BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 1999-WAS-41(c)

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

BETWEEN:	Canadian Occidental Petroleum Ltd.	**APPELLANT**
AND:	Director of Waste Management	**RESPONDENT**
AND:	BC Rail Ltd., BCR Properties Ltd., and British Columbia Railway Company (BCR Group)	**THIRD PARTY**
AND:	District of Squamish	**THIRD PARTY**
AND:	FMC Chemicals Ltd., FMC Corporation, FMC of Canada Limited - FMC Canada Limitee, and Mid-Atlantic Investments Ltd. (FMC Group)	**THIRD PARTY**
AND:	International Forest Products Ltd.	**THIRD PARTY**
AND:	Squamish Nation	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Katherine Hough, Chair
Dr. Robert Cameron, Member
Marilyn Kansky, Member

DATE OF HEARING: August 15-17, 2000

PLACE OF HEARING: Vancouver, B.C.

APPEARING:

For the Appellant:	Gary A. Letcher, Counsel
For the Respondent:	Joyce Thayer, Counsel
For the Third Party:	
BCR Group:	Ross Switzer, Counsel
FMC Group:	David H. Searle, Counsel
International Forest Products Ltd.:	Patricia Houlihan, Counsel
Squamish Nation:	Mathew Englander, Counsel

APPEAL

This is an appeal brought by Canadian Occidental Petroleum Ltd. ("COPL") of an October 8, 1999 decision by Richard H. Roberts, the Director of Waste Management, Lower Mainland Region (the "Director") to issue Remediation Order OS-16149, as amended (the "Order"). The Order is with respect to the site of a former chlor-alkali plant and certain off-site lands and water bodies, located in the vicinity of the foot of Galbraith Street in Squamish, British Columbia (collectively, the "Site").

The Board has the authority to hear this appeal under section 11 of the *Environment Management Act*, R.S.B.C. 1996, c. 118, and section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*"). The Board, or any panel of it, may, after hearing all the evidence, decide to confirm, reverse or vary the decision of the Director, send the matter back to him with directions, or make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

COPL seeks an order that the company formerly known as FMC of Canada Limited - FMC Canada Limitee, now named Mid-Atlantic Investments Ltd. ("FMC #1"), be added to the Order as a person responsible for remediation. FMC #1 was represented by counsel for FMC Group for the purposes of this appeal.

BACKGROUND

The Site is contaminated by mercury as a result of processes used in a chlor-alkali plant that operated at the plant site from 1965 until 1991. The former plant site is comprised of two parcels of land legally described as P.I.D. 008-606-153, Block B, District Lots 4618, 5717, 6042, and 7134, Plan 13542; and P.I.D. 007-774-010, Lot G, District Lots 486, 4271, 5717, 6042, 7134, Plan 14953. The former plant site is situated on a spit of land extending into Howe Sound. The spit is bounded by Cattermole Creek to the west and Mamquam Blind Channel to the east. The off-site lands and water bodies which are subject to the Order include areas of Howe Sound, Cattermole Creek, and Mamquam Blind Channel that are in the vicinity of the plant site and contain mercury levels in excess of allowable levels.

From 1965 until late 1986, the plant was owned and operated by FMC #1. CanadianOxy Metal Finishing Ltd. purchased the plant from FMC #1 by way of an asset purchase agreement dated December 22, 1986 (the "Purchase Agreement"), and continued to operate the plant until it was shut down in 1991. The Purchase Agreement was signed by FMC #1, its parent company FMC Corporation ("FMC Corp."), CanadianOxy Metal Finishing Ltd., and COPL. CanadianOxy Metal Finishing Ltd. was dissolved before January 24, 1992.

BC Rail Ltd. and BCR Properties Ltd. own the former plant site, and have leased it to the companies that owned and operated the plant. COPL's lease of the plant site expires in 2029.

On January 24, 1992, a "Release and Indemnification Agreement" (the "Release") was signed by COPL (in its own right and as a successor of CanadianOxy Metal

Finishing Ltd.), FMC Corp., and "FMC of Canada, Limited – FMC Canada Limitee, a company incorporated under the laws of Canada". Under this agreement, FMC Corp. agreed to pay COPL $2 million (Canadian funds), and in return COPL agreed to release "FMC, FMC of Canada and their successors and assigns from any Liabilities for any Environmental Matters" except for certain reserved liabilities described in the Release.

The validity and meaning of the Release is in dispute in this appeal. The parties dispute whether the signatory company described as "FMC of Canada, Limited - FMC Canada Limitee, a company incorporated under the laws of Canada" is FMC #1. When the Release was signed, FMC #1 was no longer doing business under that name. On December 30, 1987, FMC #1 signed an asset transfer agreement (the "Asset Transfer") whereby it sold its remaining assets to 751023 Ontario Limited, a company incorporated under the laws of Ontario. On January 1, 1988, FMC #1 changed its name to Mid-Atlantic Investments Ltd., and 751023 Ontario Limited changed its name to "FMC of Canada Limited - FMC Canada Limitee" ("FMC #2"). In addition, on March 22, 1988, FMC #1 filed notice with the B.C. Registrar of companies that it had ceased to carry on business in B.C. and its extraprovincial registration was cancelled. On the following day, FMC #2 was extraprovincially registered in B.C.

Thus, when the Release was signed in 1992, FMC #1 was a company incorporated under the laws of Canada and named Mid-Atlantic Investments Ltd., while FMC #2 was operating under the name "FMC of Canada Limited - FMC Canada Limitee", and was incorporated under the laws of Ontario and registered in B.C.

Before the Order was made in 1999, COPL was subject to two previous orders under the *Act* concerning mercury contamination at and near the plant site. In February 1996, Pollution Abatement and Pollution Prevention Orders OE-14886 and OE-14887 were issued to COPL. Respectively, they required COPL to submit for approval a plan for remediation of mercury in groundwater, and a report delineating and assessing the extent and impact of mercury and sulphide in the receiving environment. COPL appealed these orders, but the appeals have been held in abeyance to date. Although COPL completed some investigations of the Site after these orders were issued, the Director concluded in his "Reasons for Decision" dated October 8, 1999 (pertaining to the Order under appeal) that COPL had "failed to substantially satisfy the requirements" of either of the earlier orders.

When the Director initially issued the Order on October 8, 1999, only COPL was named as a "responsible person" under the *Waste Management Act*. Section 3.0 of the Order states:

> In view of the significant and severe mercury contamination of soil and groundwater on the Plant Site, significant mercury contamination of sediment and potential for significant mercury contamination of biota in Off-Site Waterbodies, and potential for significant mercury contamination of Off-Site Lands, […] I, hereby, order COPL to undertake the remedial requirements outlined below.

The Order requires COPL to carry out detailed investigations of the Site, prepare a comprehensive remediation plan for the former plant site, and provide written progress reports, all by specific deadlines. The remediation plan must provide for: (1) the installation of a system and/or structure for the containment and control of contaminated ground water discharging from the plant site to the receiving environment; (2) the removal and disposal, or removal and treatment of contaminated soil and sludge in the area of the "Old Lagoon" to a depth of three meters or to the top of the silt unit, whichever is less, and suitable restoration; (3) the removal and disposal, or removal and treatment of contaminated soil and sludge in the "Effluent Pond" to a depth of 3 metres or to the top of the silt unit, whichever is less, and suitable restoration; and (4) the removal and disposal, or removal and treatment of all special waste contaminated soil to a depth of three meters or to the top of the silt unit, whichever is less, on the plant site, with suitable restoration. Among other things, the remediation plan must also include soil management, water management, and air monitoring plans that are to be employed during remediation.

In addition, the Order required COPL to post financial security in the amount of almost $3.5 million by December 6, 1999.

