BRITISH COLUMBIA

Environmental Appeal Board

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

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

APPEAL NO. 2000-HEA-019(a)

In the matter of an appeal under section 8 of the Health Act, R.S.B.C. 1996, c. 179.

BETWEEN:	Dean Ellis	**APPELLANT**
AND:	Environmental Health Officer	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by written submissions concluding on February 14, 2001	
APPEARING:	For the Appellant: Dean Ellis For the Respondent: Greg Vos	

RECONSIDERATION OF APPEAL DECISION

On June 27, 2000, Dean Ellis appealed the June 15, 2000 decision of Dwayne Stroh, an Environmental Health Officer ("EHO") with the Upper Island/Central Coast Community Health Services Society (the "Health Services Society"), refusing to issue a permit for a sewage disposal system on Lot 136, Plan 24327, Section 1, Nanaimo District, with a street address of 5095 McLeod Road, Hornby Island (the "Property").

On January 15, 2001, the Board issued a decision dismissing the appeal (Appeal No. 2000-HEA-019) (unreported).

Mr. Ellis subsequently informed the Board that he had not been provided with a copy of the EHO's final written submission, and, therefore, had not had the opportunity to respond to that submission before the hearing closed. As a result, in a letter dated January 31, 2001, the Board decided that, to ensure procedural fairness, the appeal should be re-opened for the limited purpose of allowing Mr. Ellis to reply to the EHO's final written submission.

Mr. Ellis seeks the issuance of a permit to construct the sewage disposal system described in his April 26, 2000 permit application.

BACKGROUND

For a detailed background of this appeal, see the Board's decision in appeal 2000-HEA-019.

Mr. Ellis purchased the Property in 1999. He seeks a permit to construct a sewage disposal system to serve a house and cabin on the Property, which are currently serviced by an "outhouse". Before the appeal was heard, Mr. Ellis received a permit to construct a sewage disposal system that includes a "Biogreen BG2000" package treatment plant, which provides tertiary treatment of sewage effluent through an ultraviolet or chlorine disinfection system. However, Mr. Ellis seeks a permit based on his April 26, 2000 application for a system that includes a "Chromoglass CA5" package treatment plant.

The Board conducted an oral hearing on the merits of the appeal on November 16, 2000. Among other things, Mr. Ellis submitted that the EHO had approved similar systems on other properties on Hornby Island. In support, Mr. Ellis submitted copies of two sewage disposal permits issued for other properties on Hornby Island. These documents were entered into the record as exhibits 2 and 3.

Exhibit 2 is a copy of a sewage disposal permit issued in 1999 for a system located at 5145 McLeod Road, Hornby Island, which is adjacent to Mr. Ellis' Property. The system includes a Chromaglass CA5 package treatment plant. Mr. Ellis submitted that no inspection for soil depth was done at this site, and that the site was not inspected in the winter. Exhibit 3 is a copy of a permit issued in February 2000 for a system located at 3070 Shingle Spit Road, Hornby Island. This system also includes a Chromaglass CA5 package treatment plant. Mr. Ellis submitted that the system was approved despite the fact that among other things there is not 18 inches of native soil at this site.

After the conclusion of the oral hearing, but before a decision was issued, Mr. Ellis wrote to the Board with additional submissions. In a letter dated December 6, 2000, Mr. Ellis stated that the permits marked as exhibits 2 and 3:

> …were approved **after** my permit was denied so they are the most recent EHO interpretation of the rules. My position is if these interpretations of the rules are not used as guidance then the system has become corrupt and discriminatory. [Emphasis in original]

In this letter, Mr. Ellis also makes reference to the definition of "disturbed" soil in relation to exhibit 2.

It should be noted that in this letter and his subsequent submissions, Mr. Ellis mistakenly refers to exhibits 2 and 3 as exhibits 1 and 2. In the interest of accuracy, the Panel will refer to exhibits 2 and 3 as the permits for 5145 McLeod Road and 3070 Shingle Spit Road, respectively, except where quoting the parties directly.

Since Mr. Ellis raised new issues in this letter, the Board re-opened the hearing to give the EHO an opportunity to respond. In a letter dated December 6, 2000, the Board advised the parties that the EHO had until December 13, 2000 to provide a

written reply, and Mr. Ellis had until December 18, 2000 to provide a written rebuttal.

