 1999, the Assistant Manager issued the Order, the subject of this appeal. In the Order, the Assistant Manager stated that he has reasonable grounds to believe that the discharge of waste on the Southern Extension "is causing pollution through the destruction of bog habitat". He ordered the Appellants to comply with the following requirements:

1. Remove all wastes and mineral fill soil from the… southern extension, located directly south of the area formerly permitted by Permit PR-7707. The waste and mineral soil fill removal operation shall be completed no later than October 31, 1999.

2. Prior to removal of the waste and mineral soil, provide the Regional Waste Manager with a written waste removal monitoring, and contingency plan that addresses any water quality concerns with the surrounding water courses that may arise due to the excavation of the subject materials. The plan must be prepared by a qualified professional and must be approved by the Regional Waste Manager prior to removal of the subject material. The plan shall be submitted no later than June 30, 1999 and implemented to the satisfaction of the Regional Waste Manager.

...

4. No wastes or mineral fill soil shall be placed on the former permitted Alpha Manufacturing Inc. landfill authorized under Waste Management Permit No. PR-7707…

On June 22, 1999, the Appellants appealed the Order to the Board, on the grounds that the Assistant Manager acted without jurisdiction, or alternatively, acted unreasonably in issuing the Order, and that the terms of the Order were unreasonable.

By letter dated August 10, 1999, the Board advised the parties that the appeal was scheduled to be heard on November 8-9, 1999, and that the Appellants' Statement of Points was due on October 19, 1999.

In a letter to the Board dated October 6, 1999, Ernst Bauer requested an "indefinite adjournment and stay of execution" of the Order on behalf of the Appellants. Both the Assistant Manager and Delta opposed Mr. Bauer's requests.

In a letter to all parties dated October 13, 1999, the Board refused to adjourn the November hearing. In the same letter, the Board requested further submissions from the Appellants regarding their request for a stay. The Board never received this information.

By letters dated October 13 and 15, 1999, the Board reminded the Appellants that their Statement of Points was due on October 19, 1999.

By letter dated October 18, 1999, Mr. Bauer again requested that the appeal hearing be adjourned, this time until sometime after March 15, 2000, due to his and Ms. Anderson's business and travel schedules. The Assistant Manager and Delta objected to the request.

By letter dated October 21, 1999, the Board denied Mr. Bauer's second request for an adjournment, finding that "the Appellant has had sufficient time to prepare", having had notice of the hearing since mid-August. The Board also stated that since it had received no submissions in support of the Appellants' request for a stay, it would not proceed to consider that application. Finally, the Board extended the date for the Appellants to file their Statement of Points to October 25, 1999.

Despite numerous reminders and extensions, the Appellants still had not filed their Statement of Points by the end of October. Thus, by letter dated November 1, 1999, the Board requested that the Appellants file their Statement of Points by 4:30 p.m. that day, or the appeal would be dismissed. On that same day, the Board was informed that the Appellants had obtained legal counsel, who requested an adjournment in order to prepare for the appeal. No Statement of Points was filed.

By letter dated November 3, 1999, the Board notified the parties that the appeal hearing scheduled to start on November 8, 1999, was cancelled, and instead a conference call would be held for the parties to discuss how the Board should proceed with the appeal.

As a result of the November 8, 1999, conference call, the parties agreed and the Board ordered that the appeal hearing would commence on January 17, 2000. The Appellants were required to file their Statement of Points and all relevant documents by December 21, 1999. This was confirmed by a letter dated November 10, 1999, from the Board to the parties.

By letter dated December 2, 1999, counsel for the Appellants requested that the hearing be delayed for three months in order to obtain expert evidence. The other parties objected and requested that the hearing proceed as scheduled.

By letter dated December 6, 1999, the Board refused a further adjournment, noting that the Appellants had had over six months to prepare for the hearing, and had already been given several extensions to file their Statement of Points and relevant documents.

By letter dated January 11, 2000, counsel for the Appellants advised the Board that he was no longer acting for the Appellants, and that Mr. Bauer would attend the hearing on behalf of the Appellants.

When the hearing commenced on January 17, 2000, Mr. Bauer again requested an adjournment, saying that he was not able to fully prepare due in part to the recent death of his father-in-law. The Panel denied his request, noting that he had over six months to prepare for the hearing and obtain any expert evidence he required.

At the time of the hearing, the Appellants were not in compliance with any part of the Order.