In his Reasons for Decision dated October 8, 1999, the Director considered whether to name FMC Corp., FMC Chemicals Ltd., or FMC of Canada Limited - FMC Canada Limitee in the Order. In these Reasons, the Director refers to the latter company as "FMC". At that time, the Asset Transfer was not known to the Director and he was not aware that "FMC of Canada Limited - FMC Canada Limitee" has been the name of two different companies. Thus, in referring to "FMC", the Director thought that the company named "FMC of Canada Limited - FMC Canada Limitee" which was the vendor under the Purchase Agreement was one and the same as the company named "FMC of Canada Limited - FMC Canada Limitee" that signed the Release.

Noting that "FMC does not dispute that it is a responsible person", the Director considered the terms of the Purchase Agreement and the Release, and concluded as follows at page 64:

> I am satisfied after reviewing the terms of the Purchase Agreement and the Release that FMC has a full indemnity from COPL for the remediation of the Site. For further clarity I am satisfied that the terms of the Release covers [sic] work relating to environmental liabilities both on and off site which arose in the course of the operation of the Squamish Chlor-alkali Plant.

Based on these considerations and his finding that COPL has sufficient resources to undertake the necessary work, the Director decided not to name FMC Corp., FMC Chemicals Ltd., or "FMC" in the Order.

On November 8, 1999, COPL appealed the issuance of the Order and requested a stay of the requirement to post financial security. On December 7, 1999, the Board granted a stay of that requirement pending a decision on the merits of the appeal.

The Order was also appealed by BC Rail Ltd., BCR Properties Ltd., and British Columbia Railway Company (collectively, the "BCR Group") and International Forest Products Ltd. However, on March 1, 2000, the BCR Group notified the Board that it would not be actively pursuing its appeal, but did not wish to withdraw its appeal. Accordingly, the BCR Group's appeal is being held in abeyance. The BCR Group participated in this appeal as a third party. International Forest Products Ltd. withdrew its appeal on March 8, 2000, but participated in this appeal as a third party.

At the invitation of the Board, FMC Group accepted third party status on November 17, 1999. Similarly, the Squamish Nation and the District of Squamish accepted invitations by the Board to participate as third parties. However, the District of Squamish did not appear at the appeal hearing.

Subsequently, the Director became aware of the Asset Transfer and the fact that "FMC of Canada Limited - FMC Canada Limitee" has been the name of two different companies. FMC Group provided the Director with a copy of the Asset Transfer enclosed with a letter dated December 10, 1999. In the letter, counsel for FMC Group states as follows:

> As it is [FMC #2] which has the benefit of the 1992 indemnity [Release], you will see from the enclosed document that it also had acquired all of the liabilities from [FMC #1], hence making it the appropriate corporate entity to enter into the 1992 [Release] with COPL.

On March 1, 2000, COPL asked the Director to reconsider his decision not to name any of the FMC Group companies in the Order, on the basis that the Director was relying on an incorrect corporate history of the FMC Group when he issued the Order.

On July 4, 2000, the Director issued a second "Reasons for Decision" with respect to the Order ("Reasons for Decision II"). This document addresses whether BCR Group should be added to the Order as a responsible person, and whether FMC #1 or FMC #2 should be added to the Order in light of the Asset Transfer. In that decision, BCR Group was added to the Order as a responsible person. The Director declined to add either FMC #1 or FMC #2 to the Order. With respect to FMC #1, the Director found as follows:

> …I conclude that FMC #2 as the successor to FMC #1 is correctly described as the vendor of the 1986 assets. Thus, the description of FMC #2 in the 1992 release and indemnification agreement is correct.
>
> It is clear on the face of the 1987 Asset Agreement that FMC #2 is the corporate successor of FMC #1 as it relates to the obligations imposed by the 1986 asset purchase agreement… FMC #2 became for the purposes of part IV of the *WMA* the direct corporate successor of FMC #1.

With respect to FMC #2, the Director concluded that it should not be named based on the terms of the Release. Although the Reasons for Decision II is not the

decision appealed by COPL in this appeal, it was referred to in the parties' submissions before the Panel.

BCR Group has filed an appeal of the decision to add it to the Order. This appeal will be heard separately from the present appeal.

COPL does not appeal its status as a "responsible person"; it takes issue with the failure to name FMC #1 to the Order as a responsible person. COPL requests that the Board vary the Order or issue a new order naming FMC #1 (now Mid-Atlantic Investments Ltd.) as a person responsible for remediation of the Site.

The Squamish Nation and BCR Group support COPL's appeal.

The Director and FMC Group oppose the appeal and request that the Order be upheld.

No submissions were made on behalf of International Forest Products Ltd.

ISSUES

1. Whether the Director is required to name in the Order all of the persons who, based on information known to him, contributed most substantially to the Site becoming contaminated.

2. Whether the Purchase Agreement, Asset Transfer, or Release are agreements that must be considered by the Director for the purposes of section 27.1(4) of the *Act*.

3. Whether FMC #1 should be named in the Order.

RELEVANT LEGISLATION

The Director issued the Order under section 27.1 of the *Act*, which provides as follows:

Remediation orders

27.1 (1) A manager may issue a remediation order to any responsible person.

...

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most

substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release… of a contaminating substance.

…

Section 26(1) of the *Act* defines a "responsible person" as "a person described in section 26.5." Section 26.5 reads as follows:

26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract or agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

Section 26(1) defines "person" to include "a government body and any director, officer, employee or agent of a person or government body." Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 further expands the definition of "person" as follows:

'person' includes a corporation, partnership or party, and the personal or other legal representatives to whom the context can apply according to law.

Parts of section 27 of the *Act* are also relevant to this appeal:

General principles of liability for remediation

27 (4) Subject to section 27.3(3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

Section 35 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 ("*CSR*") addresses cost recovery actions under the *Act*:

Compensation payable for actions under section 27(4) of the Act

35 (1) For the purposes of determining the amount of compensation payable under section 27(4) of the Act, a defendant named in a cost recovery action may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation, or the common law.

(2) In an action between 2 or more responsible persons under section 27(4), the following factors must be considered when determining the reasonably incurred costs of remediation:

...

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to be contaminated;

...

DISCUSSION AND ANALYSIS

1. Whether the Director is required to name in the Order all of the persons who, based on information known to him, contributed most substantially to the Site becoming contaminated.

COPL submits that the Director misapplied section 27.1(4) of the *Act* by not naming FMC #1 in the Order, because FMC #1 is a most substantial contributor to the Site becoming contaminated, and all substantial contributors must be named in the

Order. COPL submits that the Director has no discretion not to name a person who, based on information known to the Director, contributed most substantially to a site becoming contaminated, taking into account the factors listed under section 27.1(4)(b). COPL submits that the Legislature did not intend for the Director to have any discretion in this regard, and that to interpret this section to mean otherwise is inconsistent with the "polluter pay" policy underlying the *Act*. COPL notes that section 27.1(4)(b) does not say that one or more "of the" persons who contributed most substantially must be named.

COPL argues that there are two categories of things that the Director must, to the extent feasible without jeopardizing remediation requirements, take into account when exercising his authority under section 27.1(4): private agreements and contribution to contamination. COPL submits that if there is only one substantial contributor, notwithstanding any private agreement, then that person must be named in a remediation order. In other words, subsection (b) is paramount to subsection (a) in those circumstances because, while a private agreement "must" be "taken into consideration", "one or more" person(s) who contributed most substantially "must" be named.