The EHO's reply submission, dated December 8, 2000, stated as follows:

1. Exhibits one and two were assessed using the same regulations, policies and guidelines as the denied sewage disposal permit application.

2. We have no further comments on disturbed soil as this was thoroughly discussed during the appeal hearing. Also I do not understand the reference to 0 and 8 inches of disturbed soil in Mr. Ellis' statement.

Mr. Ellis did not provide a rebuttal submission by the December 18, 2000 deadline.

On January 15, 2001, the Board issued its decision in the appeal. The Board held as follows regarding Mr. Ellis' submission that he was treated unfairly by the EHO:

> With respect to Mr. Ellis' allegations that the Respondent acted in an unfair or discriminatory manner when considering his application, the Panel finds that there is insufficient evidence to substantiate such claims. In particular, Mr. Ellis' evidence that other properties on Hornby Island were given permits while his was not does not convince the Panel of any unfairness. Each site must be evaluated on its own merits. In this case, the only relevant information is the site-specific details of the Ellis Property. The Panel gives little weight to the other permits when considering the merits of Mr. Ellis' application. Any decisions with respect to other properties on Hornby Island or elsewhere are irrelevant to this appeal.

With regard to the merits of Mr. Ellis' permit application, the Board held that:

> The Panel finds that the depth of natural soil on the Property does not meet the minimum of 18 inches of "natural soil", i.e. undisturbed soil native to the lot, as set in chapter 6.1 of the Policy. The Panel accepts the evidence of the Respondent, based on the field inspections by Mr. Cherry and Mr. Stroh, as well as the evidence of Mr. La Rose and Mr. Davey in this regard. Mr. Ellis has provided no technical evidence to dispute this finding.
>
> The Panel notes that the Policy suggests that EHOs may consider reducing the minimum 18 inch depth in certain circumstances, such as where the lot is a large acreage, the groundwater table is not a factor (i.e. the lateral movement of effluent would be in unsaturated conditions), rainfall levels are low, or the existing soil is ideal for treatment. However, no evidence has been provided in this case to justify reducing the minimum soil depth requirement. The Panel accepts the evidence of the Respondent that there is insufficient depth of native undisturbed soil above the water table at this site to permit the proposed sewage disposal system. The Panel agrees with the evidence of the Respondent and Mr.

> Davey that a package treatment plant utilizing a tertiary treatment process is necessary at this site in order to adequately safeguard public health.
>
> Thus, the Panel finds that the Respondent correctly exercised his discretion under section 7(1) of the *Regulation* when he rejected Mr. Ellis' April 2000 application on the ground that there is an insufficient depth of natural soil.

After receiving a copy of the appeal decision, Mr. Ellis informed the Board that he had never received a copy of the EHO's submission dated December 8, 2000, and, therefore, he had not provided a rebuttal. He requested an opportunity to respond to the EHO's letter.

In a letter dated January 31, 2001, the Board advised the parties that the Chair had agreed to re-open the appeal for the limited purpose of allowing Mr. Ellis to reply to the contents of the EHO's December 8, 2000 submission. The Board received Mr. Ellis' rebuttal submissions on February 9, 2001.

The Board has reconsidered the merits of the appeal in light of Mr. Ellis' rebuttal submissions.

ISSUE

The sole issue is whether Mr. Ellis' rebuttal submissions provide new grounds for finding that a permit to construct a sewage disposal system, as sought in the April 26, 2000 application, should be issued.

DISCUSSION AND ANALYSIS

Whether Mr. Ellis' rebuttal submissions provide new grounds for finding that a permit to construct a sewage disposal system, as sought in the April 26, 2000 application, should be issued.

In his rebuttal comments, Mr. Ellis submits that the EHO applied different standards to his application than to other applications for similar systems on Hornby Island. Mr. Ellis disagrees with the submission in the EHO's December 8, 2000 letter that the permits for 5145 McLeod Road and 3070 Shingle Spit Road were assessed using the same regulations, policies and guidelines as Mr. Ellis' permit application. Mr. Ellis argues that the EHO has interpreted the regulations, policies and guidelines differently for his denied permit application.

Mr. Ellis did not address or dispute the EHO's comments with respect to soil disturbance as outlined in his letter of December 8, 2000.