ISSUES

Two main issues were raised in this appeal:

1. Whether all of the Appellants should have been named as persons subject to the Order.

2. Whether the Order should be rescinded.

RELEVANT LEGISLATION

The authority to issue a pollution abatement order is found under section 31 of the *Act*. It states:

31 (1) If a manager is satisfied on reasonable grounds that a substance is causing pollution, the manager may order any of the following persons to do any of the things referred to in subsection(2):

(a) the person who previously had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned, or introduced into the environment;

(b) the person who owns or occupies, the land on which the substance is located or on which the substance was located immediately before it escaped or was emitted, spilled, dumped, discharged, abandoned, or introduced into the environment;

(c) a person who caused or authorized the pollution.

it applies and may require that person, at his or her own expense, to do one or more of the following:

(a) provide to the manager information that the manager requests relating to the pollution;

(b) undertake investigations, tests, surveys and any other action the manager considers necessary to determine the extent and effects of the pollution and to report the results to the manager;

(c) acquire, construct or carry out any works or measures that are reasonably necessary to control, abate or stop the pollution;

(d) adjust, repair or alter any works to the extent reasonably necessary to control, abate or stop the pollution;

(e) abate the pollution;

(f) carry out remediation in accordance with any criteria established by the director and any additional requirements specified by the manager.

...

(4) A manager may amend or cancel an order made under this section.

DISCUSSION AND ANALYSIS

1. Whether all of the Appellants should have been named as persons subject to the Order.

The Appellants submitted in their Statement of Points that Burns Industrial, Fauna, and Burns Developments should not have been named as persons subject to the Order, as they are not captured by section 31 of the *Act*. They argued, therefore, that the Assistant Manager acted without jurisdiction in naming them in the Order. Neither Alpha nor Burns 1993 took issue with being named in the Order.

At the hearing, Mr. Bauer conceded that Burns Developments was properly named, due, in part, to a letter filed by the Assistant Manager. This letter dated November 14, 1994, shows that Burns Developments remained involved in the landfilling operations and continued to correspond with Delta on matters concerning the Permit boundaries. In the letter, Ms. Anderson refers to Burns Developments as "the contractor operating on" those lands.

Therefore, the remaining issue is whether Burns Industrial and Fauna were properly named in the Order.

Burns Industrial and Fauna submit that neither of them were:

- permit holders or otherwise had possession, charge or control of the substance in question;
- owners or occupants of the Southern Extension
- owners or occupants of land on which the substance was located immediately before it was introduced to the Southern Extension; or
- persons who caused the pollution.

Burns Industrial and Fauna submit that the only nexus between them and the alleged pollution of the Southern Extension is that each are owners of land bordering the northern side of the former Permit area. Burns Industrial owns Lot 4 and Fauna owns Lots 5 and 6, all of Plan 6284, District Lot 131, Group 2, New

Westminster District. They submit that no material was ever removed from Lots 4, 5, or 6 and placed on the Southern Extension.

They note that neither of them were named in the Regional Waste Manager's orders of April 1994, and speculate that they may have been added to the present Order because they share common ownership with the other Appellants and may be perceived to have "deeper pockets" as landowners.

Mr. Bauer testified that the five Appellants are inter-related by shareholding arrangements, by which the companies hold each other's shares, but each company carries out separate functions. He stated that he and Ms. Anderson, his wife, are the sole directors or officers involved with the Appellants, and the Appellants are family companies which are "run out of the same pocket."

Regarding the landfilling operations, Mr. Bauer stated that demolition waste composed primarily of wood was trucked to the Southern Extension via an access road situated on an easement. The easement extends about 30 feet on each side of the border between Lots 3 and 4. Mr. Bauer stated that Utzig Holdings, the owner of Lot 3, granted an easement in favour of Burns Industrial, the owner of Lot 4, and vice versa, in order to create the road. Access onto the road was controlled by a metal gate located on Lots 3 and 4. Once it reached the Southern Extension, waste was dumped and sorted at a one hectare "cell". As each cell was completed, it was separated from the next cell by soil fill.

The Assistant Manager argues that Burns Industrial and Fauna are properly named to the Order, as all five Appellants were run "as one" for a common purpose. The Assistant Manager submits that the Appellants should not be allowed to hide behind the "fiction" of a corporate veil, and that Mr. Bauer's failure to present evidence that the companies were run separately should allow the Panel to draw an adverse inference against the Appellants. The Assistant Manager submits that all of the Appellants gained from the unauthorized landfilling, and therefore all should be responsible for repairing the damage caused.

