



# Environmental Appeal Board

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

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 Society  
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 Rousseau, and Suzu Speier **APPELLANTS**

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

**AND:** Timberman Developments Ltd.,  
Tony Novak and Barbara Novak **PERMIT HOLDERS**

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

**DATE OF HEARING:** Conducted by way of written submissions  
concluding on April 13, 2001

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

## **APPEAL**

This is an appeal by the Appellants of the September 6, 2000 decision of Greg Vos, Environmental Health Officer (the "EHO"), Upper Island/Central Coast Community Health Services Society, to issue sewage disposal system permit #39/00 (the "Permit") for property on Cortes Island to Timberman Developments Ltd., Tony Novak and Barbara Novak (the "Permit Holders").

The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 8(4) of the

*Health Act*. The Board, or a panel of it, after hearing all the evidence, may confirm, vary or rescind the ruling under appeal.

The Appellants, Friends of Cortes Island Society ("FOCI") and Larry Cohen, on behalf of himself and several individuals ("Mr. Cohen"), seek an order rescinding the Permit.

In the alternative, Mr. Cohen asks that a condition of the Permit, to limit occupancy to 4 persons per cabin, be included, and that all conditions attached to the Permit be registered as a restrictive covenant on the property title in favour of the Regional District of Comox-Strathcona.

FOCI has also asked for an order that the Permit Holders be required to provide a registrable covenant under section 219 of the *Land Title Act* in favour of the Regional District of Comox-Strathcona. This covenant should:

- (a) prohibit the installation and use of washing machines and waste disposal units in the cabins;
- (b) prohibit the construction of any additional floor area within the cabins;
- (c) limit the maximum occupancy of the cabins to 4 overnight occupants, including persons sleeping outside the cabins on the decks, in tents or in recreational vehicles; and
- (d) prohibit the subdivision of the Permit into separate titles and prohibit the sale or transfer of separate ownership interests in the permit site.

However, FOCI further submits that registration of a covenant would be a weak response to the sewage disposal problems.

As an alternative, FOCI is also seeking a direction from the Board that the EHO not approve any application based on the building plans submitted on June 15, 2000 unless each building is provided with at least 250 gallons per day (gpd) of sewage treatment capacity. As a further alternative, FOCI requests an order limiting the development which may be served by the Permit to a maximum of 8 cabins.

In a letter dated November 20, 2000, the Appellant, British Columbia Shellfish Growers Association (the "Association"), adopted the October 6, 2000 submissions of FOCI, and the November 15, 2000 submissions of Mr. Cohen, with respect to the remedies it is seeking.

This appeal has been conducted by way of written submissions.

## **BACKGROUND**

On July 12, 2000, Point One Engineering (Dick Bartel), applied for a permit to construct a sewage disposal system under section 3 of the *Health Act*, as agent for the owners, Timberman Developments Ltd., Tony Novak and Barbara Novak. On July 20, 2000, Mr. Bartel provided revised documentation and drawings to the EHO.

In this documentation, the development description indicated that each motel unit would consist of:

- one kitchen,
- one washroom - tub, shower, low flush (6 litre per flush) toilet, sink,
- one bedroom,
- one living room,
- one dining room,
- no dishwasher or washing machine,
- one hot water tank.

As well, it was indicated that all water fixtures would be low water use type.

It was further indicated in the July 20, 2000 documentation that the caretaker's unit will have the same features as the motel units, however, one washing machine and one dishwasher would be included.

On September 6, 2000, the EHO issued the Permit with respect to the application 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. The Permit authorizes construction of a conventional package treatment plant system to serve 11 one-bedroom motel units, without laundry facilities, and one caretaker unit with an estimated daily sewage flow of 2065 gallons [9386 litres] per day ("gpd"), and a treatment capacity of 2500 gpd. The sewage disposal system is to be installed as per the plan dated July 20, 2000.

In particular, the estimated daily sewage flow was determined by having regard to Appendix 1 of the *Sewage Disposal Regulation*, B.C. Reg. 411/85 (the "*Regulation*"), and in accordance with the Ministry of Health's *Policy - On-site Sewage Disposal*. This estimate was based on the reference to "Apartments & condominiums (having one common entrance)" rather than on the reference to "Motels/hotels". Other relevant conditions of the permit are:

- Any modification of the approved building plans, dated June 15, 2000, may void the sewage disposal permit.
- The sewage disposal system is to be certified installed according to approved plans by a professional certified engineer.
- Any changes in the design of the sewage disposal system must be approved by the EHO.
- A final inspection by the EHO is required prior to backfill and use.