To support his arguments, Mr. Ellis referred to the exhibits that were entered into the record at the oral hearing. He submits that the systems approved for 5145 McLeod Road and 3070 Shingle Spit Road use a Chromoglass package treatment plant, as does the system in his rejected application. His specific submissions with regard to 5145 McLeod Road may be summarized as follows:

- The disposal field approved for 5145 McLeod Road was permitted to be 15 feet away from the property boundary, while Mr. Ellis was required to put his field 25 feet from the Property boundary. If he had been able to locate his field 10 feet north of its present location, the soil would have been "considerably deeper than 18 inches".

- The disposal field at 5145 McLeod Road was evaluated based on only two test holes. If Mr. Ellis had been able to use only his two best test holes, he would have satisfied the requirement for a minimum of 18 inches of undisturbed native soil.

- The house at 5145 McLeod Road is 10 feet away from the absorption field trench wall. The cabin on the Property is 25 feet from the trench wall, yet this was a ground for denying his application.

Mr. Ellis' specific submissions with regard to 3070 Shingle Spit Road may be summarized as follows:

- The disposal field on 3070 Shingle Spit Road was only required to be 25 feet away from the perimeter drains, a potential breakout point. One of the reasons given for rejecting Mr. Ellis' proposed system was that the disposal field was less than 50 feet from a potential breakout point.

- The permit for 3070 Shingle Spit Road calls for the removal of "organics", yet Mr. Ellis' permit was rejected by the EHO, and was considered unacceptable by Mr. Davey, one of the engineers hired by Mr. Ellis, because Mr. Ellis had already removed the "organics". This "removal of organics would lessen the depth of soil, so if we assume there are 2 [inches] of organics on an 18 [inches] deep field therefore the EHO would be approving a 16 [inch] deep field."

- The testhole monitoring log for 3070 Shingle Spit Road shows that the February 2, 2000 depth to water table was less than 18 inches for two test holes. Section 2(b) of Schedule 1 of the *Sewage Disposal Regulation* (the "*Regulation*") requires test holes when perimeter ditching is used to show "plus 18 [inches] of above the water table for 2 years prior to issuing a permit".

- Mr. Stroh's written observations for test hole #3 on 3070 Shingle Spit Road show 17 inches to the water table, yet he approved the field in that location.

In conclusion, Mr. Ellis states that the installed cost of the Biogreen package treatment plant approved for his Property is $35,000 to $40,000, while the installed cost of a Chromoglass plant is $22,000 to $25,000.

Mr. Ellis' new submissions do not change the Panel's previous finding concerning the relevance of these two permits to this appeal. The fact that systems using a Chromoglass package treatment plant have been approved for installation on other properties has little relevance to the issues in this appeal. The issue before the Panel is whether the system proposed by Mr. Ellis for use on his Property meets the requirements of the *Regulation* and the *Health Act*. The relevant facts in this appeal are those pertaining to the merits of Mr. Ellis' application and the site

conditions of the Property, and not those facts pertaining to other permits approved for other sites. Mr. Ellis' application must be evaluated on its own merits, and not on the basis of what the EHO approved for other sites. Mr. Ellis' rebuttal submissions shed no new light on the issue of whether a permit should be issued based on his April 2000 application.

Furthermore, the Panel notes that the merits of the permits concerning systems at 5145 McLeod Road and 3070 Shingle Spit Road have never been the subject of an appeal before the Board. The only information that the Board has about these systems is that found in the permits themselves. The permits provide insufficient information to enable the Panel to make fully informed comparisons between Mr. Ellis' Property and the other two properties. To make such comparisons would, in the Panel's view, be speculative and of little value in assessing the merits of Mr. Ellis' application.

In addition, the Panel finds that the fact that a system with a Chromoglass package treatment plant has been approved on another site where the depth of native soil and setback distances may not, as in Mr. Ellis' case, have conformed with recommended policy guidelines, does not indicate the Mr. Ellis received unfair or discriminatory treatment by the EHO. As noted in the Board's January 15, 2001 decision, the EHO's statutory authority includes discretion to approve applications for systems that do not comply with certain aspects of the *Regulation*, as long as the EHO is satisfied that the system complies with all other applicable aspects of the *Regulation* and the *Health Act*.