The Assistant Manager also argues that Fauna and Burns Industrial are properly named as owners of the lands to the north that were used to access the Southern Extension. As such, the Assistant Manager submits that these companies fall within the ambit of section 31(1)(c) of the *Act*; "a person who caused or authorized the pollution". The Assistant Manager says that Mr. Bauer's testimony verifies that at least Burns Industrial controlled entry to the Southern Extension via the access road on its property.

In addition, the Assistant Manager says that funds from the unauthorized landfilling operations were used to buy and/or pay taxes on the lands owned by Fauna and Burns Industrial, which also brings them under section 31(1)(c). The Assistant Manager requested that Mr. Bauer disclose the financial records of these companies as evidence of these transactions, but he did not provide these records. Mr. Bauer did, however, concede that revenues from landfilling operations on the Southern Extension were used to pay three years of overdue property taxes owing on Fauna's land.

Delta adopts the Assistant Manager's arguments, and adds several additional arguments. Delta provided the results of company title searches, showing that all of the Appellants except Alpha share the same registered corporate office. Delta notes that all of the Appellants except Burns Industrial and Fauna were named in a 1996 court decision concerning an injunction to stop continued storage of debris within the Permit area after the Permit had been cancelled, *British Columbia* v. *Alpha Manufacturing Inc.,* [1996] B.C.J. No. 263 (S.C.); upheld, [1997] B.C.J. No. 1989 (C.A.). Delta also notes that all five Appellants were named in a Pollution Prevention Order concerning the former Permit area, issued by the Ministry on February 12, 1997, and upheld by the Board on December 12, 1997 (*Alpha Manufacturing, et al.* v. *Deputy Director of Waste Management (BC Gas Utility Ltd., Third Party)*, Appeal No. 97-WAS-04(b)) (unreported). Delta says that the naming of some or all of the Appellants in these decisions strengthens the position that they should be named in the Order.

The Panel has considered whether each of Burns Industrial and Fauna are properly named as "persons" pursuant to section 31(1) of the *Act*, in the circumstances of this appeal. While the Panel takes notice of the decisions cited by Delta, it finds that a number of them are not directly relevant to this appeal as they involved the former Permit area, and not the Southern Extension.

The Panel finds that Burns Industrial is a person who "caused or authorized the pollution", under section 31(1)(c) of the *Act*. Burns Industrial owned Lot 4, to the north of the Permit area, when landfilling took place on the Southern Extension. Mr. Bauer concedes that the Southern Extension was accessed via a road that crosses through Lot 4, and that entry to this road was controlled by a gate located on Lots 3 and 4. It appears, therefore, Burns Industrial had control over access to the Southern Extension. Further, all of the evidence shows that the corporate officers of Burns Industrial, Mr. Bauer and Ms. Anderson, were closely involved with and fully aware of the landfilling operation on the Southern Extension, due to their involvement with the other Appellants. As such, Burns Industrial "authorized" entry of waste that was to be deposited on the Southern Extension. If Burns Industrial had wanted to stop trucks from dumping waste on the Southern Extension, it could have done so by closing the gate at the access road. Mr. Bauer has presented no evidence to show that Burns Industrial tried to stop waste from being dumped on the Southern Extension, or that Burns Industrial was not aware of this situation.

Conversely, the Panel finds that Fauna is not a "person" listed in any of the subsections under section 31(1) of the *Act*. Although Fauna has some or all of the same corporate officers as the other Appellants, and may hold shares in the other Appellants, there was no evidence presented that Fauna has a controlling interest in the other four companies named in the Order. Further, no evidence has been presented to show that Fauna "caused or authorized" landfilling on the Southern Extension. Similarly, there is no evidence that it had "possession, charge, or control" of the waste deposited on the Southern Extension at any time. While its corporate officers were involved in the unauthorized landfilling operation through their involvement in other companies, no evidence has been provided to tie the activities of Mr. Bauer or Ms. Anderson <u>through their involvement in Fauna</u>, to the Southern Extension. Finally, there is no evidence that Fauna "owns or occupies land" on which the waste was "located immediately before" discharge onto the Southern Extension. While Fauna owns land close to the Southern Extension, there

is no evidence that Fauna's land was used in transporting or sorting waste destined for the Southern Extension.