COPL notes that section 27.1(4) was recently considered by the Board in *Beazer East Inc. and Atlantic Industries Ltd.* v. *Assistant Regional Waste Manager* (Appeal No. 98WAS-01(b), March 29, 2000) (unreported). COPL points to pages 46 and 47 of that decision, as follows:

> The Panel finds that the requirement that the most substantial contributors "must" be named (and then only if feasible) does not mean these are the *only* persons who may be lawfully named to a remediation order. To the contrary, section 27.1(1) clearly states that a manager may issue a remediation order to <u>any</u> responsible person. The Panel, therefore, finds that sections 27.1(1) and 27.1(4), together, provide a manager with the discretion to name any responsible person to a remediation order while, in this process, directing him to ensure that, to the extent feasible based on the information before him, he names the persons who contributed most substantially to the contamination.
>
> The Panel finds that this is a common sense approach that ensures that, where feasible, the most substantial contributors are named, but which also recognizes that there will be situations where other responsible persons should be named. Again, it must be stressed that the legislation provides for a manager to issue a remediation order promptly to protect the environment, without necessarily having to be concerned with degrees of responsibility. In creating this contribution scheme, the Panel agrees with the Respondent that a manager is not required to individually assess contributions such that he must determine which party contributed the most, then the next, and so on. The assessment is a *relative* evaluation of the "collective" of responsible persons. This is not an exact science, particularly at this point in the process where the objective is to have a relatively quick summary process to ensure a speedy cleanup.

> More complicated issues of allocation are dealt with in the cost recovery process.
>
> The Panel, therefore, finds that the manager has a wide discretion conferred upon him pursuant to section 27.1 of the *Act*. The Panel agrees that the only restriction on the manager's discretion is that, when the manager is aware of one or more responsible persons who contributed most substantially, he must name them to an order, unless remediation requirements would be jeopardized whereby the manager may decide not to name that party.

COPL emphasizes that FMC #1 is a most substantial contributor to the contamination at the Site, and is, in fact, a larger contributor to the Site becoming contaminated than is COPL. COPL further says that there has been no suggestion that naming FMC #1 to the Order could jeopardize remediation requirements, and there is no private agreement involving FMC #1 to be taken into account. In light of these facts, COPL submits that there is "no principled or reasoned basis" to exclude FMC #1 from the Order.

The Squamish Nation submits that all responsible persons who contributed most substantially to a site becoming contaminated should be named in an order, unless remediation requirements would be jeopardized. The Squamish Nation argues that FMC Group should bear some responsibility for the remediation of the Site given that FMC #1 operated the chlor-alkali plant for two decades and acknowledges that it is a substantial contributor to the Site's contamination. In addition, the Squamish Nation notes that COPL has a history of non-compliance with previous orders respecting remediation of the Site, and submits that there is no certainty that COPL will continue to comply with the Order. The Site's remediation requirements may, therefore, be jeopardized if "FMC" is not named in the Order.

BCR Group supports COPL's position that FMC #1 should be added to the Order, given that it is a most substantial contributor, and argues that there is no reason not to name FMC #1 based on the facts.

The Director submits that section 27.1(1) conveys a broad discretion to issue a remediation order to "any responsible person". Similarly, there is a broad discretion under section 27.1(4) to name persons in a remediation order, which is subject only to the requirement that remediation must not be jeopardized. Thus, the Director submits that the Panel should not adopt a restrictive interpretation of section 27.1(4) in this case. The Director notes that COPL is presently adhering to the remediation requirements in the Order and, if these circumstances changed, then FMC #2 could be named to the Order as the successor to FMC #1. Finally, the Director notes that his decision not to name FMC #1 in the Order is not determinative of the rights of COPL or BCR Group to recover their remediation costs from other responsible persons under section 27(4) of the *Act*.

FMC Group adopts the Director's submissions wholly. FMC Group concedes that FMC #1 is a former operator and owner of the plant, is one of the most substantial contributors to contamination at the Site and, as such, could be named in the Order. However, FMC Group argues that COPL is also a most substantial

contributor to the contamination at the Site, and submits that the *Act* does not require the Director to name all of the most substantial contributors in the Order. FMC Group submits that the Director must name one or more most substantial contributors, but is not required to name either all of the most substantial contributors or **the** most substantial contributor. The Legislature could have stated in the *Act* that "all" of the most substantial contributors had to be named, but it did not.

FMC Group argues that it is not necessary for FMC #1 to be named to the Order at this time, given that COPL has the resources to complete the remediation and is now complying with the Order. It further submits that the Director has the discretion to name FMC #1 in the Order in the future, if necessary, by amending the Order under section 27.1(10) of the *Act*.

All of the parties agree that FMC #1 is a past operator and owner of the Squamish plant, and is a responsible person who contributed most substantially to the Site becoming contaminated. The question is whether the *Act* requires that FMC #1 **must** be named in the Order, based on the information before the Panel.

As noted above by COPL, the Board previously considered the interpretation of sections 27.1(1) and (4) in the *Beazer* decision. While COPL pointed to portions of that decision to support its argument that all "most substantial contributors" must be named in the Order, this Panel is not bound by previous decisions of the Board. The present appeal must be decided on the facts and circumstances of this case, which are different from those in *Beazer*. The Panel notes that the portions of *Beazer* quoted by COPL address the issue of whether persons who may not have contributed most substantially could be named in a remediation order. There, the Board was dealing with a different issue and different facts than those facing this Panel. The issue before this Panel is whether the *Act* requires that **all** persons who contributed most substantially must be named in an order.

The Panel has examined the language used in section 27.1(4), and has considered it within its statutory context and in light of some commonly accepted presumptions of statutory interpretation. One such presumption is that the Legislature intends every word in a statute to have a meaning and function. Another presumption is that the Legislature uses language carefully and consistently, and that the same words are given the same meaning throughout a statute. In addition, there is the maxim of *expressio unius est exclusio alterius*, or implied exclusion, which means that to express one thing is to exclude another. For example, once a pattern of words is used to express a particular purpose or meaning, it is presumed that the pattern is used for the same purpose or meaning throughout the statute.

Section 27.1(4)(b) provides that a manager, or in this case the Director, "must to the extent feasible without jeopardizing remediation requirements… on the basis of information known to the [Director], name one or more persons whose activities… contributed most substantially to the site becoming a contaminated site". The key words here are "one or more". The word "all" is not used. The Panel presumes that, if the Legislature had intended that the Director must name **all** of the most substantial contributors, it would have used the word "all", rather than the words "one or more". Indeed, the Legislature has used the word "all" elsewhere in the

Act. For example, under section 26.4(2), a manager "must do all of the" things listed thereunder in determining whether a site is a contaminated site. Accordingly, the Panel finds that the Legislature did not intend that section 27.1(4)(b) requires the Director to name in an order all persons who contributed most substantially to the contamination of a site. However, the fact that the Legislature chose to use the words "must… name one or more persons" leads the Panel to conclude that the Director must name, on the basis of information known to him, at least **one** person who contributed most substantially, as long as remediation requirements are not jeopardized. If that person has the resources to remediate the site and remediation requirements will not be jeopardized, the manager may stop there.

Under subsections 27.1(4)(a), (b)(i), and b(ii), the Director is also directed to "take into account" certain information, when it is known to him or her, in deciding which persons should be named to an order. Under subsection (4)(a), a manager must take into account any private agreements respecting liability for remediation between responsible persons. The Panel has considered the meaning of subsection 4(a) in its discussion of the next issue. Under subsection (4)(b), a manager must take into account "factors such as… the degree of involvement by the persons in the generation… of any substance that contributed" and the "diligence exercised" by the person in respect to the contamination. Thus, the degree to which a responsible person was involved in the contamination is one factor to be considered under subsection 4(b)(i), but is not necessarily determinative of whether a responsible person should be named in a remediation order.