- Addition of laundry facilities or exceeding daily sewage flow will void the sewage disposal permit.
- No in sink food waste disposal units are allowed in the motel or caretaker unit.
- The reserve field areas are to remain undisturbed.
- An alarm system is required for the pump chamber.
- The actual flow volume data from the package treatment plant must be submitted to the EHO's office semi-annually or at the EHO's discretion.
- The total length of the drainage pipe is 460 feet.

The Association, FOCl, and Mr. Cohen filed separate appeals of the EHO's decision to issue the Permit.

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 Appellants opposed the application. After receiving submissions from all Parties, the Board, in a written decision dated January 5, 2001, denied the application to dismiss the appeals summarily, and decided to proceed by way of written submissions.

It should be noted that this is the third sewage disposal permit that has been issued for this resort development. The first permit, #113/94, 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-Health)(unreported). The permit holder in that appeal, Triple R Land Company, then constructed and installed part of the permitted system, including the drainage pipe, 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 Developments Ltd. was issued a second sewage disposal permit, #15/98. That permit was appealed by the Association, FOCl, Mr. Cohen, on his own behalf, 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. As well, he did not have up to date plans, and the square footage per unit on the permit application was incorrect. (*Friends of Cortes Island et al. v. Environmental Health Officer*, Appeal No. 98-HEA-12(c), March 3, 1999)(unreported). 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 current Permit Holders re-submitted building plans for the resort development to the EHO, and the third permit (i.e. the Permit) was issued. The decision to issue the Permit is the subject of these appeals.

The Appellants' grounds for appeal include the following:

- The EHO did not have all the relevant information before him to assess the estimated minimum daily sewage flow;
- 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 11 one-bedroom motel units, rather than as 11 free-standing cabins, and, as a result, the total daily flow for the system has been underestimated;
- The EHO should have ordered additional tests to be carried out in accordance with the *Regulation* given the soil conditions at the site and the system's proximity to wells and beaches;
- The system poses a threat to the environment and to shellfish growing operations given the proposed setback of the disposal field from the beach and the percolation rates in the area;
- The proposed sewage treatment system represents a health risk; and
- The Permit Holders failed to comply with the mandatory notice requirements in the *Regulation*.

## ISSUES

1. Whether the EHO erred in issuing the Permit based on an underestimation of the daily sewage flow from the development.
2. Whether the Permit Holders failed to comply with the notice requirements in the *Regulation*.

FOCI also argues that because of the soil conditions within the site and the proximity of the sewage disposal system to wells and beach areas, the EHO should have required alternative or additional tests in accordance with section 3(1) of Schedule 3 of the *Regulation*. Because no evidence was provided to the Panel regarding the soil conditions within the site, the Panel is not prepared to address this issue.

## RELEVANT LEGISLATION

### SEWAGE DISPOSAL REGULATION

#### Permits to construct systems

- 3 (1) No person shall construct, install, alter or repair a sewage disposal system or cause it to be constructed, installed altered or repaired unless he holds a permit issued under this section or section 3.01.

(2) Application for a permit under this section must be made in a manner and form satisfactory to the Ministry of Health with all relevant details completed by the applicant.

(3) No permit shall be issued under this section

(a) in the case of construction or installation, until site investigation tests set out in or required by Schedule 1 have been carried out to the satisfaction of the medical health officer or public health inspector, and either of them is satisfied that, having regard to the provisions of that schedule, the construction, installation and ultimate use of the system will not contravene the Act or this regulation, and ...

### **Notification requirements**

**3.2** A person who is issued a permit under section 3 or 3.01 to construct, install, alter or repair a sewage disposal system

[a] must post a notice in accordance with section 3.3, and

(b) if the estimated daily sewage flow from that system is more than 4 546 / [1 000 imperial gal.] but less than 22 730 / [5 000 imperial gal.], must also publish a notice in accordance with section 3.4.

### **Posted notice**

**3.3** (1) The notice required under section 3.2 (a) must be in the form specified in Schedule 5 and must include

(a) a site map showing the location of the sewage disposal system that is to be constructed, installed, altered or repaired, and

(b) the conditions that apply to the permit.

(2) The notice required under section 3.2 (a) must

(a) be posted in a conspicuous place on the parcel for which the permit is issued,

(b) be posted not more than 3 days from the date the permit is issued, and

(c) remain posted for 30 days after the date the permit is issued.

### **Published notice**

**3.4** (1) The notice required under section 3.2 (b) must

(a) contain a site map showing the location of the sewage disposal system that is to be constructed, installed, altered or repaired,

(b) include the conditions that apply to the permit,

- (c) refer to section 8 (4) of the *Health Act*,
  - (d) describe how an appeal of the decision to issue the permit is to be commenced, and
  - (e) refer to the 30-day time period for commencing an appeal.
- (2) The notice required under section 3.2 (b) must
- (a) appear in at least 2 issues of a newspaper that
    - (i) circulates in the area in which the sewage disposal system is located, and
    - (ii) is published not less than weekly, and
  - (b) be published as soon as possible, but not more than 10 days after the permit is issued.