It appears that Fauna has been added to the Order simply because it is associated by common ownership with the other Appellants. However, this is not a ground for being named under section 31(1). Accordingly, the Panel finds that Fauna should not have been named in the Order.

2. Whether the Order should be rescinded.

a. Application of *res judicata* and issue estoppel

The Appellants request that the Order be rescinded or stayed, and that the Panel reconsider the Board's 1996 finding that the Southern Extension is not within the former Permit area.

At the hearing, Mr. Bauer conceded that the "southern finger" portion of the Southern Extension is not located within the Permit area. Regarding the remainder of the Southern Extension, Mr. Bauer asserted that the Appellants have obtained new evidence, a surveyor's report, that was not available during the Board's 1995 appeal hearing, which may prove that the Southern Extension is actually within the former Permit boundaries. However, Mr. Bauer failed to provide the surveyor's report, and, in any event, he conceded that it may have been part of the evidence before the Board during the 1995 *Alpha* appeal hearing.

Delta submits that the issues of the Permit boundaries and whether the landfilling activities have damaged a unique ecosystem are *res judicata*, and are, therefore, estopped from being re-decided in this appeal.

Delta submits that the doctrine of *res judicata* applies to administrative tribunals such as the Board, citing the Ontario Court of Appeal decision in *Rasanen* v. *Rosemount Instruments Ltd.*, [1994] O.J. No. 200. Delta further submits that for *res judicata* to apply, it is sufficient that the same parties, or their privies, participated in both proceedings, citing the decision in *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.). Thus, Delta submits that the doctrine of *res judicata* applies in this appeal because the Board's 1996 decision resolved the same issues that are now being raised, was a final decision, and the same parties or their privies have participated in both appeal processes. Although Alpha was the only current Appellant to be a party to the previous appeal, Delta submits that Mr. Bauer and Ms. Anderson participated in the previous appeal as Alpha's corporate officers, and, as such, they should be considered the other Appellants' privies for the purposes of the current appeal.

This argument was also adopted and supported by the Assistant Manager.

Res judicata is an equitable principle intended to discourage repetitive litigation within the larger equitable concern of being fair. *Res judicata* is defined in *Black's Law Dictionary* as:

> A matter adjudged … Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of

> the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

Issue estoppel is a subsidiary of *res judicata*. As stated by Abella, J.A. (as she was then), issue estoppel is also intended to "preclude relitigation of issues that have been determined in a prior proceeding" (*Rasanen,* at page 9).

The doctrines of *res judicata* and issue estoppel apply to administrative tribunals. This is clear from the Court's application of these doctrines to a tribunal's proceedings in *Rasanen*, and in this Board's decision in *Raymond and Gordon Creed* v. *Engineer Under the Water Act*, (Appeal No. 98-WAT-28(a), May 11, 1999) (unreported). In *Creed*, the Board explained these doctrines, and the circumstances in which they may apply:

> The legal doctrine of "issue estoppel" is a subsidiary of *res judicata*, and may operate in instances where *res judicata* cannot be established. Issue estoppel bars the re-litigation of a particular issue or determinative fact in a proceeding where that question of fact or law has been heard in a previous proceeding by the same parties (or their privies). Unlike *res judicata*, an argument of issue estoppel may be successful even where the causes of action are not the same as between the prior judgement and a present appeal.

It is also clear from *Saskatoon Credit Union Ltd.*, cited by Delta, that *res judicata* and issue estoppel may apply where, although the parties in each proceeding are not necessarily the same, their privies are involved in both proceedings. As stated at page 97 of *Saskatoon Credit Union Ltd.*:

> … no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some over-riding question of fairness requires a rehearing. [emphasis added]

In its 1996 *Alpha* decision, the Board addressed the issues of whether the Southern Extension is within former Permit boundaries, and whether the landfilled waste is damaging the environment. The Board found as follows:

> The Land is described only by legal description. The legal description refers to the boundaries of property as they are currently surveyed and registered at the Land Title Office. The Board agrees with the Respondent and Third Party that legal boundaries cannot be amended by agreement between Alpha and Western Delta Lands. A new boundary requires a subdivision or new survey. Given the opinion of Mr. Frith and the inconclusive findings of Mr. Cameron, the Board finds that the southern boundary of the Land is north of the Delta drainage ditch.
>
> The Board therefore finds as a fact that the 55000 cubic metres of demolition materials and soil which have been placed on the southern

7 acre portion have been placed outside of the permit boundaries of PR7707.