Section 7(1)(b) of the *Regulation* provides as follows:

Alternate methods

7 (1) Where a medical health officer or public health inspector is satisfied that it is impossible for a person to comply with

…

(b) in the case of a conventional package treatment plant, **sections 11**, 12 or 18 of Schedule 3...

but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under section 3, containing conditions that he considers appropriate to meet the omitted standards having regard to safeguarding public health. [emphasis added]

Mr. Ellis refers to differences in the setback distances permitted for the systems described in the permits for 5145 McLeod Road and 3070 Shingle Spit Road as compared to his rejected application. The Panel notes that the EHO has no discretion to reduce the minimum 10 foot setback required between an absorption field and a parcel boundary, building, or an interceptor drain, as prescribed in section 14 of Schedule 3. However, the Panel notes that the setbacks that Mr. Ellis points to in these two permits all conform with the minimum setback requirement. The 50-foot setback to which Mr. Ellis refers is found in chapter 4.4 of the Policy,

and is therefore not legally binding. Rather, it merely provides a guideline to assist the EHO in exercising his discretion. The Policy also suggests that the EHO may consider reducing this 50-foot minimum setback distance in appropriate circumstances.

In any event, the Panel's decision to dismiss Mr. Ellis' appeal was not based on setback considerations. Its decision was based on public health concerns due to insufficient depth of undisturbed native soil on the Property.

In his rebuttal, Mr. Ellis also compares the EHO's findings regarding the depth of undisturbed native soil on his Property to that at 5145 McLeod Road and 3070 Shingle Spit Road. As noted above, the EHO has discretion to approve a system that does not comply with section 11 of Schedule 3. Section 11 addresses soil depth requirements, and provides as follows:

11. A conventional absorption field shall not be located in an area where an impervious layer of soil or bedrock, or the ground water table, are less than 1.2 m [4 ft.] below the ground before it has been artificially disturbed by placement of fill, excavation or otherwise.

To assist EHOs in exercising their discretion over soil depth requirements, chapter 6.1 of the Policy recommends that there be at least 18 inches of "natural soil", or undisturbed native soil, on sites where alternate systems are proposed. However, the Policy suggests that this 18-inch minimum may be reduced in certain circumstances, such as where the lot is a large acreage, the groundwater table is not a factor, or the existing soil is ideal for treatment.

In the Panel's previous decision, it found that there was less than 18 inches of undisturbed native soil on the Property, and that none of the circumstances suggested in the Policy for reducing the 18 inch minimum applied to the Property. In making that finding, the Panel weighed all of the evidence, including that of Mr. Davey, who agreed with the EHO's conclusion that a plant with tertiary treatment was appropriate for this site. The fact that the EHO approved the permits for 5145 McLeod Road and 3070 Shingle Spit Road does not indicate that the EHO applied the regulations and policy guidelines differently to Mr. Ellis' application than to those two permits. It merely indicates that having considered the applicable regulations and policies with respect to the particular site characteristics of the respective properties, the EHO decided that a Chromoglass system would be safe to use on those two properties but not on Mr. Ellis' Property. There is no indication that the EHO exercised his discretion in an unfair, arbitrarily, or discriminatory fashion in approving those two permit applications and denying Mr. Ellis'.

On review of Mr. Ellis' comments regarding the permits for 5145 McLeod Road and 3070 Shingle Spit Road, the Panel finds that there is no indication that the EHO improperly exercised his discretion or exceeded the limits set out under the *Health Act*, *Regulation*, or Policy. However, had the EHO improperly exercised his discretion or exceeded those limits, it would not justify the approval of another system that failed to protect the public health. Two "wrongs" do not make a "right", and the Panel would not be prepared to use its authority to approve an unsafe system under those circumstances or for that reason.

In summary, the Panel finds that Mr. Ellis' rebuttal submissions provide no new evidence to support the merits of his application with respect to the Property, and provide no basis to refute the Panel's previous findings. They also provide no evidence that the EHO failed to properly consider the relevant regulatory provisions or policy guidelines when considering Mr. Ellis' application, nor any indication that Mr. Ellis' application was the subject of unfair or discriminatory treatment by the EHO.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has considered all of the evidence before it, whether or not specifically reiterated here.

For all of the reasons set out above, the Panel confirms its decision in this appeal. The EHO's decision to refuse to issue a sewage disposal system permit, as sought in Mr. Ellis' April 26, 2000 application, is reasonable in the circumstances.

The appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

March 5, 2001