Province of British Columbia

Environmental Appeal Board

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APPEAL NO. 00-WAS–008(a)

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

BETWEEN:	The Straw Farm Limited	**APPELLANT**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
AND:	City of Abbotsford; East Abbotsford Compost Association; Farmers' Fresh Mushrooms Inc.; Ross Land Mushrooms Ltd.	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE:	Conducted by way of written submissions concluding on April 17, 2000	

APPEARING:	For the Appellant:	David A. Critchley, Counsel
	For the Respondent:	Joyce Thayer, Counsel
	For the City of Abbotsford:	Kathleen T. Higgins, Counsel
	For the East Abbotsford Compost Association:	Barbara Cornish, Counsel
	For Farmers' Fresh Mushrooms Inc. and Ross Land Mushrooms Ltd.:	Lee Sawatzky, Counsel

STAY DECISION

APPLICATION

On March 31, 2000, R.H. Robb, the Assistant Regional Waste Manager for the Lower Mainland Region, issued Pollution Abatement Order OA-16332 (the "Order") to The Straw Farm Limited (the "Applicant") to deal with air contaminants being released from its mushroom composting operation located at 39960 South Parallel Road, Abbotsford, B.C. The Order requires the Applicant to immediately cease bringing partially composted mushroom growing media or raw materials capable of emitting odours onto its property, to remove all mushroom growing media capable of causing emissions to the air from the property within 10 days of the date of issuance of the Order, and to confirm the performance of these requirements by April 17, 2000.

On April 10, 2000, the Applicant appealed the decision of the Respondent and applied for a stay of the Order.

This application for a stay was conducted by way of written submissions.

BACKGROUND

At approximately the end of August of 1996, the Applicant began the operation of a mushroom compost production facility on South Parallel Road, which is located in a rural part of Abbotsford, B.C.

The present principals of the Applicant acquired the shares of the company in December of 1998. The previous owner had operated the facility on the site since 1996.

Prior to the Order, which is the subject of this appeal, the previous owners of the facility were issued Pollution Prevention Order OA-15446 in May of 1998. This order was issued to address "unauthorized discharge of leachate resulting from effluent management practices" and "unauthorized discharge of air contaminants resulting from insufficient odour management practices."

When the new owners took control of the operation later that year, a plan was prepared to upgrade the operation and address pollution concerns. The plan was accepted by the Ministry. Since that time, there have been various meetings with Ministry officials and City of Abbotsford officials to discuss upgrading the facility, as well as attempts by the Applicant to obtain rezoning to cover remedial works to extend the building and completely enclose the facility. On February 21, 2000, the City of Abbotsford Council decided not to proceed with the second and third readings of the rezoning bylaw.

The Applicant met with the Ministry to discuss the problems associated with its operation on February 24 and March 1, 2000. During the March 1st meeting, the Ministry provided the Applicant with a draft pollution abatement order OA-16332. That order imposed design and construction requirements on the facility. The designs were to be submitted to the Ministry by March 15, 2000 and the construction was to be complete and the facility operational, as designed, by June 30, 2000.

On or about March 15th, the Ministry provided the Applicant with a new draft order with similar or the same terms as the Order now under appeal – it effectively shuts down the Applicant's operation. According to the Respondent, the new draft was issued "when it became apparent that the Straw Farm would not be able to implement works to control the present odours within a reasonable time frame which would prevent the production and release of air contaminants in the course of the mushroom composting operation."

On March 31, 2000, the Respondent issued the subject Order that was served on the Applicant on April 3. As noted above, the Order, issued pursuant to section 31 of the *Waste Management Act*, required the Applicant to:

- immediately cease bringing partially composted mushroom growing media or raw materials capable of emitting odours onto the site;

- within 10 days of the date of issuance of the Order, remove all mushroom growing media capable of causing emissions to the air; and

- confirm the performance of these requirements by letter dated no later than April 17, 2000.

On April 4, 2000, a Conservation Officer with the Ministry attended the site and observed that the Applicant was continuing to accept partially composed material.

On April 6, 2000, Mr. Yang, an officer with the Ministry, observed effluent coming out of a six-inch PVC pipe from the facility and discharging into Sumas Canal, which is adjacent to the Applicant's property. He obtained a sample of the water. The preliminary results showed a fecal coliform count in excess of 240,000 MPN (Mean Probable Number).

On April 10, 2000 the Applicant appealed the Order and requested a stay.