The Panel finds that the doctrine of issue estoppel applies to the boundary issue. The Board's 1996 decision was final and conclusive regarding this issue. Mr. Bauer and Ms. Anderson were involved in that appeal as Alpha's principles, and were owners and officers or directors of the other Appellants at that time. Consequently, Mr. Bauer and Ms. Anderson participated in that appeal as privies of the other Appellants. Although the grounds for appeal are not exactly the same in these two appeals, the Order now under appeal flows from the orders involved in the 1996 appeal. In any event, since different causes of action do not bar the application of issue estoppel, neither would different grounds for appeal. Finally, the Panel finds that no over-riding question of fairness requires a re-hearing of this issue, since the Appellants have provided no new evidence relating to this matter.

Accordingly, the Panel accepts that the landfilled material on the Southern extension was deposited outside of the boundaries of the former Permit.

b. Whether the Order is unnecessary or unreasonable due to the zoning designation of the Southern Extension

Alternatively, the Appellants argue that the Order is unnecessary or unreasonable, because the Southern Extension is zoned for a purpose that required it to be filled. The Appellants submit that immediately south of the former Permit area is a 300 metre wide strip of land zoned "I-1, Light Industrial", and that this area includes the Southern Extension. They submit that the owner of this land, whom they claim is Utzig Holdings, intended to construct an industrial park in this area. Thus, removal of the landfilled waste would prevent the Southern Extension from being used for its zoned use.

In support, Mr. Bauer provided a report titled "Draft River Road East Area Plan", prepared by Delta in December 1990. Mr. Bauer submits that maps at pages 87 and 89 of the draft plan show that the Southern Extension is within an area that was planned for industrial uses.

The Assistant Manager submits that the Order is necessary and reasonable. Regarding the alleged zoning of the Southern Extension, the Assistant Manager submits that the owner of these lands, and not the Appellants, is the proper person to address that issue. The Assistant Manager submits that Western Delta Lands, the registered landowner, was served with a copy of the Order when it was issued, and was invited by the Board to participate in this appeal as a third party, but declined. Therefore, the Assistant Manager says that the property owner is aware of and does not oppose the Order.

Delta submits that the Southern Extension was not and is not zoned for light industrial use. Delta says that it is in fact zoned "I3 - Extraction Industrial", which permits farming, the extraction of peat, sand and gravel, and related activities, but does not allow the construction of an industrial park. Delta points out that the Draft River Road East Area Plan presented by Mr. Bauer is merely a discussion paper presented by the planning department, and has never been formally accepted by the Delta municipal council. Delta adds that as of November 1993, its bylaws

prohibit landfilling in much of Burns Bog, unless approved in relation to building construction. Only certain types of buildings are allowed in the "I3" zone, including farm house accommodations, a watchman's residence, and offices within a maximum gross floor space of 371.6 square metres. Delta submits, therefore, that once the landfilled waste is removed from the Southern Extension, there is no possibility that the site could be filled again to support an industrial park, unless its zoning designation changed.

In support, Delta presented copies of relevant municipal bylaws and maps. On November 25, 1993, Delta passed the "Delta Soil Deposit Regulation Bylaw No. 4848, 1991 Amendment (Burns Bog) Bylaw No. 5155, 1993", which prohibits the deposition of soil or wood waste on the lands in and around Burns Bog south of River Road, as shown in Schedule "F", a map appended to the bylaw. Although this map did not clearly identify the Southern Extension, nor did other maps showing zoning designations, Vern Kucy, Manager of Delta's Environmental Services Division, Department of Engineering, verified the site's zoning designation.

Mr. Kucy testified that the land south of the drainage ditch, identified as a dotted line on the zoning map at page 46 of the Catherine Berris report, is zoned "I3 – Extraction Industrial", and the land north of the ditch is zoned "I2 – Heavy Industrial". Mr. Kucy confirmed that the drainage ditch coincides with the northern property line of the Southern Extension, and the Southern Extension is within the area zoned "I3", which permits certain types of resource extraction, and related sorting, stockpiling and mixing activities, but does not permit the construction of an industrial park.

Finally, Delta says that, in any event, the Southern Extension's zoning designation is irrelevant to the outcome of this appeal because the landfilling was never authorized by the former Permit.

