



# Environmental Appeal Board

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## APPEAL NOS. 2000-HEA-036(a), 037(a), 038(a)

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

**BETWEEN:** British Columbia Shellfish Growers Association  
Friends of Cortes Island  
Larry Cohen on behalf of himself, Carol Tidler,  
Gail Ringwood, Nancy Kendel, Ray Kendel,  
Bruce Jacobson, Elizabeth Anderson,  
Shirley Winter, Leonard Wowitka, Alois Stranan,  
Anna Stranan, David Rosseau, and Suzu Spier **APPELLANTS**

**AND:** Environmental Health Officer **RESPONDENT**

**AND:** Point One Engineering **PERMIT HOLDER**

**BEFORE:** A Panel of the Environmental Appeal Board  
Alan Andison, Chair

**DATE OF HEARING:** Conducted by way of written submissions  
concluding on November 28, 2000

**APPEARING:** For the Appellants:  
B.C. Shellfish Ruth Salmon  
Friends of Cortes Island Grant Anderson, Counsel  
Larry Cohen, et al Larry Cohen  
For the Respondent: Greg Vos  
For the Permit Holder: Dick Bartel

## APPLICATIONS

Greg Vos, an Environmental Health Officer ("EHO"), made two applications to the Board in relation to the above-captioned appeals, requesting that:

1. the appeals be denied, or alternatively,
2. the appeals be heard by way of written submissions.

All parties have had an opportunity to respond to these applications, which have been conducted in writing.

**BACKGROUND**

On September 6, 2000, the EHO issued sewage disposal permit 39/00 to Point One Engineering for construction of a sewage disposal system on Lot A, District Lot 307, Sayward District, Plan VIP 68955 ("Lot A"), located at the east end of Red Granite Road, Cortes Bay, Cortes Island. Lot A is a 1.5 acre portion of Lot 307, which is approximately 36 acres in size. Lot A is owned by Timberman Developments Ltd., Tony Novak, and Barbara Novak. The permit authorizes construction of a conventional package treatment plant system to serve 11 one-bedroom motel units (without a laundry facility) and a caretaker cabin, with a combined estimated daily sewage flow of 2065 gallons [9386 litres] per day.

The British Columbia Shellfish Growers Association (the "Association"), Friends of Cortes Island ("FOCI"), and Larry Cohen all filed separate appeals of the EHO's decision to issue the permit. Larry Cohen's appeal was filed on behalf of himself and several other individuals.

In a letter dated October 23, 2000, the EHO asked the Board to deny the appeals, or alternatively, hear them by way of written submissions.

The Board invited each of the parties to make submissions on this application. Submissions were received from all parties.

It should be noted that this is the third sewage disposal permit that has been issued for this resort development. The first permit was issued in 1995 and was appealed to the Board by the Cortes Island Seafood Association. On August 30, 1995, the Board upheld the issuance of that permit (*Cortes Island Seafood Association v. Environmental Health Officer*, Appeal No. 95/01). The Permit Holder in that appeal, Triple R Land Company, then constructed and installed part of the permitted system, the absorption field, but did not install the package treatment plant before the permit expired, one year later. The permit holder was therefore required to reapply for a permit.

On May 22, 1998, Triple R Development Ltd. was issued a second sewage disposal permit. That permit was appealed by the Association, FOCI, Larry Cohen and the Comox-Strathcona Regional District. The Board rescinded that permit because it found that the EHO did not have all of the material information before him when he issued the permit (*Friends of Cortes Island et al. v. Environmental Health Officer*, Appeal No. 98-HEA-12(c), March 3, 1999). The Board recommended that the Permit Holder re-submit accurate plans showing the size, layout, and square footage of the proposed units, in order to confirm the correct estimated daily sewage flow for the system.

The present Permit Holder re-submitted building plans for the resort development to the EHO, and a third permit was issued. The decision to issue this permit is the subject of these appeals.

The EHO submits that the appeals involve a single issue, and the only information that needs to be reviewed is the building plan for the motel units in accordance with

the Board's last decision. He submits that, in these circumstances, the appeals should be denied or, if they proceed, they should be conducted in writing.

The Permit Holder supports the EHO's applications.

The Appellants all oppose the applications.