### **Standards for systems**

- 6** Subject to section 7, no sewage disposal system constructed after the date of this regulation which involves the use of a septic tank or a package treatment plant is permitted unless the system conforms with the standards of construction, capacity, design installation, location, absorption, operation and use set out
- (a) for conventional septic tank systems, in Schedule 2,
  - (b) for conventional package treatment plant systems, in Schedule 3, and...

### **Schedule 3**

#### **Conventional Package Treatment Plant Systems**

- 1 This schedule applies to package treatment plant systems for domestic sewage only, and does not include food premises as defined in the Food Premises Regulation.
- ...
- 4 The treatment capacity of a package treatment plant serving a single family dwelling, with 4 bedrooms or less shall have a minimum treatment capacity of 1 363 l (300 imperial gal.) per day.
- 5 The treatment capacity of a package treatment plant serving a facility other than one described in section 4 shall not be less than the estimated sewage flow set out in Appendix 1 of Schedule 2.
- ...

## DISCUSSION AND ANALYSIS

### 1. Whether the EHO erred in issuing the Permit based on an underestimation of the daily sewage flow from the development.

#### *Submissions of the Association*

Grant Webb, a resident of Cortes Island, and a Director of the Association, gave evidence by way of Affidavit on behalf of the Association. He submits that the Association was incorporated in 1948, and is a province wide industry organization, serving the interests of individuals and companies engaged in the business of growing, selling and processing farmed shellfish. The Association submits that Cortes Island is one of the main shellfish growing areas in BC, and that almost 50% of BC's production comes from this area.

The Association submits that the proposed development has not been accurately described. It submits that, in fact, the proposed development is 12 separate self-contained residential units, and not 11 one-bedroom motel units plus one caretaker unit as described in the permit application.

The Association is concerned that, given the proximity of the proposed development to beaches and several shellfish farming tenures, and the soil type, the shellfish growing area will be negatively impacted by the proposed development. As well, it is concerned that water quality will be negatively impacted by the actual sewage flows from the proposed development. It asks the Panel to note that sewage pollution is the largest threat to the current and future viability of commercial shellfish growing operations.

#### *Submissions of FOCI*

FOCI submits that because the proposed development is located near public beaches and domestic water wells, it is essential to ensure that the sewage treatment system will have adequate treatment capacity.

FOCI also submits that the EHO did not carry out a proper analysis of the projected sewage flow from the proposed development, and therefore erred in underestimating the daily sewage flow that will be produced by the development, and hence, in issuing the Permit. It submits that the EHO's decision to issue the Permit is based on his conclusion that the plans and description reflect a "Motel/hotel" under Appendix 1 of the *Regulation*, a decision that is not supported by the plans. It also submits that an objective analysis of the plans does not support the conclusion that the development is a motel, hotel, apartment or condominium. Further, it submits that the EHO offered no real explanation for the rationale behind this decision.

FOCI also submits that the EHO failed to adequately consider the size of the proposed buildings, the number of rooms in the buildings, the number and type of plumbing fixtures, the likely occupancy of the buildings and the context of the development as a whole before making his decision. For these reasons, FOCI has asked the Board to reach its own conclusions. However, FOCI



suggests that, while the proposed buildings do not readily fit into any of the categories in Appendix 1 of the *Regulation*, they are similar to one-bedroom houses.

Further, based on the Affidavit evidence provided by George West, consultant, Bruce Jacobson, retired, David Rousseau, design consultant, Bruce Ellingsen, sawmill operator, Vicki De Boer, real estate agent, and Rankin Smith, marina manager (all residents of Cortes Island), FOCI asks the Board to take the following additional factors into account in making its determinations:

- the plans show buildings designed to accommodate family groups for extended occupancy, rather than overnight accommodation, resulting in a high level of domestic water consumption and sewage effluent production;
- the very intensive seasonal accommodation use of existing cabins which are similar to the proposed cabins and which are located on nearby sites;
- the substantial demand for family tourist accommodation in such cabins and the outdoor recreation activities associated with that accommodation;
- the relative ease with which the cabins could be converted to 2 bedroom cabins;
- the lack of convenient public laundry facilities and the availability of space in the cabins that could be used for laundry facilities; and
- the admissions by one of the owners that the Permit Holders are not interested in operating a motel, and that they intend to sell the individual units.