The Panel accepts Delta's evidence that the Southern Extension is not zoned for uses that support the construction of an industrial park. The Panel also accepts Delta's evidence that the placement of soil or wood waste on the Southern Extension is prohibited under Delta's municipal bylaws. Thus, it is clear that current zoning and bylaws do not allow landfilling at the site for the purpose of constructing an industrial park. Consequently, the Panel rejects the Appellants' assertion that the Order is unnecessary or unreasonable on the basis that Southern Extension is zoned for a purpose that allows it to be filled. The evidence clearly shows that this assertion is unsubstantiated.

c. Whether the Order is reasonable and necessary for the rehabilitation and protection of the environment

Mr. Bauer asserts that Burns Bog is not a pristine or unique environment. Mr. Bauer says that there are other bogs in the lower mainland that contain many of the species found in Burns Bog, and notes that Mr. Moore agreed that most of the species found in Burns Bog are found elsewhere in B.C. Mr. Bauer also notes that large portions of the bog have been mined for peat. Mr. Bauer asserts that trees will grow sooner on the Southern Extension if the waste is not excavated. He says that areas mined as early as the 1930's remain underwater today, and provided an aerial photograph dating from 1986 in support.

Mr. Bauer also claims that much of Burns Bog was, until recently, planned for development as a theme park, and there is a good chance such developments will proceed in the future. Therefore, he submits that it is senseless to put effort into removing the fill on the Southern Extension, when neighbouring lands in the bog may be filled in the future. In support of his assertions, Mr. Bauer provided newspaper clippings from 1999 to show that the provincial government and Delta supported some of the proposed developments in Burns Bog.

In response, the Assistant Manager says there is no evidence that the Southern Extension will be developed in the foreseeable future. The Manager submits that Western Delta Lands has agreed to a moratorium on development of its lands in Burns Bog, including the Southern Extension. The Assistant Manager also notes that the provincial government is involved in an ecosystem study of Burns Bog, which could result in part of the Southern Extension becoming a natural reserve area. Finally, the Assistant Manager submits that even if legal development eventually occurs in some of Burns Bog, the area of the bog should not be reduced by illegal, unauthorized development.

The Assistant Manager presented the testimony of Brent Moore, a habitat biologist with the Ministry, to show that complete removal of the landfilled debris is necessary for rehabilitation of the bog environment. The Panel accepted Mr. Moore as an expert in environmental impact assessment, especially in relation to terrestrial environments and vertebrates.

Mr. Moore visited the Southern Extension on January 13, 2000, and took several photos of the Southern Extension and adjacent areas, which he presented to the Panel. Mr. Moore says that the landfilling on the Southern Extension destroyed rare bog habitat of significant ecological value, and now prevents the restoration of that habitat. He observed that the Southern Extension is being repopulated by grasses, thistles, blackberry, and other plants commonly found on vacant lots throughout the lower mainland, which are not typical of bog environments. However, Mr. Moore believes that if the landfilled waste is removed, the Southern Extension will return to its former state. He says that initially, the site will become a pond, providing habitat for aquatic plants, birds and some mammals found in the bog. Through natural succession, the pond will return to its natural state in 40 to 50 years, as the pond becomes filled with peat created by the anaerobic conditions, forming the type of soil necessary for the forest previously found there. If the waste is not removed, Mr. Moore says that the natural vegetation will never re-establish itself, because the demolition debris and soil fill now in place does not provide the same wet, anaerobic conditions as a peat soil.

With the exception of its conclusions on habitat heterogeneity, Mr. Moore adopts the 1995 report of Martin Gebauer, which was prepared for Alpha, titled, "Impact of Alpha Manufacturing Inc.'s Demolition Landfill (Southern Landfill Extension) on Flora and Fauna". Mr. Gebauer's report states that landfilling on the Southern Extension "has resulted in the removal of three distinct 'bog' habitats", including a unique type of mixed pine forest and heathland, and has directly impacted a number of wildlife species. Mr. Moore adds that although most of the plant and animal species found in this habitat are found elsewhere in B.C., these species are not usually found living together. In other words, this pine habitat was unique because of its unusual plant associations and "community structure". For example, the area contained

pine trees with an understory of bog species, which is found nowhere else in the lower mainland. Mr. Moore also states that at least one species thought to be extinct in the lower mainland, the red-backed vole, has recently been discovered in natural bog areas adjacent to the Southern Extension.