## **ISSUES**

The Panel has considered the two following issues:

1. Whether the appeals should be dismissed summarily.
2. Whether the appeals should be conducted in writing.

## **DISCUSSION AND ANALYSIS**

### **1. Whether the appeals should be dismissed summarily.**

The EHO submits the appeals should be dismissed. He argues that the decision to issue a permit for the proposed development has been appealed on two previous occasions, and that the application for the present permit included the building plans required by the Board in its 1999 decision. The EHO asserts that these plans were reviewed to ensure that the designed daily sewage flow of the system will not be exceeded. Therefore, the only issue that should be subject to an appeal is whether the building plans match an estimated sewage flow of 9386 litres per day, as shown on the subject permit.

The Permit Holder does not address this issue directly, but submits that it provided the EHO with the most recent, complete and accurate information and building plans to corroborate the flow of 9386 litres per day being appropriate for the planned buildings, and that this is the original design flow approved for the installed disposal field.

Counsel for FOCI submits that FOCI's appeal is not frivolous, is not based entirely on legal argument, and is not an attempt to re-argue issues that have already been decided. Specifically, FOCI submits that an entirely new set of plans, which have not been the subject of a previous appeal, were submitted with the application for the present permit. Its appeal is based on a genuine concern that the estimated daily sewage flows for the most recent version of the proposed development have been underestimated, and that environmental damage will result if the proposal proceeds. FOCI maintains that, as the Board has not heard this issue before, the appeal should not be summarily dismissed.

FOCI also argues that the EHO appears to concede that there is a live issue as to whether the building plans submitted match a daily sewage flow of 9386 litres.

Mr. Cohen accepts that the present permit does not make any changes to the disposal field built under the previous permit. However, he submits that the appeal by his group raises an issue as to the calculation of the daily sewage

flow for the proposed development. Mr. Cohen submits that this issue is not frivolous since public health concerns demand that the disposal field be able to adequately process this level of flow. Therefore, the appeal should not be summarily denied.

The Association adopts the submissions of FOCI and Mr. Cohen respecting this application.

The Appellants' grounds for appeal in their respective Notices of Appeal include the following:

- the proposed development has not been accurately described by the developer in its permit application or building plans;
- the EHO improperly calculated the estimated daily sewage flow for the proposed development as an 11 bedroom motel, rather than as 11 free-standing cabins, and, as a result, the total daily flow for the system has been underestimated;
- the system poses a threat to the environment and to shellfish growing operations given the setback of the disposal field from the beach and the percolation rates in the area;
- the EHO should have ordered additional tests to be carried out in accordance with the *Sewage Disposal Regulation* given the soil conditions at the site and the system's proximity to wells and beaches; and,
- the Permit Holder failed to comply with the mandatory notice requirements in the *Sewage Disposal Regulation*.

The Panel notes that the primary issue underlying all of these concerns is whether the permitted system poses any threat to human health or the environment. A question as to whether the Permit Holder complied with the statutory notice requirements is also posed.

The Panel also notes that the decision to issue the permit appears, on the basis of submissions in these preliminary applications, to affect FOCI's interests in the environment of Cortes Island and the health of its residents. It also appears to impact the Association's interests in the sustainability of shellfish growing operations around Cortes Island. It is unclear exactly how the permit affects the interests of Mr. Cohen, who resides in Vancouver, or the group he represents.

The EHO, as the applicant, has the onus of establishing why the appeals should be dismissed summarily, without a hearing on the merits of the appeals. The Panel notes that the EHO has not provided extensive submissions in support of this application. The EHO's submissions focus on the fact that the decision to issue a permit for the proposed development has been appealed on two previous occasions. While the Board generally will not re-hear matters on which it has already made a final decision, the Panel notes that the EHO effectively concedes that there is a new question raised by these

appeals: whether the building plans match the estimated daily sewage flow shown in the permit. Although both the EHO and Permit Holder argue that these plans confirm that the estimated daily sewage flow stated in the permit is correct, there is clearly a dispute between the parties as to the proper interpretation of these plans. In addition, the Appellants have raised valid concerns regarding the safety of the permitted system and the adequacy of public notice of the permit.

As such, the Panel finds that it has not been provided with sufficient reasons to justify dismissing the appeals summarily. It further finds that the appeals raise valid questions, and that the parties should be provided with an opportunity to make their cases before the Board. Therefore, the remaining issue is whether the appeals should proceed by way of an oral or written hearing.