On April 13, 2000, the City of Abbotsford and the East Abbotsford Compost Association (the "Compost Association"), a group of approximately 20 individuals and families who own neighbouring properties to the Applicant, applied for and were granted full party status in this appeal.

On April 14, 2000, Farmers' Fresh Mushrooms Inc. ("Farmers' Fresh") and Ross Land Mushrooms Ltd. ("Ross Land") applied for third party status in the appeal. Farmers' Fresh is an agency designated to market mushrooms grown in B.C. which has grower contracts with five mushroom farms, all of which purchase their compost from the Applicant's mushroom composing site. Ross Land is one of the mushroom farms with a grower contract with Farmers' Fresh. The Board granted both Farmers' Fresh and Ross Land full party status in the appeal.

All parties made submissions on the stay application. The Respondent, the City of Abbotsford and the Compost Association oppose a stay of the Order. Farmers' Fresh and Ross Land support the granting of a stay.

The Board notes that a number of rebuttal submissions on this application were provided after the deadlines imposed by the Board. Due to the short time frames initially given for making submissions on the application, and the addition of parties just prior to closure of submissions on April 17, the Board has considered the rebuttal submissions in the course of making its decision.

To date, no enforcement action has been taken on this Order or the 1998 order.

ISSUE

The sole issue arising from this application is whether the Board should grant a stay of the Order, pending a decision on the merits of the appeal.

The authority of the Board to grant a stay in an appeal brought under the *Waste Management Act* is derived from section 48, which provides:

> An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05 (a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. there is a serious issue to be tried;

2. irreparable harm will result if the stay is not granted; and

3. the balance of convenience favours granting the stay.

The Board notes that the onus is on the Applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court stated that unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

The Applicant submits that there are serious issues to be addressed in its appeal. It alleges that the terms of the Order exceed the jurisdiction of the Respondent under the *Waste Management Act*, and that the Order was issued without procedural fairness and without following the rules of natural justice. It also submits that the issuance of the Order purports to be based upon a determination that the facility is allowing the release of air contaminants that have been determined to be causing pollution, when such is not the case.

The Applicant submits further that the Order is unjustly discriminatory, as compared to the Ministry's dealings with two other mushroom composting operations in the same region, and that the Order is inconsistent with the previous orders, statements and conduct of the Ministry in the course of its dealings with the Applicant.

For the purposes of this application, the Respondent concedes that there is a serious question to be tried.

The Board finds that the issues to be addressed in this appeal are neither frivolous, vexatious, nor pure questions of law. Among other things, the appeal involves

issues of procedural fairness and an interpretation of the terms "air contaminant" and "pollution" as used in the *Waste Management Act*. The appeal also requires a factual inquiry into the extent and/or magnitude of the alleged pollution that is to be abated. The volume of submissions provided to the Board on this application and the differing views expressed in those submissions, in and of themselves, support a finding that there are serious issues to be decided in this case.

Irreparable Harm

The second factor to be considered is whether the Applicant will suffer irreparable harm if the stay is not granted. As stated in *RJR- MacDonald* at page 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

The Applicant submits that, if the Order is not stayed pending the hearing on the merits, it will suffer irreparable harm in the nature of extreme financial hardship and its employees will lose their jobs. In the affidavit of the Applicant's president, Frank Moscone, sworn on April 17, 2000, Mr. Moscone states that the annual revenue of the company is approximately $5,000,000. The Applicant submits that, if a stay is not granted and the Applicant is ultimately successful on its appeal, a portion of this will be lost as the Order effectively shuts down the facility.

The Applicant also submits that the Order prevents it from filling its client's orders, which would put it in default of its contractual obligations. It submits that this exposes it to potential liability for breach of contract. In his affidavit, Mr. Moscone states that a significant number of the growers who rely on the Applicant for compost would be lost as customers forever either as a result of them going out of business, or because they would eventually establish a new source of supply.

Both the Compost Association and the Respondent dispute the Applicant's claim that it will suffer serious financial hardship if the stay application is denied. They submit that, in addition to its Abbotsford operation, the Applicant also operates a large composting facility near Ferndale in Washington State. According to an October 1998 final report of the Mushroom Industry Advisory Committee, the Applicant has permits to bring finished compost into Canada from that facility, which is a 20 minute drive from the border. The Respondent submits that the

Ferndale operation could be modified to complete the composing that is currently being done in Abbotsford or modify the Abbotsford facility. An affidavit of Wilbert Yang, Licensed Officer with the Ministry, was tendered in support of this submission.