Mr. Moore also adopted the report of Catherine Berris Associates, prepared in 1993 for the Ministry, titled, "Burns Bog Analysis". This report explores the ecological impact of the unauthorized landfilling, and raises concerns about the future of the bog, given its special ecological value and pressure to accommodate competing land uses.

Mr. Moore concludes that the landfilled material will have a greater adverse impact on the environment if it remains in place than if it is completely removed. He also states that partial removal will not allow restoration of the natural habitat, due to the nature of the filled materials. Consequently, he says that nothing in the Order should be added to or changed.

Regarding the environmental impact of the landfilling on the Southern Extension, Delta quotes extensively from the Board's 1996 decision in *Alpha*. Delta also submits that the potential for fire at the Southern Extension presents a real risk of environmental damage, not to mention costs, and notes that the landfill has already experienced a fire which burned for over three weeks before it was extinguished. Delta notes that a fire at the neighbouring Delta Shake and Shingle site has been burning for months, so far costing over $2 million in firefighting expenses and causing an unknown amount of air pollution. Delta submits that the Appellants lack the expertise or resources to fight such a fire if one occurred at the Southern Extension.

In response to Delta's concerns about the risk of fire, Mr. Bauer submits that the risk of fire at the Southern Extension is extremely low because the wood waste there is damp and not exposed to air. In any event, a fire would not spread far according to Mr. Bauer because the waste cells are insulated from one another by soil fill barriers. However, if a fire occurred, he claims that he himself has the expertise to control and extinguish it, based on previous experience.

In the Board's 1996 *Alpha* decision, it found as follows:

> With the area in question, 7 acres of undisturbed peat bog have been destroyed by the placement of 55000 cubic metres of material. This is not a situation where the effect on the environment is insignificant with respect to the duration of the effect, the extent, the area, the visual impact nor the effect on former flora and fauna. This is an activity which has obliterated 7 acres of the peculiar environment which was described in evidence before the Board as being an extremely unusual ecosystem. The Board has no difficulty in finding that the placement of fill on such a large area is a substantial alteration of the environment and, as such, is pollution.

During the hearing of the present appeal, Mr. Moore stated that the landfilling operations have adversely affected the original bog environment. In addition, he adopted the reports of two consultants, including one commissioned by Alpha, that

reached the same conclusion. The Appellants provided no evidence to contradict that conclusion, or Mr. Moore's testimony that the Southern Extension was part of a rare habitat that supports at least one species thought to have been extinct in the lower mainland, and which shows unique associations of plant species.

The Appellants also provided no evidence to contradict Mr. Moore's testimony that the site will only return to its natural state if all of the landfilled materials are removed. Although Mr. Bauer says that other areas of the bog that were mined for peat in the 1930's remain underwater today, this suggests to the Panel that re-establishment of the previous pine forest and heathland may take more than the 40 to 50 years estimated by Mr. Moore. If that is so, it is even more imperative that the waste be removed expeditiously, so that recovery may begin. The sooner the landfilled materials are removed, the sooner the bog conditions will be re-established, and the area can begin its natural succession back to pine forest and heathland.

In addition, the Panel accepts that there may be a risk of fire involving the wood waste on the Southern Extension, given that one such fire has already occurred. Such a fire could cause harm to the environment, even if limited to a single, one hectare waste "cell." Despite Mr. Bauer's self-proclaimed expertise and previous experience combating a fire at the landfill, the Panel finds there is insufficient evidence to show that he, or the Appellants, possess the resources or ability to effectively control and extinguish a fire if it occurred.

While the Panel cannot predict what, if any, development may occur in Burns Bog in the future, the Panel is not prepared to allow unauthorized waste to remain at the site, based on speculation or newspaper articles suggesting that development might occur. In addition, the Panel understands that Burns Bog, including part of the Southern Extension, is the subject of an ecological study by the province, and some areas may become part of a nature reserve.

In conclusion, the Panel finds that, based on expert evidence and the Board's previous finding that the landfilled materials constitute pollution, the requirements in the Order that all wastes and mineral fill soil be removed from the Southern Extension is necessary and reasonable for the rehabilitation and protection of the environment.

d. Whether the Order should be stayed

The Appellants submit that the Order should be stayed until current charges against them under the *Act* have been decided by the courts, as these decisions could affect the Panel's findings. In late 1999, the Ministry laid various charges against Alpha and its principals in connection with the former Permit, and these charges are scheduled to be heard commencing in the summer of 2000. The Appellants submit that the courts will be re-examining the question of where the Permit boundaries lie, and new evidence may be presented that could lead the courts to a different conclusion than the Board's. Thus, the Appellants argue that they should not have to remove the waste until the courts have confirmed that the Southern Extension is outside of the former Permit boundaries.