## **2. Whether the appeals should be conducted in writing.**

The EHO submits that the appeals should be conducted in writing because the only issue is whether the estimated sewage flow for the proposed development is correct, and the only evidence that needs to be reviewed is the building plan.

The Permit Holder submits, for the reasons it provided above, that the appeals should be conducted in writing.

FOCI argues that the proper estimated daily sewage flow from the proposed development can only be established in the context of a full hearing, as evidence concerning the future use of the proposed buildings and likelihood for internal changes to them will be introduced. Counsel for FOCI anticipates that the evidence will be conflicting, and that witnesses may need to be cross-examined so as to assess their credibility.

Mr. Cohen argues that the building plans submitted to the EHO are crucial to determining the necessary capacity of the disposal field, and show that a field with more capacity than that approved in the permit is needed. His appeal is also based on concerns about the intended use of the proposed development, and the adequacy of the Permit Holder's posting or publishing of notice of the permit. Mr. Cohen anticipates that the evidence for determining these issues will be in dispute and that oral testimony and cross-examination will be necessary for the Board to make an informed decision.

Section 4(2) of the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82, authorizes the Board to decide appeals "on the basis of a full hearing or from written submissions." There is no obligation for the Board to hold an oral hearing in order to comply with the rules of natural justice. This was confirmed by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4<sup>th</sup>) 193. At paragraph 33 of that decision, the Court stated as follows:

... it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature

of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

The main consideration for the Board in deciding whether a hearing should be conducted orally or in writing is whether, considering all of the circumstances, those whose interests are affected will have a meaningful opportunity to present their cases fairly and fully. As stated at pages 17-18 of the Board's *Procedure Manual*, written hearings will normally result in a fair hearing in cases where credibility is not a significant factor in an appeal, where the material facts are not in dispute, and/or where the issues to be decided have been dealt with in previous appeals, are not complex, or involve purely legal questions.

Whether the Appellants' concerns have been dealt with in previous appeals

In their Notices of Appeal, some of the Appellants have raised questions as to the soil conditions, setback from beaches, and percolation rates for the permitted disposal field. The Panel notes that, in the Board's 1999 decision in Appeal No. 98-HEA-12(c), the Board considered issues respecting the soil conditions, adequacy of setbacks from beaches, and the need for further hydrogeological tests at this very same site. On those issues, the Board concluded as follows at page 9:

The Panel is satisfied, as was the Board in the previous appeal of this disposal field, that the field is adequate for the estimated daily sewage flows on the permit application. The setbacks from the domestic water source and tidal water are in accordance with the *Regulation* and policy...

The Panel is satisfied that the EHO properly formed the opinion that there was sufficient site assessment and design for the proposed sewage disposal system, and that he did not require a hydrogeological assessment. However, if on a new permit application from the developer, the EHO concludes that the daily sewage flow is higher than the current estimate of 9386 litres, he will have to reconsider the size and adequacy of the field for the increased flow.

Some of the Appellants have also raised concerns about the potential future uses of the buildings described in the plans submitted to the EHO. The appellants in the 1999 appeal also raised concerns about future development on the site. On the question of future development, the Board found as follows at page 5:

The sewage disposal system in this permit is limited to the resort development as described in the permit. It cannot be used for any additional development...

Finally, the issue of whether the EHO underestimated the daily sewage flow for the proposed development was also considered in the 1999 decision. On that issue, the Board held at page 12 that:

... the sewage disposal system in Triple R's 1998 permit No. 98/15, would be permissible if the daily sewage flow estimate of 9386 litres is correct. However, the Panel has determined that the EHO did not have all of the material information before him when he made his decision. Most

significantly, he did not have up-to-date plans showing the size and layout of the units, and the square footage per unit on the permit application was incorrect. That information is material and may have affected the estimate of minimum daily sewage flows, and consequently the adequacy of the proposed sewage disposal system to protect public health...

Having reviewed the Board's 1999 decision in Appeal No. 98-HEA-12(c), this Panel concludes that several of the concerns raised by the Appellants are similar to, or the same as, some of those considered in the Board's previous decisions regarding this site. In addition, the Panel notes that all of the present Appellants were also appellants in the last appeal (98-HEA-12(c)). These similarities between the previous and present appeals generally favour proceeding by way of written submissions.