Specific evidence relating to potential use of the cabins was given by Rankin Smith in his Affidavit. He indicated that he has owned and operated cabins at Cortes Bay, immediately adjacent to the Permit area, for 30 years. These cabins are approximately 600 square feet and have one-bedroom. Based on his experience, the cabins are most often occupied by family groups and use of the plumbing facilities in the cabins is very intensive. His experience is that the cabins are often occupied for longer periods rather than single overnight visits.

FOCI submits, that, taken as a whole, the evidence demonstrates that the proposed development would generate sewage flows substantially greater than the flows from the ordinary motel or apartment uses that were taken into account by the EHO. Rather, it suggests that the sewage flow from the proposed buildings would be at least equivalent to the flow from a one-bedroom house, particularly during the peak summer season. As well, it submits that the consequences of inadequate treatment could be very detrimental to the health of nearby residents and beach users.

*Submissions of Mr. Cohen*

Mr. Cohen submits that the EHO did not correctly exercise his discretion in assessing the daily estimated sewage flow for the proposed system under the applicable regulations and policies. He submits that the EHO erred in his estimate of the daily sewage flows, by characterizing the facilities under Appendix 1 of the *Regulation* as 11 one-bedroom apartments or condominiums, and concluding that each will have an estimated minimum daily sewage flow of 165 gpd. He further noted that the EHO assigned the other proposed cabin the category of a residential unit because it is intended as a caretaker's cabin having laundry facilities, resulting in an estimated minimum daily sewage flow of 250 gpd for that unit. Mr. Cohen further argues that the EHO ignored the distinction between stand alone units and units with one common entrance when estimating the sewage flow.

Mr. Cohen also submits that the evidence of Rankin Smith and George West indicates that the proposed development is a destination resort, rather than a motel/hotel, and that it is accommodation for families or groups of 5 or more people.

In support of his arguments, Mr. Cohen referred the Panel to the Ministry of Health's *Policy - On-Site Sewage Disposal* ("the *Policy*"), which he states supports the proposition that an increase in the square footage of a unit is significant in assessing estimated minimum daily sewage flow.

As well, Mr. Cohen argues that the EHO did not have the information before him, as per the Affidavit of George West, that the proposed individual cabin units are intended for sale and not for use as a motel. Mr. Cohen argues that, based on this information, the correct characterization of the development is "Houses, duplexes (other residential units)" under Appendix 1 of the *Regulation*.

For these reasons, Mr. Cohen submits that the correct assessment of minimum daily sewage flow should be 250 gpd, under "Houses and duplexes (all other residential units)," thus totalling 3000 gpd.

Alternatively, Mr. Cohen argues that the correct assessment of minimum daily estimated sewage flow is 225 gpd for a 2 bedroom apartment or condominium unit under Appendix 1, for the 11 units, and 250 gpd for the caretaker unit, totalling 2725 gpd. Mr. Cohen submits that this is appropriate for the likely use of the units for groups or families of 6 or more persons, but insufficient because it does not recognize that the units are stand-alone cabins.

Mr. Cohen states that both of the above assessments exceed the capacity of the proposed package treatment plant, which has a capacity of 2500 gpd.

Mr. Cohen also argues that the length of the drainage pipe required by the Appendix (section 5 of schedule 3), for the first alternative suggested, 3000 gpd, is, for a five minute percolation rate, 220 feet per 1000 gpd, or 660 feet. For the second alternative submitted above, the 2725 gpd estimate requires

599.5 feet of drainage pipe. Mr. Cohen therefore submits that the existing 460 feet is not adequate to safely process the sewage flow.

Mr. Cohen also submits that none of the sworn affidavit evidence provided by the Appellants has been contradicted by the EHO or Point One Engineering.

*Submissions of the EHO*

The EHO submits that 4 Environmental Health Officers evaluated the building plans to ensure that the sewage system was adequately sized for the proposed development, and that all 4 agreed that the building plans represented one-bedroom motel units with housekeeping facilities. In addition, all 4 agreed that the sewage disposal system was sized appropriately for the proposed development. The EHO adds that "destination resorts" can be included within the category of "motel/hotel".

The EHO submits that he estimated the minimum daily sewage flow for motels and hotels with housekeeping facilities to be the same as those for apartments and condominiums, in accordance with the *Policy*. The EHO submits that the estimated daily sewage flow for a condominium is 65 per cent larger than the regulatory requirement for a motel/hotel housekeeping unit. He further submits that this increase in estimated sewage flow for this development to that of a condominium will be sufficient considering the potential use of a condominium compared to the proposed development. He also notes that a condominium would produce more sewage flow than the proposed cabins due to its residential use. A condominium can have laundry facilities, and is generally similar or, more often, larger in size than the proposed units. Because a condominium could have a larger sewage flow than these units, this indicates that this sewage system is more than adequately sized for the proposal.