In response, the Applicant submits that the Ferndale operation does not have the facilities or production capacity to compensate for the loss of production that would result from a shut down of the Abbotsford facility. Further, the evidence of Mr. Moscone is that the Applicant has gone to considerable expense since 1998 to maintain and upgrade its Abbotsford facility by:

- purchasing a high speed turning machine (in excess of $200,000);
- constructing three concrete bunkers;
- purchasing a $145,000 piece of equipment (a bunker filler conveying system) that has yet to be installed due to approval delays.

He states that the total cost of these alterations and improvements is $785,000. If it could do without the Abbotsford facility, the Applicant argues that it would not have spent this money.

The Board finds that, if the Applicant is required to comply with the terms of the Order, it will suffer at least some financial harm and there may be associated job losses. As the Order requires that production be halted within ten days of its issuance, the Board further finds that the Applicant will not be able to fill its orders and will be in default of its contractual obligations. The Board accepts that this may result in a loss of clients, market share and commercial goodwill that may not be recoverable if the Applicant succeeds in its appeal. The Board finds that these are all the types of harm that the Court in *RJR-MacDonald* considered "irreparable."

In supplemental submissions, the Respondent claimed that the Applicant's market is not at "arm's length" due to some overlap between the Applicant's directors, and the owners and directors of some of the mushroom growers and agencies. While the Respondent's evidence shows that some of the companies supplied by the Applicant share common owners or directors, it is equally clear that others do not. Accordingly, even if the Respondent's claim did have some bearing on whether the Applicant will suffer market loss, it does not affect the Applicant's case vis-à-vis those completely unrelated companies. Further, it does not change the fact that the Applicant, itself, will suffer financial loss.

The Board has also considered submissions from the Respondent, the City and the Compost Association that the Applicant should not be servicing a number of its clients due to Agricultural Land Commission ("ALC") restrictions, that the Applicant is not conforming with its current zoning and that the Applicant risked receiving an order of this kind when it made a business decision to operate contrary to the law. The Applicant disputes the truth and relevance of these claims.

The Board finds that the relevance of these allegations to the subject Order and their legal effect on the Respondent's decision are more properly determined at the hearing of the merits of the appeal.

The Board finds that the Applicant has established that it will suffer irreparable harm if the Order is not stayed.

Balance of Convenience

This branch of the test requires the Board to determine whether greater harm will result from the granting of, or refusal to grant the stay application.

The Respondent, the City of Abbotsford and the Compost Association argue that, even if the Applicant will suffer irreparable harm, the balance of convenience weighs in favour of refusing a stay. They want the Order to take effect immediately.

The Respondent submits that there will be irreparable harm to third parties and the environment if a stay of the Order is granted. The harm to third parties consists of the adverse impact on those exposed to the "strong odour" that is alleged to be emanating from the Applicant's facility. The Respondent submits that odour complaints and reports of material effects accompanying the odours have been received by the Ministry from as far as two kilometres from the facility, and that there are 50 or more families living within that two kilometre radius. Attached to the affidavit of Wilbert Yang, sworn on April 13, 2000, are various reports and "odour diaries" of local residents, containing complaints of odours from the Applicant's facility and reporting health effects such as headaches, illness and difficult breathing as a result of the odours.

The alleged harm to the environment is in the form of "toxic leachate" being discharged into the Sumas Canal. The Respondent states that the leachate currently being discharged into the Sumas Canal by means of a pipe originating in the Applicant's facility is extremely toxic to fish. The Compost Association notes that the canal drains into the Vedder River and then the Fraser River. It also submits that, in approximately six weeks, the canal will be reverse pumped to irrigate the Sumas Prairie, a major agricultural area, and that the leachate contamination will have a detrimental effect on farming operations there.

The City of Abbotsford concurs with the Respondent that the neighbours who live in the vicinity of the site will suffer irreparable harm if the stay is granted. Its experience since 1996 has been that the complaints about the odour emanating from the Applicant's facility increase during the warm spring months and, in particular, during the hot summer months. The City submits that it has already begun to receive complaints about the operation.

As evidence of the nature of the harm to local residents, the City submitted a petition signed and forwarded to it by numerous local residents which states that the effects of the odours coming from the facility include an adverse impact on the enjoyment of their properties and adverse health effects in the form of prolonged headaches. The petitioners also express concerns about the health of the children

and staff at a nearby school and the potential impact of the odour/fumes on local livestock and crop production.