The Appellants' grounds for appeal do, however, raise some new issues that have not been previously considered by the Board. In particular, the question of whether the Permit Holder complied with the notice requirements in the *Sewage Disposal Regulation* is a new issue relating specifically to this permit. In addition, the Panel notes that the present appeals involve a new permit, and not just an amendment to the permit previously considered. Accordingly, the Panel finds that these appeals raise some issues that have not been previously considered by the Board.

#### Whether the material facts are in dispute

The Appellants and EHO agree that the building plans are material evidence and will most likely be subject to differing interpretations by the parties. The Panel agrees. However, the Panel finds that the building plans are documents that will be presented in written form, and that oral testimony may not be required for the fair and full presentation of submissions on these plans and how they should be interpreted.

Regarding the issue of whether the permitted sewage disposal system can safely process the estimated daily sewage flow once the correct flow is determined, the Panel notes that the material facts concerning the disposal field have been considered by the Board on two previous occasions. Furthermore, the disposal field has been in place for several years, and there is no suggestion that there has been any change made to it or the site that would change its performance in attenuating sewage effluent. Thus, any evidence presented respecting the disposal field would be somewhat repetitive of that considered by the Board in the previous two appeals.

The Panel finds that the Appellants' concerns about the future uses or potential for internal changes to the buildings described in the permit are speculative, and not material to the Board's decision in these appeals. The Panel agrees with the Board's finding in the 1999 decision that a sewage disposal permit is limited to the development described in the permit. Therefore, the Panel concludes that any evidence concerning the future uses or potential for internal changes to the buildings would provide little assistance to the Board in deciding these appeals.

With respect to whether the Permit Holder complied with the statutory notice requirements, the Panel notes that the parties have not explained what facts are material to that issue, nor whether those facts will be in dispute. Under section 3.2 of the *Regulation*, permit holders must post notice of the permit in accordance with section 3.3, which requires the permit to be posted in a conspicuous place on the site for a prescribed period of time. Notice must also be published in local newspapers within a prescribed period of time. The Panel notes that if the material facts surrounding this issue are in dispute, evidence of posting may be provided by way of documents such as copies of newspaper ads, photographs, or affidavits. Beyond such evidence, submissions as to the adequacy of notice tend to include legal arguments concerning the proper interpretation of the statutory provisions, which can be fully assessed in written form.

In summary, the Panel finds that some of the material facts are in dispute, but that evidence and submissions relating to those facts may be fairly and fully heard by way of a written hearing.

#### Whether credibility is a significant factor

While the EHO does not address the issue of credibility directly, his submissions suggest that there is no credibility issue with respect to the building plans. The Appellants raise the issue of credibility primarily in relation to their concerns about the potential future uses of the buildings described in the plans submitted to the EHO. The Panel has already concluded that those concerns are speculative and irrelevant to the present appeals. The Appellants also claim that credibility is an issue generally, but have not clearly addressed how it may be a significant factor in deciding those issues that the Panel considers relevant.

Upon careful consideration of the issues to be addressed in these appeals and based upon the submissions provided in relation to this application, the Panel finds that credibility does not appear to be a significant factor in deciding these appeals.

#### Conclusion

In summary, the Panel finds that several of the issues raised by the Appellants have been dealt with in previous appeals and that the relevant issues do not raise significant questions of credibility. While there are some new issues and the parties clearly dispute certain material facts relating to the interpretation of the building plans, the facts in dispute are not complex, and oral testimony will not be required for the fair and full presentation of submissions on these plans and how they should be interpreted.

Further, the issue of posting may be fairly addressed without the need for an oral hearing on that issue.

For these reasons, the Panel finds that a written hearing will provide the parties with a meaningful opportunity to be fully and fairly heard. However, if it later becomes apparent that oral testimony is required, the Panel notes that the Board or a party may request that an oral hearing be held to hear certain evidence.



**DECISION**

For the reasons provided above, the Panel orders that the appeals will be heard by the Board by way of written submissions. A submission schedule will be established and provided to the parties in due course.

The application to summarily dismiss the appeals is denied.

The application to hear the appeals by way of written submissions is granted.

Alan Andison, Chair  
Environmental Appeal Board

January 5, 2001