In addition, the Panel notes that a manager may not have sufficient information to quantify exactly the relative contribution to the contamination by each responsible person for the purposes of issuing a remediation order. Indeed, the Legislature did not intend that the process of determining which responsible persons to name in a remediation order should involve a precise assessment of each person's degree of responsibility for the contamination. The objective underlying Part 4 of the *Act* is to ensure that contaminated sites are remediated in an expeditious and effective manner, by one or more persons responsible for the contamination at a specific site. In this respect, the Panel agrees with the *Beazer* decision, which states:

> Again, it must be stressed that the legislation provides for a manager to issue a remediation order promptly to protect the environment, without necessarily having to be concerned with degrees of responsibility. In creating this contribution scheme, the Panel agrees with the Respondent that a manager is not required to individually assess contributions such that he must determine which party contributed the most, then the next, and so on. The assessment is a *relative* evaluation of the "collective" of responsible persons. This is not an exact science, particularly at this point in the process where the objective is to have a relatively quick summary process to ensure a speedy cleanup. More complicated issues of allocation are dealt with in the cost recovery process.

As indicated above in *Beazer*, responsible persons may seek to recover their reasonable costs of remediation from other responsible persons by pursuing a cost recovery action under sections 27(4) and 27.1(5) of the *Act*. Section 35(2) of the

CSR requires the courts to consider various factors in determining the reasonably incurred remediation costs of responsible persons for the purposes of a cost recovery action. These factors include the "relative due diligence" of each person, the amount of contaminating substances attributable to them, and the "relative degree of involvement" of each person in the activities that caused the contamination. Thus, even if one of the responsible persons whose activities contributed most substantially to the site becoming contaminated is not named in a remediation order, that person remains potentially liable for a share of the remediation costs. Consequently, the Panel finds that it does not conflict with the "polluter pay" principle underlying Part 4 of the *Act* to interpret section 27.1(4) as providing the Director with discretion **not** to name a most substantial contributor in appropriate circumstances.

For the reasons indicated above, the Panel finds that the Director is not required under the *Act* to name all persons who contributed most substantially to a site becoming contaminated. However, the Director must, to the extent feasible without jeopardizing remediation requirements, name at least one person who contributed most substantially to the Site becoming contaminated, having taken into account factors such as those listed in section 27.1(4)(b) and any private agreements of the type specified in section 27.1(4)(a) that are known to the Director. Provided that the one responsible person to be named has sufficient resources to carry out the remediation such that remediation requirements will not be jeopardized, the Director need not name other responsible persons.

2. Whether the Purchase Agreement, Asset Transfer, or Release are agreements that must be considered by the Director for the purposes of section 27.1(4) of the *Act*.

COPL's submissions

COPL submits that the Director erred by deciding not to name FMC #1 in the Order on the basis of a private agreement. COPL submits that the Director is required under section 27.1(4)(a) to take into account only specific types of private agreements, and then only "to the extent feasible". COPL argues that a private agreement must be "respecting liability for remediation" and must be "between or among responsible persons". COPL says that, in this case, there is no such private agreement to be considered. COPL also maintains that the Legislature never intended for managers to consider the types of private agreements in evidence in this appeal. COPL argues that these agreements may be taken into account in a cost recovery action, and submits that the courts are a more appropriate forum for the interpretation of complex contractual agreements.

COPL submits that the 1986 Purchase Agreement must be referenced when considering the 1987 Asset Transfer and the 1992 Release. While there is no dispute that FMC #1 signed the Purchase Agreement and the Asset Transfer, COPL argues that FMC #1 has obligations respecting remediation of the Site as a result of the terms of the Purchase Agreement, and that these obligations were not transferred, terminated or amended as a result of the 1987 Asset Transfer. COPL submits that FMC Group cannot rely on the Asset Transfer because COPL never

consented to it. Specifically, COPL points to paragraphs 20.02 and 20.07 of the 1986 Purchase Agreement, respectively:

> Vendor shall not assign its rights under this Agreement without the consent of the Purchaser…
>
> … No supplement, modification, waiver or termination of this agreement shall be binding unless executed in writing by the party or parties to be bound by it.

In addition, COPL says that it is common ground that COPL was not aware of the Asset Transfer when it signed the Release, and that the Asset Transfer was not made available to the parties by FMC Group until December 10, 1999.

COPL submits that FMC #2 is not a "responsible person" under the *Act*, and, therefore, the Asset Transfer is not an agreement between responsible persons. COPL submits that while FMC Group is willing to concede that FMC #2 may be a responsible person, FMC #2 does not fall within the statutory definition of a responsible person found under section 26.5 of the *Act*. Specifically, COPL says that FMC #2 was never an owner or operator of the plant, was not the vendor of the plant, and was not even incorporated when the plant was sold.

COPL also questions whether FMC #2 acquired the environmental liabilities of FMC #1 as a result of the Asset Transfer. COPL notes that the Asset Transfer was signed one year after the Squamish plant had been sold, and points to page 2 of the Asset Transfer, which describes the liabilities assumed by FMC #2:

> Assumed Liabilities – means all of the liabilities and obligations of every nature or kind of the Transferor [FMC #1], as of the Effective Time [December 31, 1987], **except only liabilities on the books of its Headquarters Division**, and except the balances in the account Reserve for Income Taxes of any of the previously mentioned divisions; [emphasis added]

The Asset Transfer does not specify what liabilities were on the books of the Headquarters Division at that time. COPL says that even if environmental liabilities associated with the Squamish plant were on the books of the Headquarters Division at that time, they could not have been assumed by FMC #2 because they were not known to COPL.

In addition, COPL refers to the first paragraph of the Asset Transfer, which describes FMC #1 as carrying on business through five divisions: "Food and Pharmaceutical, Automotive Service Equipment, Material Handling, Peroxygen and Food Processing Machinery". COPL argues that FMC #1 did not have an operating division dealing generally with chemicals or chlorine production at that time. Therefore, FMC #2 could not have acquired any environmental liabilities associated with the Squamish chlor-alkali plant.

COPL submits, therefore, that the Asset Transfer is not an agreement respecting liability for remediation between responsible persons, and therefore is not an agreement that falls within the ambit of section 27.1(4).

With regard to the Release, COPL argues that it is not a private agreement respecting liability for remediation that can assist FMC #1. COPL notes that the Release purports to "settle outstanding issues relating to the Environmental Liabilities under the [Purchase] Agreement". However, COPL submits that the parties to the Release are not the same parties that signed the Purchase Agreement. Specifically, COPL submits that FMC #1 is not a party to the Release, and therefore cannot benefit from it.

COPL notes that the Purchase Agreement was signed by FMC #1, described in the Purchase Agreement as "FMC of Canada Limited - FMC Canada Limitee, a company incorporated under the laws of Canada". While the Release is signed by a company described as "FMC of Canada, Limited - FMC Canada Limitee, a company incorporated under the laws of Canada", COPL submits that this cannot be a reference to FMC #1. In support, COPL provided corporate search documents showing that when the Release was signed in 1992, the only company with the name FMC of Canada Limited - FMC Canada Limitee was FMC #2, a company incorporated under the laws of Ontario and extraprovincially registered in B.C. The documents also show that at the time the Release was signed, FMC #1 had changed its name to Mid-Atlantic Investments Ltd. and was no longer registered in B.C.

COPL also maintains that the Release may not even be a valid contract, given that FMC #1, the vendor of the Squamish plant, never signed the Release, and COPL never knew of nor consented to the Asset Transfer.

COPL further submits that, even if the Panel finds that the Release is a private agreement respecting liability for remediation, the Release is not an agreement between responsible persons, because FMC #2 is not a responsible person.

In conclusion, COPL says that FMC #1 should be named to the Order because it contributed most substantially to the contamination, and FMC #1 cannot rely on the Release to argue that it should not be named in the Order.