The City submits further that, normally, the granting of a stay preserves the status quo in the matter at issue, pending the outcome of the appeal on the merits. It submits that, in this case however, the Applicant has expanded its operation and production levels at the site and intends to expand them further in the immediate future. The City submits that this intention to expand the operation conflicts with the authorized use of the site, which is limited in scope to that which existed at the time an amending bylaw was passed by the City in August of 1997.

Similarly, the Compost Association states that the Applicant is operating a commercial composting operation in an area zoned for agricultural use, and that the volume of production has more than tripled while complaints from the neighbours to the facility have continued. It also submits that, given the issuance of the 1998 Pollution Prevention Order, it is apparent that concerns about odour management and leachate at the Applicant's facility have persisted since 1996.

The Compost Association submits further that local residents have been forced to tolerate the alleged odours from the Applicant's facility for the past 4½ years and that, if a stay of the Order is granted, this situation will continue for a significant period pending the decision of the Board on the merits.

Conversely, the Applicant, Farmers' Fresh and Ross Land submit that the balance of convenience strongly favours the granting of a stay. While the Applicant acknowledges that odours are escaping from its operation "from time to time," it submits that the Respondent has not established that these odours can be equated with "pollution" or "air contamination" as defined in the *Act*. It also submits that the Respondent has not shown that the odours have any adverse effects on plants, animals or humans. It submits, to the contrary, that the Ministry has tacitly acknowledged in its actions since, at least 1998, that, while the situation is undesirable, it does not warrant the drastic action of immediate closure of the operation.

The Applicant submits that the evidence submitted by the Respondent, the City and the Compost Association respecting the nature of, frequency and magnitude of the odours at issue is not based on science. It submits that it appears that no air quality samples have been taken or analyzed, as one would reasonably expect of a decision-making process culminating in an order to effectively shut down an operation such as the Applicant's.

While the Applicant states that it is not uncaring, it states that the Board should not accept the individual accounts of odour and health impacts without the benefit of a full hearing and cross-examination of the individuals. It notes that there is no standardized rating system used for reporting odours, and that there are gaps in the data with respect to duration of episodes and the names of the individual's reporting effects. In addition, it submits that there is no evidence that the odours complained of originate from the Applicant's facility, rather than from farms in the area. Mr. Moscone notes in his affidavit that almost all of the neighbours of the

Applicant are either dairy farms or poultry farms, which have their own sources of odours.

The Applicant submits that no reliable evidence has been submitted by any of the parties to show that the odours at issue are so intolerable that they can not be further tolerated through the approximately two-month duration of the appeal process. Having said that, the Applicant repeatedly states that it plans to virtually eliminate all odours from the operation, and that it has been attempting to do so for quite some time through upgrades and attempts at rezoning. Since rezoning has recently been derailed, it is seeking a building permit from the City to improve the facility and prevent odours from escaping. It submits that it is "ready, willing and able" to begin the improvements as soon as it gets the necessary approvals. In the meantime, Mr. Moscone states, on page 7 of his affidavit that the Applicant has offered to make temporary changes to the facility for the duration of the stay period, should one be granted. The Applicant has offered to tarp the front of the bunkers that are currently open on one side, and to erect a temporary tarped wall on the west end of the of the facility building which could be kept closed except when people are working in the building.

With respect to the issue of leachate from a pipe into the canal, the Applicant notes that this problem was discovered after the Order was issued and, therefore, it was not a basis of the Order. Nevertheless, after being notified of the leachate, the Applicant investigated and has identified the problem. In his affidavit sworn on April 19, 2000, Dudley Kirk states: "I will have the openings repaired so that water will not flow from this area into the pipe."

Farmers' Fresh submits that it presently has grower contracts with five mushroom farms, all of which purchase their compost from the Applicant's Abbotsford facility. The vice-president of Farmers' Fresh, Ma Nguyen, states in his affidavit that all of the farms supplying mushrooms to Farmers' Fresh obtain their compost from the Applicant's Abbotsford facility, and that he is not aware of any other sources of compost for these farms.

The president of Ross Land, one of the farms in question, states in his affidavit that, if Ross Land is unable to obtain its regular shipments of compost from the Applicant, it would have potentially fatal economic consequences to that company, its shareholders, and its employees. The deponent also states that there is currently a severe limitation on the availability of compost in the Fraser Valley.