The Assistant Manager argues that the pending court hearings are irrelevant to the outcome of this appeal. The Assistant Manager further submits that, in any event, the court's decision will be based on the higher burden of proof required in criminal matters, i.e. "proof beyond a reasonable doubt," as opposed to the lower standard used in administrative proceedings, i.e. "proof on a balance of probabilities". This alone could result in the courts making a different finding than the Board on the boundary issue. Therefore, even if the court makes a different finding on this issue, the Assistant Manager argues that it would not invalidate the Board's 1996 finding.

The Panel agrees with the Assistant Manager, and finds that these circumstances do not justify a stay of the Order. Even if the court arrives at a different conclusion than the Board concerning the boundary issue, its decision would not invalidate the Board's decision. The court's decision will be based on a higher standard of proof than is used in these proceedings. Therefore, whether the Crown proves beyond a reasonable doubt that the Appellants violated certain sections of the *Act* will not affect the findings of the Board, which are based on proof that is established on a balance of probabilities.

Accordingly, the request for a stay is denied.

e. Deadlines in the Order

The Appellants did not directly address whether the deadlines in the Order should be extended if the Order is upheld and not stayed. However, this question was raised by the Panel because these deadlines have already passed.

The Assistant Manager and Delta submit that the dates in the Order should remain in place. They submit that the Appellants should not be rewarded with a time extension, as they have made no attempt to comply with the Order, and have used the appeal process as a stalling tactic. In final submissions, the Assistant Manager noted that the Order had originally contemplated removal of waste and soil fill during the summer months.

1. The Panel has reviewed the evidence and notes that the waste and soil fill removal should occur during summer to minimize water handling problems while the waste is being removed. Due to the fact that the dates in the Order have already passed, the Panel finds that the Order should be amended as follows:

2. Clause #1 should be amended to substitute "**August 31, 2000**" for "October 31, 1999".

3. Clause #2 should be amended to substitute "**March 17, 2000**" for "June 30, 1999".

COSTS

The Assistant Manager and Delta both request that they be awarded costs against the Appellants in relation to this appeal. They submit that the Appellants have flagrantly abused the appeal process by missing required deadlines for filing submissions, by being unprepared at the hearing despite being granted one

adjournment, and by using the appeal process as a way of avoiding the requirements set out in the Order.

The Appellants oppose the request for costs.

Section 11 of the *Environment Management Act* provides the Board with the general power to require a party to pay all or part of the costs of another party in connection with an appeal. Section 11(14.2) reads:

11(14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:

(a) Requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

The Board has adopted a general policy to award costs in "special circumstances". These circumstances are outlined in the *Environmental Appeal Board Procedure Manual*, starting at page 44, and include:

(a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

...

(d) where a party unreasonably delays the proceeding;

The awarding of costs may be used to discourage improper claims and compensate parties who are unduly inconvenienced or incur unnecessary costs as a result of frivolous or vexatious appeals. In deciding whether to award costs, the Board may weigh the importance of these concerns against the danger of deterring parties from participation in the appeal process.

The Panel finds that, in the circumstances, it is not appropriate to award costs in favour of either the Assistant Manager or Delta. This appeal did not involve purely frivolous or vexatious issues. The Appellants were successful in having Fauna removed from the Order. Although the Appellants repeatedly failed to meet reasonable deadlines for filing documents, and were poorly prepared for this hearing, there is no evidence that they brought the appeal maliciously. In these circumstances, the Panel denies the Assistant Manager's and Delta's request for costs.

DECISION

In making this decision, the Panel has carefully considered all of the evidence and testimony provided, whether or not specifically reiterated here.

For the reasons given above, the Panel dismisses the appeal and varies the Order as follows:

1. Delete all references to Fauna Landfill Ltd. from the Order;

2. Amend Clause #1 to substitute "**August 31, 2000**" for "October 31, 1999"; and

3. Amend Clause #2 to substitute "**March 17, 2000**" for "June 30, 1999".

The requests for costs are denied.

Toby Vigod, Chair
Environmental Appeal Board

February 3, 2000