The Squamish Nation's submissions

The Squamish Nation submits that, while section 27.1(4)(a) requires the Director to take into account private agreements respecting remediation, private agreements are only one factor to be considered, and should never be used to "immunize" a polluter from its obligations under the *Act*. The Squamish Nation further submits that it was not "feasible" for the Director to interpret these particular private agreements, and it should be left to the courts to decide the companies' obligations under those agreements. Finally, the Squamish Nation submits that both FMC #1 and FMC #2 should be named in the Order, based on the letter from counsel for FMC Group dated December 10, 1999, that accompanied the copy of the Asset Transfer that was provided to the Director (referred to above in the 'Background' to this decision).

BCR Group's submissions

BCR Group adopts COPL's position that FMC #1 is not a party to any private agreements respecting liability for remediation between responsible persons. BCR Group submits, therefore, that there is no such agreement between FMC#1 and COPL to be considered. BCR Group submits that FMC#1 should be named in the Order.

The Director's submissions

The Director submits that he properly exercised his discretion to take into account the private agreements known to him in this case. The Director submits that managers "must" take into account private agreements that are known to them, and that managers have the discretion to honour private agreements provided that remediation is not jeopardized. This allows for corporate certainty. The Director submits that managers have jurisdiction to address complex legal issues where appropriate, especially where a private agreement is clear on its face. The Director maintains that the private agreements in issue here are clear on their faces. Furthermore, the Director submits that the propriety of his exercise of discretion should not be affected by whether his interpretation of the agreements was correct.

The Director maintains that the Purchase Agreement is not a standard agreement for the purchase and sale of assets, in which assets are bought and liabilities are left behind. In this case, COPL assumed assets and all of the liabilities associated with the Squamish plant, except for those specified in the Purchase Agreement.

The Director also submits that FMC #2 and FMC Corp. voluntarily assumed environmental liabilities associated with FMC #1's operation of the Squamish plant and, as such, are corporate successors of FMC #1 who may be named in a remediation order. Specifically, the Director maintains that the provisions in the Purchase Agreement for allocating "Environmental Liabilities" apply to FMC #2 as the corporate successor of FMC #1. He points to article 1 of the Purchase Agreement, which states as follows:

> "Party" or "Parties" means a party or parties to this Agreement (and it **or their successors** and permitted assigns, as the case may be). [emphasis added]

The Director acknowledges that the situation between FMC #1 and FMC #2 is not one of amalgamation. However, he argues that FMC #2 is clearly a corporate successor of FMC #1 by virtue of the Asset Transfer. The Director submits that a person need not be an actual operator, as FMC #1 was, in order to be a responsible person. Two companies can remain in existence with one standing in the shoes of the other with respect to specific obligations. The Director argues that Canadian law is moving away from the old English cases regarding corporate succession and towards the direction of American law, which shows a greater willingness to pierce the corporate veil where appropriate.

The Director also submits that, under article 19.05 of the Purchase Agreement, FMC Corp. agreed to indemnify COPL for any costs arising from the failure of FMC #1 to

perform any of the terms or conditions of the Purchase Agreement. Therefore, FMC Corp. remains liable for all obligations set out in the Purchase Agreement regardless of what happens with FMC #1 or FMC #2.

Regarding the Release, the Director says it is exactly the type of agreement contemplated in section 27.1(4)(a). It is an indemnity agreement respecting environmental liabilities arising from the Squamish plant, and all of the parties are responsible persons. The Director says that the Release was drafted after the plant was closed, and when a draft of Part 4 of the *Act* was in public circulation.

The Director argues that the Release is clear, on its face, that the environmental liabilities associated with the plant would be assumed by COPL, and it specifically contemplates the remediation work being done now. The Director maintains that, since the Release remains a valid contract, he does not see why he should 'go behind' it. The Director submits that the purpose of the *Act* is not to find fault; rather, it is to get contaminated sites cleaned up, and it is up to private parties to organize their affairs as they see fit. Since FMC #1, FMC #2, and FMC Corp. have divested themselves of their assets and/or liabilities associated with the Squamish plant, and COPL is presently complying with the Order, there is no need to add any of the FMC companies to the Order. He adds that not naming these responsible persons in the Order does not absolve them from responsibility for remediation, because they remain exposed to civil actions in the courts. In addition, the Director maintains that he may amend the Order by adding them as responsible persons if the circumstances change.

FMC Group's submissions

FMC Group adopts the Director's arguments on this issue. FMC Group further submits that the Purchase Agreement is conclusive in that COPL agreed to take the lead in "Environmental Matters", and points to article 11.04 of that agreement:

> To the extent that the Vendor or the Purchaser is liable for Claims for any Environmental Matters pursuant to this Article XI, then the Purchaser and the Vendor will co-operate and consult together for the purpose of minimizing, treating or disposing of the Environmental Matters. The conduct of any action taken for this purpose shall rest with the Purchaser…

Based on this article, FMC Group suggests that COPL agreed to take the lead in the remediation of the Site.

In addition, FMC Group says that contrary to COPL's assertion, it is not trying to escape liability by relying on the Asset Transfer. Rather, it is attempting to show that FMC #2 agreed to receive liability in lieu of FMC #1 as its corporate successor. Additionally, FMC Group submits that FMC #1 did not require COPL's consent before transferring its liabilities to FMC #2. FMC Group concedes that COPL's consent was required before FMC #1 could assign its liabilities to another entity, according to the Purchase Agreement. However, it maintains that COPL's consent was not required where liabilities were transferred to a successor of FMC #1, which was the case with FMC #2.

With respect to COPL's submissions that no environmental liabilities associated with the Squamish plant were transferred from FMC #1 to FMC #2, FMC Group provided a letter dated August 16, 2000, from Theodore H. Laws, a manager in the corporate tax department of FMC Corp. In this letter, Mr. Laws states as follows:

> …the "Headquarters Division" referred to in [the Asset Transfer] is a non-operating division of FMC No. 1 used to account for corporate transactions of the company which do not relate to the day-to-day operation of the active businesses of the company. The books and records for Headquarters are kept at FMC's Corporate office and are used to account for financial transactions of FMC No. 1… Assets and liabilities for an active business of FMC No. 1 would not be recorded on the books of the Headquarters Division. In my 25 years with FMC, I have never seen an environmental liability recorded on the books of an FMC foreign subsidiary.
>
> …I have also examined FMC Corporation's U.S. federal income tax return for the period… which contains the December 31, 1987 balance sheets of FMC's controlled foreign subsidiary corporations and can say that with respect to FMC No. 1 there are no liabilities on the books of the Headquarters Division for any environmental matters.

However, in cross-examination Mr. Laws stated that he did not examine any audited financial statements, or any balance sheets associated with FMC Corp. in preparing his letter. He stated that he did not know where any environmental liabilities associated with the Squamish plant would have been accounted for, if they existed, and he had no knowledge of details concerning payments for environmental liabilities by his firm. He also stated that he did not know whether a chlor-alkali plant would operate under a different division from those listed in the Asset Transfer.