As a result of these considerations, the EHO applied discretion, and used the *Policy* to increase the sewage flow to 165 gpd.

The EHO submits he did not further increase the estimated sewage flow because no laundry facilities will be allowed in 11 units of the proposed development, thus eliminating a large amount of sewage from the total daily sewage flow. As well, the use of dishwashers is prohibited, and low water use fixtures will be installed, including low flush toilets, although these are not required by the *Regulation*.

The EHO concludes that the sewage system is adequately sized for the proposed development, and clearly meets the requirements of the *Regulation* and will safeguard public health.

The EHO submits that his office does not object to incorporating any of the permit conditions into a restrictive covenant, if the Board decides that a covenant is required.

*Submissions of the Permit Holders*

The Permit Holders submit that a condition of the issued Permit is that if the daily sewage flow exceeds the authorized flow then the sewage disposal permit will be void. It submits that to address this requirement, a non-resettable elapsed timer and cycle counter will be installed on the effluent pump control. The flow rate of the effluent pump is known, and the actual effluent amount is monitored. Furthermore, a condition of the permit is that the actual flow volume data, from the sewerage system, be provided to the EHO's attention semi-annually or at his discretion. The Permit Holders also state that the package treatment plant will be upgraded as technology improves.

The Permit Holders further submit that a restrictive covenant, registered in favour of the Regional District of Comox-Strathcona or alternatively the Ministry of Health, could be attached to the title, restricted to that portion of the lands being the subject of the current application. This covenant would incorporate the conditions of the Permit as issued, include the maximum daily flow of 2065 gpd, and a performance clause stipulating the requirement for semi-annual inspections of the system by a certified technician.

*Rebuttal Submissions of Appellants*

FOCI submits that the submissions of the EHO and the Permit Holders are unsupported by any affidavit evidence and contain extensive hearsay and unsubstantiated statements of fact. The FOCI argue that the Board should be reluctant to base its findings on allegations of fact, which are not supported by evidence. FOCI also submits that the number of officials who may have evaluated the plans and their conclusion is immaterial. Mr. Cohen asks the Panel to note that while the EHO submits that 4 environmental health officers evaluated the plans, there is no affidavit or other evidence in support of their conclusions.

In FOCI's view, the relevant question is what the plans and other evidence reveal about the likely volume of sewage flow from the proposed development. With respect to the EHO's submission that a condominium would produce more sewage flow than the proposed cabins, FOCI argues that the EHO failed to take into account the location, layout and likely occupancy of these particular proposed cabins.

In response to the EHO's submission that a destination resort can be included in the motel/hotel classification under Appendix 1 of the *Regulation*, FOCI states that motels with housekeeping facilities typically consist of one room and a bathroom, while the plans for the proposed development show units with 4 rooms plus a bathroom. FOCI also submits that the absence of laundry facilities does not address the under-capacity of the sewage system.

In response to the Permit Holders' submission that daily sewage flows will be monitored by a timer and counter, FOCI submits that that is an inadequate response to the deficiency in the treatment capacity.

Mr. Cohen also submits that while the EHO followed the *Policy*, he disagrees with the EHO's assertion that a condominium would produce more sewage flow than the proposed cabins. He submits that this position is unsupported by evidence. Furthermore, Mr. Cohen argues that the lack of laundry facilities will not result in less daily use of the sewage system from other uses. He further notes that the proposal has increased significantly in square footage area from the permit issued in 1994, but that the estimated daily sewage flow has remained the same in this Permit as it was in 1994.

In response to the Permit Holders' submissions, Mr. Cohen argues that it is no answer to the Permit being issued for an inadequate system that the system can be shut down if it proves inadequate. Mr. Cohen also argues that it is irrelevant that new technology will be used.

### *Analysis*

Although there is evidence before the Panel with respect to the possible conversion of and possible sale of the units, the Panel's deliberations are based on the nature of the development at present, as described in the Permit, and the anticipated use of the development. As the Panel has previously indicated, it is unable to speculate regarding possible future changes to the nature of the development.

The issue before the Panel is whether the EHO erred in issuing the Permit because of an underestimation of the daily sewage flow from the development. In order to make its determination, the Panel must first consider the characterization of the development units.

