BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2001-WAS-014(a)/017(a)/018(a)/020(a)/021(a)

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

BETWEEN:	Imperial Oil Limited H. Hagman Holdings Limited Bri-Don Installations Ltd. Otto Hagman and Thomas R. O'Neill Edward and Yrsa Hagman	**APPELLANTS**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
AND:	Sanbo Developments Limited	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on August 17, 2001	

APPEARING:

For the Appellants:	
Imperial Oil Limited:	Simon Wells, Counsel
H. Hagman Holdings Limited:	Waldemar Braul, Counsel
Bri-Don Installations Ltd.:	Jan A. Fishman, Counsel
Otto Hagman and Thomas R. O'Neill:	Otto H
Edward and Yrsa Hagman:	Edward and Yrsa Hagman
For the Respondent:	Frank Rhebergen
For the Third Party:	Murray T. Wolf, Counsel

PRELIMINARY MATTER - JURISDICTION

Imperial Oil Limited ("Imperial Oil"), H. Hagman Holdings Limited ("Hagman Holdings"), Bri-Don Installations Ltd. ("Bri-Don"), Otto Hagman and Thomas O'Neill, and Edward and Yrsa Hagman appealed the June 5, 2001 preliminary determination of Frank Rhebergen, Assistant Regional Waste Manager (the "Regional Manager"), Ministry of Water, Land and Air Protection (the "Ministry"), that a site is a contaminated site pursuant to section 26.4(2)(a) of the *Waste Management Act* (the "*Act*").

By letter dated July 5, 2001, the Environmental Appeal Board (the "Board") requested submissions from the parties on the issue of whether a preliminary

determination that a site is a contaminated site constitutes a decision under section 44 of the *Act* that may be appealed to the Board. This decision addresses that issue.

BACKGROUND

In a letter dated June 5, 2001 to Sanbo Developments Limited ("Sanbo"), and copied to the Appellants, the Regional Manager gave notice of his preliminary determination pursuant to section 26.4(2) of the *Act,* that Lots 37 to 48, Block 109, District Lot 865, Range 5, Coast District, Plan 1054, located at 4011 Highway 16 East, Smithers ("the Site") was classified as a "medium size, complex contaminated site as defined in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*"). Sanbo is the owner of the Site.

In his June 5, 2001 letter, the Regional Manager provided support for his preliminary determination that the Site is a contaminated site, as follows:

> My staff have reviewed the following reports prepared for Sanbo Developments Ltd. (collectively, the "O'Connor Reports"):
>
> - "Smithers Bread and Butter Stop" (Preliminary Subsurface Investigation), dated August 30, 1995 by O'Connor Environmental Associates Ltd.
>
> - "Smithers Bread and Butter Stop" (Detailed Subsurface Investigation), dated October 27, 1995.
>
> O'Connor Associates Environmental Inc. on behalf of Sanbo Developments Ltd. submitted a Preliminary Site Investigation (PSI) of the above mentioned property to the Ministry of Environment, Lands and Parks (BC Environment) on August 30, 1995. Based on the findings of the PSI, a Detailed Site Investigation (DSI) was conducted by O'Connor Associates Environmental Inc. in October 1995. The DSI indicated evidence of off-site migration of contamination and the presence of special waste level contamination (in the form of free liquid product, or LNAPL) in the soil and groundwater. In addition, the size of the contaminated site was greater than 1500 m^2.

The Regional Manager further advised the Appellants that comments provided by July 15, 2001 "will be given full consideration before the Manager makes a final determination with respect to the subject site."

The Parties' submissions indicate that Sanbo commenced voluntary remediation of the Site in approximately 1997. Voluntary remediation arises from section 28 of the *Act*, which provides for independent remediation of a contaminated site by a responsible person. In addition, in the fall of 1999, Sanbo initiated a cost recovery action pursuant to section 27(4) of the *Act* against Imperial Oil, Bri-Don and other unspecified parties, in the Supreme Court of British Columbia. That action is still pending.

Between July 5 and July 30, 2001, Imperial Oil, Hagman Holdings, Bri-Don, Otto Hagman and Thomas O'Neill, and Edward and Yrsa Hagman submitted Notices of Appeal to the Board. They requested orders from the Board granting an immediate stay of the preliminary determination, and quashing and setting aside the preliminary determination, among other things. The Notices of Appeal were substantively the same.

With respect to the preliminary issue of the Board's jurisdiction to accept the appeals, submissions were received from Bri-Don and Sanbo on July 27, 2001, from Imperial Oil and Hagman Holdings on July 30, 2001, and from Otto Hagman on behalf of himself and Thomas O'Neill on August 14, 2001. No submissions were received from Edward and Yrsa Hagman. The Board received a reply submission from Sanbo on August 17, 2001.