COPL's reply submissions

COPL submits that the Director erred in his Reasons for Decision II by finding that FMC #2 is the direct corporate successor of FMC #1 and is correctly described in the Release as the vendor of the plant. COPL notes that the *Act* does not use the word "successor", and says that the proper inquiry is whether FMC #2 is a responsible person as defined under section 26.5. COPL submits that FMC #2 cannot "be" FMC #1, even if it is a corporate successor, because FMC #1 still exists as Mid-Atlantic Investments Ltd. COPL argues that an asset transfer should not be confused with corporate amalgamation or merger, as was the case in *Beazer*, where the amalgamating companies continue as one unified entity. In support, COPL quotes from the Supreme Court of Canada's decision in *R.* v*. Black & Decker Manufacturing Co. Ltd*., [1975] 1 S.C.R. 411, where Dickson, J. stated at page 421:

> There are various ways in which companies can be put together. **The assets of one or more existing companies may be sold to another existing company or to a company-newly incorporated, in exchange for cash or shares or other consideration.** The consideration received may then be distributed to the shareholders of the companies whose assets have been sold, and these companies wound up

> and their charters surrendered. In this type of transaction a new company may be incorporated or an old company may be wound up but the legal position is clear. **There is no fusion of corporate entities**… But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies... But whatever the motive, the end result is to coalesce to create a homogeneous whole… [emphasis added]

Similarly, COPL submits that the Director erred in his Reasons for Decision II by finding that "this is an appropriate case to pierce the corporate veil and find that FMC #2 is the corporate successor of FMC #1." COPL submits that a lawful assignment of rights or obligations from one company to another should not be confused with a situation of corporate successors. COPL asserts that there is no basis under Canadian law to suggest that the corporate veil of either FMC #1 or FMC #2 may be pierced for the benefit of related but separate companies. COPL also notes that FMC #1 and FMC #2 did not co-exist at the time of the liability generating events.

Analysis

Under section 27.1(4)(a), a manager must "take into account…private agreements respecting liability for remediation between or among responsible persons", when such agreements are known to him or her, when considering which responsible persons to name in a remediation order. The Panel notes that this section uses very specific language to describe the type of agreements to be taken into account, as compared to other provisions in the *Act* and *CSR* that refer to agreements. For example, section 27.1(5) of the *Act* refers to the right of responsible persons to seek relief under "an agreement" through a cost recovery action. Under section 35(1) of the *CSR*, a defendant in a cost recovery action may assert any right to obtain relief under "an agreement". Clearly, the Legislature intended for managers to consider a narrower range of agreements under section 27.1(4)(a) than those agreements that may be considered by the courts in a cost recovery action. Thus, in order for an agreement to be taken into account by a manager under section 27.1(4)(a), it must be respecting liability for "remediation" between or among "responsible persons", as defined under the *Act*.

The Panel also notes that, while a manager must "take into account" the types of private agreements described in section 27.1(4)(a) when considering whom to name in a remediation order, there may be situations where it is not feasible for a manager to determine the meaning of an agreement, such as where the agreement is not clear on its face or the parties to the agreement dispute its meaning. The Panel emphasizes that the objective in issuing a remediation order is to have a "relatively quick summary process to ensure a speedy cleanup", as was stated by the Board in *Beazer*. As such, there may be situations where it is not feasible for a manager to determine the meaning of a private agreement while still ensuring a speedy cleanup. A manager must not exercise his or her discretion to name persons in a remediation order in a manner that jeopardizes remediation requirements. Where it is not feasible for a manager to determine the meaning of

a private agreement, the agreement may still be considered by a court for the purposes of a cost recovery action. This ensures that private parties may still seek to rely on agreements that do not fall within the scope of section 27.1(4)(a).

The Panel now turns to the three agreements at issue in this appeal.

Purchase Agreement

The Purchase Agreement is, fundamentally, an agreement respecting the purchase and sale of the assets of the Squamish plant. The Panel acknowledges that asset purchase and sale agreements commonly include provisions allocating responsibility between the vendor and purchaser for liabilities associated with the assets being sold. Although the primary purpose of this Purchase Agreement is to transfer the ownership of specified assets in exchange for monetary or other consideration, this Agreement also contains clauses respecting the allocation of liability for "Claims" arising from "Environmental Matters" associated with the Squamish plant. At article 4, the Purchase Agreement states:

> At the Closing Purchaser shall assume the following liabilities and obligations of the Business [Squamish plant]:
>
> …
>
> (d) Environmental and employee health responsibilities as specifically stated to be assumed by the Purchaser in Article XI…

And at article 11.02:

> Subject to Articles 11.03 [Vendor's Liability] and 11.06 [Health and Welfare Claims], responsibility for any liability, costs, claims, demands, penalties, fines, suits, and actions by other than the Parties including any work required by lawful authority to be done (hereinafter called "Claims") relating to Environmental Matters shall be apportioned as follows...

Article 1 of the Purchase Agreement defines "Environmental Matters" as follows:

> "Environmental Matters" means actual or alleged, direct or indirect impairment of or damage to the natural environment, including air, water, land, or injury to the health or death of a person or damage to any property resulting from the use, storage, emission, disposition or loss of any toxic chemicals or other substances.

Article 4 of the Purchase Agreement does not expressly refer to liability for "remediation", nor do the definitions of "Environmental Matters" and "Claims" expressly refer to "remediation".

Remediation is defined under the *Act* as follows:

> **"remediation"** means action to eliminate, limit, correct, counteract, mitigate or remove any contaminant or the negative effects on the

> environment or human health of any contaminant, and includes, but is not limited to, the following:
>
> (a) preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment;
>
> (b) evaluation of alternative methods of remediation;
>
> (c) preparation of a remediation plan, satisfactory to the manager, including a plan for any consequential or associated removal of soil or soil relocation from the site;
>
> (d) implementation of a remediation plan;
>
> (e) monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by the manager;
>
> (f) other action that the Lieutenant Governor in Council may prescribe;

The Panel notes that the definition of "Environmental Matters" in the Purchase Agreement bears some similarities to the first part of the definition of "remediation" found in the *Act*. The definition of "Environmental Matters" refers to impairment of or damage to the natural environment or human health resulting from toxic chemicals, while the definition of "remediation" refers to the removal or mitigation of contaminants or their negative effects on the environment or human health. The Panel also notes that article 11.02 of the Purchase Agreement defines "Claims" relating to Environmental Matters as including "any work required by lawful authority to be done… relating to Environmental Matters".

To assist in making its decision, the Panel has reviewed the relevant provisions of the *Act* that existed at the time when the Purchase Agreement was signed. The Panel notes that while the version of the *Waste Management Act* that existed in 1986 provided for the issuance of pollution abatement orders by waste managers, it did not directly address the remediation of contaminated sites, liability for contaminated site remediation, or the issuance of remediation orders. The Panel further notes that when the contaminated site provisions in Part 4 of the *Act* came into force, they significantly changed the law respecting liability for contaminated sites in this province. Among other things, they expanded the scope of who may be liable for remediation of contaminated sites, the nature of that liability, and what remedial actions may be required.

Specifically, in 1986, section 22 of the *Waste Management Act*, S.B.C. 1982, c. 41 (the "1982 *Act*"), provided that a manager could issue a pollution abatement order where satisfied on reasonable grounds that a substance was causing pollution. Pollution was defined to mean the presence of "substances or contaminants that substantially alter or impair the usefulness of the environment". Environment was defined as "the air, land, water and all other external conditions or influences under which man, animals and plants live or are developed". A person subject to a

pollution abatement order in 1986 could have been required to abate pollution, provide the manager with information relating to the pollution, undertake investigations to determine the extent and effects of the pollution, and carry out any measures necessary to control, abate or stop the pollution. Thus, in 1986, a pollution abatement order could have been used to make a polluter control or stop contaminants that were substantially altering the usefulness of the air, land, and water.

However, the 1982 *Act* did not provide, in 1986, for the issuance of remediation orders, nor did it expressly mention "remediation" or "contaminated sites". It also did not provide for the same level of liability for past and present polluters. In particular, the 1982 *Act* did not provide that persons ordered to abate pollution were "absolutely, retroactively and jointly and severally liable" to any person or the government for remediation costs. The 1982 *Act* also provided no mechanism for allocating liability between multiple parties, and no right (in the absence of contractual remedies) for those subject to a pollution abatement order to claim against others who might be responsible for causing the contamination. In addition, there was no statutory obligation for managers to consider private agreements under the 1986 pollution abatement provisions.