The Panel notes that under section 5 of Schedule 3 of the *Regulation*, the treatment capacity of a conventional package treatment plant system must not be less than the estimated daily sewage flow set out in Appendix 1 of Schedule 2. The relevant portions of Appendix 1 of Schedule 2 of the *Regulation* are:

### **APPENDIX 1**

#### **ESTIMATED MINIMUM DAILY SEWAGE FLOWS IN LITRES (IMPERIAL GALLONS)**

<b>Type of Facility</b>	<b>Estimated Minimum Daily Sewage</b>
Apartments & condominiums (having one common entrance)	750 for 1 bedroom unit [165] 1 022 for 2 bedroom unit [225] 1 136 for 3 bedroom unit [250]
Houses, duplexes (all other residential units)	1 136 for 1 and 2 bedrooms [250] 1 363 for 3 bedrooms [300] ...
Motels/hotels	318 per unit [70] 454 per housekeeping unit [100]

	454 per housekeeping unit [100]
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The Panel also notes that "Note 2 and 3 of Appendix 1" state:

- (2) The estimated daily sewage flows for facilities not mentioned in this table may be determined by the medical health officer or public health inspector.
- (3) The above table gives minimum estimated daily sewage flows. The medical health officer or public health inspector may increase these estimated flows if circumstances warrant this in any specific application.

As well, the Panel notes that Ministry of Health, "*Policy - On-Site Sewage Disposal*", in Chapter 6, states that the "estimated minimum daily flow of sewage for motels and hotels with housekeeping facilities shall be the same as that for apartments and condominiums." However, the Panel also notes that while the *Policy* is phrased in a mandatory manner, it is not a regulation and does not preclude the exercise of discretion by either the EHO or the Panel.

Based on Appendix 1 of the *Regulation* and the *Policy*, the EHO estimated, for the 11 units, the daily sewage flow to be the same as one-bedroom motel units with housekeeping facilities. Subsequently, in accordance with the *Policy*, and exercising his discretion, the EHO determined that the daily sewage flow would be the same as that for apartments and condominiums. This resulted in an estimated daily sewage flow of 165 gpd.

In making this determination, the EHO considered various aspects of the development, including that no laundry facilities and no dishwashers would be allowed in 11 of the units, and the Appellants' estimates of size and number of bedrooms.

The Panel agrees with the Appellants that the Panel should use a cautious approach given that the purpose of the *Regulation* is the protection of public health. The Panel agrees that this is particularly relevant to this appeal because of the proximity of the proposed sewage system to a beach that is used frequently by the public, and given the commercial importance of harvested seafood from Cortes Bay.

The Appellants presented considerable evidence to the Panel in support of their argument that the EHO incorrectly characterized the units, and hence underestimated the daily sewage flow for the development. In particular, this argument was based on the fact that the units are individual units, rather than units having one common entrance, and the potential use of the development as a destination resort by groups of 5 or more individuals.

It is clear to the Panel that because Appendix 1 of the *Regulation* does not contain a category that specifically describes the type of development contemplated for this Permit, it required an exercise of discretion by the EHO.

As well, having regard to notes (2) and (3) to Appendix 1, it is clear that the *Regulation* contemplates such an exercise of discretion by the EHO. This discretion is with respect to both the estimated daily sewage flows for facilities not mentioned in the table, and an increase in the estimated daily sewage flows if circumstances warrant it.

It is the Panel's view that the EHO exercised a cautious approach in calculating the estimated daily sewage flow for the development. In this case, the plan that forms part of the Permit shows one-bedroom units. Based on this and the *Policy*, the Panel is of the view that it was reasonable for the EHO to conclude that the units should be classified as one-bedroom condominium units. Indeed, it would be entirely hypothetical and contrary to the express terms of the Permit for these units to be considered as 2-bedroom units. The Panel also notes that, as per the Permit, the units are unlike a house in that there will be no laundry facilities and no in sink food waste disposal units.

Although the Panel notes the concerns of the Appellants, in making its decision, the Panel has taken into account that the addition of laundry facilities or exceeding daily sewage flow will void the sewage disposal permit. As well, any modifications to the building plans may void the Permit. As a further safeguard, there are also requirements to submit actual flow volume data to the EHO's office.

The Panel is of the view, however, that a change to the Permit is required to ensure that dishwashers are not used in the 11 motel units.

Accordingly, conditions 1 and 7, as set out in the September 6, 2000 decision letter, should be amended to add a reference to "and dishwashers", after "laundry facilities", so that the addition of dishwashers to any of the 11 motel units will void the Permit. The revised conditions, with changes underlined, would read as follows:

1. Sewage disposal system construction permit is approved for 11 – one-bedroom motel units (without laundry facilities and dishwashers) and one caretaker unit.
7. Addition of laundry facilities and dishwashers to the 11 motel units or exceeding daily sewage flow will void sewage disposal permit.

With the above-noted changes, the Panel is satisfied that, based on the evidence presented, the permitted sewage disposal system will protect the public health. The Panel therefore agrees that the EHO properly estimated the daily sewage flow for the proposed development, and upholds the Permit as issued.