In response, the Respondent submits that the farms in question can find an alternate source of supply for mushroom compost other than that produced by the Applicant. In support, the Respondent provides an affidavit from a representative of Money's Mushrooms stating that Money's Mushrooms is prepared to consider supplying mushroom composting substrate to farmers with contracts with agencies other than Money's Mushrooms.

The Board accepts that there are legitimate concerns with regard to odours emanating from the Applicant's composting operation. In particular, the Board takes note of the evidence concerning the observations and concerns of area

residents, and of the affidavit of the employee of the Ministry. In *Her Majesty the Queen* v. *Money's Mushrooms Ltd.* (8 December 1997), Surrey 84932 (B.C. Provincial Court), the Court ruled that it would accept the subjective evidence of people claiming that they could smell strong odours to determine the presence of air contaminants. However, this does not end the matter. The Court also held that this evidence had to be supplemented with other objective evidence to establish that there was an "air contaminant" and "pollution" as defined in the GVRD's bylaw and the *Waste Management Act*. This test will be central to the Board's determining, in the appeal on the merits, whether the Respondent and the other parties have established that the issuance and terms of the Order are warranted in this case.

While there appears to be legitimate concerns about the odours emanating from the facility, and also concerns about delays in making the planned improvements to the facility, the Board finds that the need to shut down the Applicant's operation is not so urgent that it warrants such drastic consequences to the Applicant and its customers. As all of the parties have noted, the local community has lived with the presence of this facility since 1996. The leachate was not discovered until after the Order was issued, and the Applicant has said that it is taking care of the problem. Further, less than one month before this Order was issued, the Ministry was apparently willing to allow the facility to continue to operate, provided that it made changes to its facility. Those changes were to be made by June 30, 2000. Within two weeks of that draft order, on or about March 15, 2000, the Ministry had apparently changed its position and was going to require what can only be construed as immediate closure of the facility.

Further, the "trickle down" effect to other farms and agencies, should the Order take effect immediately, is unreasonable. Even if there are other mushroom compost sources available, it will take some lead time for them to make appropriate arrangements.

While it is not necessary for the Respondent and the other parties opposing a stay to prove their case at this juncture, it is the Board's view that there needs to be more evidence of a serious threat to human health or the environment to warrant the drastic action required by the Order, if the Order is to be enforced prior to a full hearing on the merits. Accordingly, the Board finds that the balance of convenience favours the granting of a stay pending a decision on the merits of this appeal.

Finally, the Board notes that the Respondent made submissions regarding the general lack of authority for the Applicant's operations. He submits that the Applicant has never been authorized to accept partially composed mushroom growing media under the *Waste Management Act* and submits that the Applicant is not operating the facility in compliance with the *Mushroom Composting Pollution Prevention Regulation*, B.C. Reg. 413/98. The Respondent submits that neither the Respondent nor the Board has jurisdiction to authorize an activity that is proscribed by the provisions of the *Waste Management Act*. The Respondent submits that the Applicant has continued to accept the mushroom media without the authorization required by the *Act*, and in violation of the Order. He submits that the Order is designed to abate pollution caused by the unauthorized deposit of business waste

into the environment and that the effect of a stay could be seen as authorizing the contravention of section 3 of the *Waste Management Act*.

The Board notes that the Order itself states that it "applies to the mushroom composting operation that is allowing the release of air contaminants that have been determined to be causing pollution." There is nothing in the Order that even remotely suggests that it is to address "illegal" acceptance of mushroom growing media or an "illegal" operation. It is only to address air contaminants, which are said to be causing "pollution." If the operation is, in fact, illegal as contended by the Respondent, that is a completely separate matter and the Ministry has, at its disposal, all of the usual enforcement tools in the *Act* to address that situation.

DECISION

In all of the circumstances, the Board finds that the Order should be stayed with the following condition:

1. In accordance with its offer, the Applicant will tarp the front of the bunkers that are currently open on one side, and erect a temporary tarped wall on the west end of the facility building. The tarped wall is only to remain open when people are working in the building. These changes are to be made within a reasonable time, which is to be determined by the Respondent.

Although the Board notes that odours are worse in the spring and summer, the above-noted measures to be implemented by the Applicant should be of some assistance. In addition, the Board will make every effort to ensure that a hearing can take place as quickly as possible.

The Board also takes note of the Applicant's submission that, during the stay period, it will "diligently pursue the issuance of a building permit and the construction of the full enclosure of the facility so that all operations take place within a negative pressure building and that the airflow exiting the building first passes through a biofilter."

Toby Vigod, Chair
Environmental Appeal Board

April 20, 2000