The Panel also notes that a contaminant had to be causing actual harm to the environment before a pollution abatement order could be issued. As a result, it may have been unclear whether some contaminated sites met this threshold. In contrast, "remediation" means the removal or mitigation of "any contaminant or [its] negative effects on the environment or human health". Moreover, in 1986, the 1982 *Act* was largely silent as to the procedures and standards required to assess and clean-up contaminated sites. As a result, there were no legally enforceable standards to trigger remediation or ensure that it was done effectively.

Subsequent amendments to the 1982 *Act* gradually added provisions to address the remediation of contaminated sites. The terms "remediate" and "contaminated site" first appeared in the 1982 *Act* as a result of the *Waste Amendment Act, 1990*, S.B.C. 1990, c. 74 (the "1990 *Amendment Act*"). Effective on August 31, 1990, the 1990 *Amendment Act* amended the 1982 *Act* by adding "Part 3.1 - Contaminated Site Remediation", which included three sections. Section 20.1 provided a definition of "contaminated site", section 20.2 provided for the issuance of a certificate of compliance if a manager was satisfied that a contaminated site had been remediated, and section 20.3 provided for Crown immunity from proceedings relating to a certificate of compliance. The 1990 *Amendment Act* also added a definition of "remediate" to section 1 of the 1982 *Act*.

In June 1993, the *Waste Amendment Act, 1993*, S.B.C. 1993, c. 25 received Royal Assent. It replaced Part 3.1 of the 1982 *Act* with 22 new sections designed to provide a comprehensive statutory scheme for identifying contaminated sites, imposing liability for remediation on responsible persons, and ensuring that remediation is properly undertaken. These sections were brought into force effective April 1, 1997, to become Part 4 of the *Act*. The principles of "absolute, joint and several and retroactive liability" are the basis for the assignment of liability under this scheme.

It is clear from the history described above that some measure of statutory liability for the clean-up of contaminated sites did exist in 1986, even though the scheme of liability in Part 4 of the *Act* goes significantly beyond what existed in 1986 under the 1982 *Act*. The Purchase Agreement attempted to address the statutory liability that existed in 1986. This is indicated in the portions of the agreement that address liability for "Claims" relating to "Environmental Matters", including "work required by any lawful authority" to be done to address "damage to the natural environment or human health resulting from toxic chemicals". As such, the Panel finds that the Purchase Agreement does address "liability for remediation" to the limited extent that was provided for in 1986 under the 1982 *Act*.

In addition, it is clear that the Purchase Agreement is a private agreement between or among "responsible persons". Both COPL and FMC #1 were signatories to the Purchase Agreement.

Accordingly, the Panel concludes that the Director must take the Purchase Agreement into account in exercising his discretion under section 27.1 of the *Act*. However, the Panel notes that in taking the Purchase Agreement into account, the Director is not bound by its provisions. The Director may still decide to name any of the responsible persons in the Order after having taken the terms of the Purchase Agreement into account.

Having taken into account the terms of the Purchase Agreement that relate to liability for "Claims" relating to "Environmental Matters", the Panel finds that this Agreement does not cover the full extent of the liability for remediation imposed by Part 4 of the *Act*. As stated above, Part 4 creates a scheme of liability for remediation that goes significantly beyond the liability for pollution abatement that existed in 1986 under the 1982 *Act*. Pursuant to Part 4, statutory liability for the costs of complying with a remediation order applies "absolutely, retroactively and jointly and severally" to both the vendor and purchaser of the former plant. When the Purchase Agreement was signed, the 1982 *Act* did not provide for such liability or the strict remediation requirements that now exist. There is no clear indication in the terms of the Purchase Agreement that the parties to this Agreement intended it to cover such extensive liability. As such, the Panel finds that the terms of the Purchase Agreement do not provide sufficient grounds for not naming FMC #1 in the Order.

Asset Transfer

The Asset Transfer addresses the transfer of "all property, assets, and liabilities of every nature relating to the Business and all other assets and property" of FMC #1 to FMC #2. FMC #1 is described as carrying on a "Business" through five divisions, none of which clearly indicate the operation of a chlor-alkali plant. The Panel notes that the Asset Transfer makes no mention of environmental liabilities or a chlor-alkali plant. In addition, FMC #1 had sold the Squamish plant one year before this agreement was signed. The Panel finds that the evidence of Mr. Laws does not assist in resolving this uncertainty.

Thus, the Panel finds that the Asset Transfer is not clear on its face as to whether any environmental liabilities associated with the Squamish plant that remained with

FMC #1 were transferred from FMC #1 to FMC #2, and the additional evidence before the Panel on this point is inconclusive. Thus, it is the Panel's view that the evidence does not establish on a balance of probabilities that the Asset Transfer is an agreement respecting liability for remediation between responsible persons, within the meaning of section 27.1(4).

Accordingly, the Panel finds that the Asset Transfer is not an agreement that must be taken into account by the Director under section 27.1(4). However, as the Panel has found with respect to the Purchase Agreement, even if the Asset Transfer were such an agreement, the Director is not bound by its provisions.

Release

The Release is an indemnity agreement respecting certain environmental liabilities associated with the Squamish plant. Specifically, it addresses "Liabilities" for any "Environmental Matters" at the Squamish plant. The Release adopts the definition of "Environmental Matters" that is found in the Purchase Agreement.

"Liabilities" are defined in the Release as:

> Claims, actions, assessments, causes of action, losses, damages, judgements, orders, response costs, penalties, fines, reasonable out-of-pocket costs and expenses (including without limitation, interest, penalties, costs, reasonable expenses of investigation by engineers, environmental consultants and similar technical personnel incurred in the defense of any such demand, claim, action or assessment and reasonable attorney's fees and expenses).

Like the Purchase Agreement, the Release does not use the word "remediation". However, the Release defines "Liabilities" as including "orders". In addition, "Liabilities" include the investigation expenses of engineers and environmental consultants, which is suggestive of the types of remedial actions undertaken in a remediation order. Furthermore, the Panel notes that the Release was signed in January 1992. Counsel for the Director stated that a discussion paper outlining the legislative reforms found in the *Waste Amendment Act, 1993* was in public circulation by January 1991. This discussion paper would have been available to the public before the Release was signed. For these reasons, the Panel concludes that the Release is an agreement "respecting liability for remediation" within the meaning of section 27.1(4) of the *Act*.

The next question concerns whether FMC #1 or FMC #2 signed the Release.

The Release is signed by COPL, FMC Corp., and "FMC of Canada, Limited - FMC of Canada Limitee, a company incorporated under the laws of Canada". Regarding the party named as "FMC Canada Limited - FMC Canada Limitee", there is clear evidence that, when the Release was signed, FMC #1 was no longer named "FMC of Canada Limited - FMC Canada Limitee", as it was referred to in the Purchase Agreement. When the Release was signed, FMC #1 existed as a company named Mid-Atlantic Investments Ltd., and was no longer extraprovincially registered in B.C.

It is also clear from the evidence that, when the Release was signed, FMC #2 had changed its name to "FMC of Canada, Limited - FMC of Canada Limitee". However, it was not a company incorporated under the laws of Canada, but was a company incorporated under the laws of Ontario and extraprovincially registered in B.C.