With respect to the Appellants' submissions regarding a registrable covenant, the Panel notes that the Permit Holders and the EHO did not object to registration of such a covenant. Although there was no evidence before the Panel on the procedures or law regarding registration of a covenant, the Panel is not satisfied that a covenant under section 219 of the *Land Title Act* would provide any additional protection to that which is already found in the Permit. This is

particularly so given that neither the Regional District of Comox-Strathcona nor the Ministry of Health have indicated that they would have any interest in enforcing such a covenant. Under the circumstances, the Panel is not prepared to impose such a condition on the Permit Holders.

**2. Whether the Permit Holders failed to comply with the notice requirements in the *Regulation*, and if so, whether the EHO erred in issuing the Permit.**

FOCI submits that the Permit Holders and the EHO failed to protect the public by providing proper notification of the issuance of the Permit in accordance with sections 3.2 to 3.4 of the *Regulation*. It submits that the appropriate outcome is the nullification of the Permit on both procedural and substantive grounds. In support of its arguments, FOCI referred the Panel to the B.C. Supreme Court decision of *Nisga'a Tribal Council v. British Columbia* (1988) B.C.J. No.3110. FOCI further suggests that the Permit Holders disregarded the notice requirements in an attempt to avoid or defuse public opposition to the issuance of the Permit. FOCI also relied on the *Nisga'a* case in support of the proposition that the fact that the Appellants became aware of the Permit by other means is not determinative of the notice issue.

In his Affidavit, Bruce Jacobson, a retired resident of the area, deposes that he has a clear view from his property of the areas where the proposed sewage treatment system would be installed. He states that he observed that notice of the Permit was not posted on the development site until September 15, 2000, and did not include any plan of the proposed system, or the permit conditions. He further states that he receives three newspapers that circulate on Cortes Island, reads them regularly, and did not see any notice concerning the Permit in any of those newspapers.

Mr. Cohen also submits that the Permit was not posted or published in accordance with the mandatory provisions of the *Regulation*. He submits that proper notice is necessary to ensure that any and all persons who might be affected by the Permit will have an opportunity to appeal.

Mr. Cohen further submits that it is not an answer to non-compliance with notice that the Permit has been appealed by a party or parties. He indicates that each member of the public for whom notice is intended may be affected uniquely and must be allowed to raise those unique objections, particularly when the subject matter of the Permit may affect the health of that person.

The EHO did not address the notice requirements in his submissions.

The Permit Holders submit that the application was submitted for the purposes of completing the installation of the sewage treatment system because the original permit had expired before the treatment system was completed. It states that the treatment plant was not installed for fear of damage to the new equipment as one of the potable water wells had been vandalized. The disposal field and pump chamber were installed under the previous permit, within the approved period. While the application is for an "alteration", the Permit Holders submit that the



application is in fact to "complete the installation", which is not a category on the form. It notes that the only difference from the previously issued permit is the installation of an upgraded sewage treatment plant.

The Permit Holders further submit that the permit application was posted at the site as soon as practical and remained posted well beyond the required 30-day period. Notification was not published in a newspaper, as there was no change to the sewerage system (flow or field size) as previously approved and published on 2 previous occasions. It argues that the awareness requirement was satisfied as 3 groups have appealed the application.

The Panel has reviewed the copy of the notice that was provided, and agrees with the Appellants that the posted notice did not contain the conditions of the Permit or the plans it refers to. The Panel further notes that the Permit Holders acknowledge their failure to comply with these provisions.

The Panel notes that the estimated daily sewage flow was greater than 1000 gpd, and as a result, under section 3.2 of the *Regulation*, the notice requirements of both sections 3.3 and 3.4 are applicable. This means that the notice must contain a site map showing the location of the sewage disposal system and the conditions that apply to the Permit.

Based on the evidence of the Appellants and the Permit Holders of non-compliance with the required provisions, the Panel concludes that the notice did not fulfil the requirements with respect to the site map and the conditions that apply to the Permit. As well, the Panel finds that the notice was not posted within the 3 days from the date the Permit was issued, as required under section 3.3(2) of the *Regulation*.

Further, the Appellants submit that the Permit Holders also failed to publish the notice, as required by section 3.4(2) of the *Regulation*. The Permit Holders have acknowledged the failure to publish, because of their view that there was no change to the sewerage system as previously approved and previously published.

The Panel therefore finds that the Permit Holders also did not comply with the requirement to publish the notice, pursuant to section 3.4(2) of the *Regulation*.