Based on this evidence, the Panel finds that the Release was not signed by FMC #1. There was no evidence presented that FMC Corp. had the authority to sign the Release on behalf of FMC #1. Had it wished to do so, it should have clearly indicated that intent in the Release. It is the Panel's view that for a private agreement to be one that must be considered under section 27.1(4), it must be clear enough on its face, and taking into account any submissions with respect to its interpretation, that a manager can determine who is party to the agreement, that those parties are responsible persons, and that it is an agreement respecting liability for remediation. It is important to bear in mind that a remediation order is not a final determination regarding liability for remediation costs, and that the objective at this point is to ensure a relatively speedy cleanup of the contamination.

For these reasons, and considering all of the evidence with respect to this issue, the Panel finds that the Release was not signed by FMC #1. Therefore, the Director was not required to consider the Release in relation to deciding whether to name FMC #1 in the Order. The Release provides no basis for FMC #1 not to be named in the Order.

However, the Panel also finds that, based on the evidence, it is not clear whether FMC #2 is a party to the Release. While it is clear that FMC #2 was registered under the name "FMC of Canada Limited - FMC Canada Limitee" when the Release was signed, FMC #2 was not registered under the laws of Canada. Rather, it was a company registered under the laws of Ontario. The company that signed the Release is described as being registered under the laws of Canada. Therefore, it appears that neither FMC #2 nor FMC #1 are parties to the Release. Even if FMC #2 were a party to the Release, the Panel has found that the evidence fails to establish that FMC #2 acquired any environmental liabilities associated with the Squamish plant from FMC #1 by virtue of the Asset Transfer.

With respect to the parties' submissions on the liability of FMC #1's alleged corporate successors, the Panel agrees that the situation between FMC #1 and #2 is not one of amalgamation. Under the Asset Transfer, the two companies intended to transfer certain assets and liabilities from FMC #1 to FMC #2, but no amalgamation or fusion of the corporate entities occurred. As stated by the Supreme Court of Canada in *Black & Decker*, there is no fusion of the corporate entities through an asset transfer. Thus, FMC #2 did not become FMC #1.

The parties presented a number of court decisions that consider the liability of corporate successors and the assignment of liabilities by corporations. However, given the Panel's findings above with respect to the Asset Transfer and the Release, the Panel finds that it is unnecessary to decide whether FMC #2 or FMC Corp. may be successors or assignees of FMC #1 for the purposes of a remediation order.

In addition, the Panel notes that no submissions have been provided by the parties in this appeal with respect to whether FMC Corp. or FMC #2 may be responsible

persons on the basis that they were actual owners or operators with respect to the former plant. Nor have the parties made submissions on whether FMC Corp. or FMC #2 actually produced or transported a substance in a manner that caused the Site to be contaminated, or exercised any control over how FMC #1 conducted its operations at the Site. Finally, no evidence was presented showing that FMC Corp. or FMC #2 have ever been agents of FMC #1.

The Panel makes no finding as to whether FMC Corp. or FMC #2 are responsible persons who may be named in the Order.

For these reasons, the Panel concludes that the Release does not apply to FMC #1, and that it is unclear whether the Release is an agreement between or among responsible persons. As such, the Release is not an agreement that the Director must take into account in exercising his discretion under section 27.1 in relation to FMC #1.

3. Whether FMC #1 should be named in the Order.

There is no dispute that FMC #1 is a responsible person by virtue of its status as an owner and operator of the Squamish plant for over 20 years. As such, the Director, and thus the Board under section 47 of the *Act*, have the discretion to name FMC #1 to the Order.

In deciding whether to name FMC #1 as a person responsible for remediation, as requested by COPL, the Panel has considered the Director's reasons for not naming FMC #1 to the Order. In his "Reasons for Decision" dated October 8, 1999, the Director refers to "FMC" because, at that time, he was not aware of the Asset Transfer and the existence of both FMC#1 and #2. It is clear from the Director's Reasons that his decision not to name "FMC" in the Order was largely based on his interpretation of the Release and the Purchase Agreement. At page 65 of his Reasons, the Director stated as follows:

> COPL and FMC are sophisticated private corporations who have chosen to order their affairs according to the terms of the Purchase Agreement and the [Re]Lease. I am satisfied that it is appropriate for me to take these agreements into account and of the two companies name only COPL to the Order. At this time I am satisfied that COPL has sufficient resources to undertake the necessary work. I, of course, reserve the right to revisit this determination should circumstances change.

The Panel concluded above that FMC #1 cannot rely on the Purchase Agreement or the Release as a basis for not being named in the Order.

The Panel has considered those portions of the Director's Reasons for Decision that contain his final determinations respecting contamination at the plant site and off-site waterbodies. No parties contested the Director's preliminary determination of contamination with respect to the plant site, but COPL contested the Director's preliminary determination of contamination with respect to the off-site lands.

With respect to the plant site, the Director states as follows:

> The Plant Site is contaminated with mercury as a result of historic spills and discharges that occurred in connection with former chlor-alkali operations. During its operation the chlor-alkali plant discharged large volumes of mercury into the air, water and land. The largest discharges occurred during the first five years of operation [1965 to 1970] when from 2 to 31 kg/day (1000 to 10,000 kg/year) are estimated to have been released to air and water from the plant. Sludges from early wastewater treatment operations were also deposited into a manmade unlined lagoon on site (the "Old Lagoon").
>
> In the years following 1970 when environmental controls were instituted, significant reductions in mercury discharges were achieved. However, direct mercury discharges in the order of 1 kg/day (370 kg/year) were still occurring in 1991 when the plant was shut down.

With respect to waterbodies adjacent to the plant site, the Director states:

> Mercury concentrations above regulatory levels have been measured in sediments in the waterbodies adjacent to the Plant Site as far back as the early 1970's… The studies spanning the 1970's through 1981 showed the highest levels of mercury occurring near the chlor-alkali plant dock in Mamquam Blind Channel and the effluent discharge point at the southwest corner of the site.
>
> Subsequent studies in the 1980's showed elevated mercury levels in sediments in Cattermole Creek. Investigations conducted in 1993 and 1997 show that mercury concentrations in subtidal sediments have declined since 1981, however, levels in the intertidal zones have either remained constant or increased slightly…
>
> …
>
> The old lagoon… received mercury laden sludges and wastewater during the early years of operation of the chlor-alkali plant… An estimated 36,000 cubic metres of mercury contaminated sludges and soil exist within and around the lagoon… High levels of dissolved mercury (up to 100 times the standard) are present in groundwater discharging into Howe Sound from below the Old Lagoon.

The Director's findings confirm that most of the mercury discharges from the plant that continue to be a source of contamination at the plant site and surrounding environment were discharged while FMC #1 operated the plant. For the purposes of this decision, the Panel accepts these findings by the Director. While the Panel recognizes that COPL has appealed some of the Director's findings with respect to contamination, those aspects of COPL's appeal have yet to be heard by the Board.

The Panel has also considered several technical and scientific reports dating back to 1978, which were among those considered by the Director in reaching his determinations respecting contamination at the Site. For the purposes of this

decision, the Panel finds that these reports confirm that the mercury contamination arising from the plant's operations largely occurred during the tenure of FMC #1.

Finally, the Panel notes that FMC #1 still exists as a company (albeit under a different name than when it operated the plant), and FMC Group concedes that FMC #1 is a responsible person who contributed most substantially to the contamination of the Site. There has been no suggestion that adding FMC #1 to the Order would jeopardize remediation efforts.

In these circumstances, the Panel finds that FMC #1 should be named in the Order as a person responsible for remediation.

DECISION

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

The Panel finds that the Director is not required to name in an order all persons who "contributed most substantially" to a site becoming contaminated. However, in the circumstances of this appeal, the Panel orders that the Order shall be amended by adding Mid-Atlantic Investments Ltd. as a person responsible for remediation.

The appeal is granted.

Katherine Hough, Panel Chair
Environmental Appeal Board

March 20, 2001