The Appellants submit that the Permit Holders' failure to comply with these notice requirements is grounds for rescinding the Permit. In support of this proposition, the Panel was referred to the *Nisga'a* case. In that case, the holder of a pesticide use permit did not fulfil the notice requirements. The permit holder did not publish in the most local paper, nor did the notice include the content required by the permit. The court stated: "the residents...who may be affected by the proposed use of the pesticide...were not given effective notice in accordance with the provisions and spirit of the Act and therefore denied their rights to natural justice." The Court also, in reviewing the evidence regarding notice, stated: "I believe this indicates an indifference as to whether effective notice was given...in my judgment this is a defect that goes beyond a technical defect. It is a breach of natural justice."

In response to the Appellants' arguments, the Permit Holders submit that "the awareness requirement was satisfied as 3 groups have appealed the application. The Appellants argue that it does not matter that the Permit was appealed. In support of this argument, they again refer the Panel to the *Nisga'a* case (*supra*) where the Court held that it was irrelevant whether the Nisga'a, or anyone, were prejudiced by the error. At page, 4, the Court relies on a decision of the B.C. Court of Appeal, *Bay Village Shopping Centre and Victoria*, (1973) 1 W.W.R. 634, and quotes as follows:

It will be seen that I have, with respect, disagreed with the view of the learned judge below, being of the opinion that there was a failure to fulfill a statutory prerequisite, that it is immaterial whether any one was prejudiced by the error, and that the Court has no discretion to refuse to quash.

The Panel therefore must turn its mind to whether the failure of the Permit Holders to provide notice in accordance with the *Regulation* constituted a breach of natural justice. In doing so, the Panel must have regard to the facts of this case.

Although the Panel is of the view that the EHO did not err in issuing the Permit on its technical merits, the Panel is of the view that the *Nisga'a* case (*supra*) is applicable here. There is no question that the Permit Holder failed to comply with the notice and publication requirements of the *Regulation*. The Panel is of the view that the standard of care taken by the Permit Holder in complying with the notice requirements falls far short of what the Legislature intended. In particular, the Panel notes that the notice was posted on September 15, 2000, 6 days beyond the required date for posting, and once posted, the notice was clearly defective. Further, there was no publication of the Permit at all.

In making its decision, the Panel notes that under section 8(4) of the *Health Act*, an aggrieved person only has 30 days from the date of the ruling in which to appeal. There is no ability for the Board to extend that date, or to accept jurisdiction, even where no notice or inadequate notice has been given. In light of this provision, the Panel finds that a high standard of care in complying with notice requirements should be maintained. This is to ensure that aggrieved members of the public are not denied their right to appeal.

The Permit Holder submits that no prejudice has resulted from the failure to comply with notice requirements, as indicated by the fact that 3 groups have appealed the decision. However, this argument was also before the Court in the *Nisga'a* case (*supra*) which held that it was irrelevant whether the Nisga'a or anyone, was prejudiced by the error, and that the Court has no discretion to refuse to quash.

For these reasons, despite the fact that the Panel would have upheld the Permit on its technical merits, the Panel finds that the failure to comply with the notice requirements in the *Regulation* constituted a breach of natural justice. The Panel is of the view that it is desirable to err on the side of caution where it is possible that aggrieved persons may be negatively affected by the issuance of the Permit, and may have been deprived of an opportunity to appeal the decision.

*Application for costs*

FOCI has also made an application to the Board for costs against the EHO and the Permit Holders. It submits that such an award should be made because the Permit Holders have failed to comply with the *Regulation*, and have replied to this appeal in an unresponsive manner. No further submissions have been made with respect to FOCI's application for costs.

Under section 11(14.2) of the *Environment Management Act*, the Board may order costs in respect of an appeal. In the "Environmental Appeal Board Procedure Manual", it specifies that as a matter of policy, the Board will award costs in "special circumstances". These "special circumstances" include where the action of a party or the failure of a party to act in a timely manner results in prejudice to any of the other parties, or where a party unreasonably delays the proceeding. The Board is of the view, in this case, that the failure of the Permit Holders to comply with the notice and posting requirements of the *Regulation* and their response to the appeal do not constitute special circumstances. Further, there is no evidence before the Panel that the Permit Holders have failed to act in a timely manner, or in a manner that prejudiced the Appellants in their conduct of the appeal. Therefore, an award of costs is unwarranted in this case.

**DECISION**

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

The Panel finds that the EHO did not err in estimating the daily sewage flow of the development, and hence did not err in issuing the Permit on this basis.

However, the Panel finds that the Permit Holder did not comply with the notice requirements pursuant to sections 3.2, 3.3 and 3.4 of the *Regulation*, and therefore breached the fundamental principle of natural justice, and may have deprived aggrieved persons the right to appeal. On this basis, the Panel rescinds the Permit.

The appeal is allowed in part.

Alan Andison, Chair  
Environmental Appeal Board

July 20, 2001