The Appellants request that the Board find that a preliminary determination under section 26.4(2)(a) of the *Act* constitutes a "decision" under section 44 of the *Act*. They ask the Board to hear their appeals of the Regional Manager's June 5, 2001 preliminary determination.

Sanbo asks the Board to find that a preliminary determination pursuant to section 26.4(2)(a) of the *Act* is not a "decision" and cannot be appealed pursuant to section 44 of the *Act*. Sanbo requests that the Board dismiss the appeals.

Although the Regional Manager provided no submission, the Board received a letter from him dated August 8, 2001, which stated:

> I have no submissions to make on the appealability of the preliminary determination herein.
>
> The preliminary determination in question was made on the understanding that it was a non-contentious procedural matter. It is now apparent that this is not the case and given recent developments I would have difficulty in justifying the time and expense of appeal proceedings based on environmental risk associated with this site. It is accordingly not my intention to proceed to a final determination for this site at the present time.

ISSUE

The issue before the Panel is whether a preliminary determination that a site is a contaminated site pursuant to section 26.4(2)(a) of the *Act* constitutes a decision under section 44 of the *Act* that may be appealed to the Board.

In addressing this issue, the Panel has considered the following sub-issues:

a. Whether a preliminary determination constitutes a "decision" within the meaning of section 43 of the *Act*;

b. Whether section 26.4 of the *Act* indicates that a preliminary determination is a decision that may be appealed to the Board; and,

c. Whether procedural fairness requires that a preliminary determination should be appealable to the Board.

RELEVANT LEGISLATION

The relevant provisions of the *Act* are as follows:

Definitions and interpretation

1 (1) In this Act:

"order" means an order made or given under this Act;

PART 4 - CONTAMINATED SITE REMEDIATION

Determination of contaminated sites

26.4 (1) A manager may determine whether a site is a contaminated site and, if the site is a contaminated site, the manager may determine the boundaries of the contaminated site.

(2) Subject to subsection (3), in determining whether a site is a contaminated site, a manager must do all of the following:

(a) make a preliminary determination of whether or not a site is a contaminated site, on the basis of a site profile, a preliminary site investigation, a detailed site investigation or other available information;

(b) give notice in writing of the preliminary determination to

...

(iv) any person known to a manager who may be a responsible person under section 26.5 if the site is finally determined to be a contaminated site;

(c) provide an opportunity for any person to comment on the preliminary determination;

(d) make a final determination of whether or not a site is a contaminated site;

(e) give notice in writing of the final determination to

...

(iv) any person known to the manager who may be a responsible person under section 26.5, and

(v) any person who has commented under paragraph (c);

...

(3) A manager, on request by any person, may dispense with the procedures set out in subsection (2) (a) to (c) and make a final determination that a site is a contaminated site if the person

(a) provides reasonably sufficient information to determine that the site is a contaminated site, and

(b) agrees to be a responsible person for the contaminated site.

...

(5) A final determination made under this section is a decision that may be appealed under Part 7 of this Act.

Part 7 — Appeals

Definition of "decision"

43 For the purpose of this Part, **"decision"** means

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of a power,

...

Appeals to Environmental Appeal Board

44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

The relevant provision of the *Regulation* is as follows:

Procedure for determination of "contaminated site"

15 (1) A manager must, after making a preliminary determination under section 26.4(2)(a) of the Act, provide an opportunity for written comments to be submitted to the manager during a period of not less than 30 days and not more than 60 days after delivering notice of a preliminary determination, with reasons for the preliminary determination, under section 26.4(2)(b) of the Act.

DISCUSSION AND ANALYSIS

Whether a preliminary determination of a contaminated site pursuant to section 26.4(2)(a) of the *Act* constitutes a decision under section 44 of the *Act* that may be appealed to the Board.

a. Whether a preliminary determination constitutes a "decision" within the meaning of section 43 of the Act

The first question for the Panel to consider is whether a preliminary determination constitutes a "decision" within the meaning of section 43.

The Panel notes that, to be appealable to the Board, a preliminary determination must be a decision pursuant to section 44 of the *Act.* Sections 43(a), (b) and (c) define the meaning of "decision" for the purpose of section 44, as "the making of an order," "the imposition of a requirement" or "an exercise of a power." The Parties made no specific submissions concerning sections 43(d) or (e).

Imperial Oil submits that a section 26.4 preliminary determination "plainly meets the definition of a 'decision'." It refers the Panel to the definitions of "determination" and "decision" in the *Shorter Oxford English Dictionary.* "Determination" is defined as a "Judicial or authoritative decision or settlement" (emphasis added). "Decision" is defined as "The action of deciding (a contest, question, etc.); settlement, determination…." (emphasis added) Thus, Imperial Oil argues that "on a plain reading, the two terms equate."

It further submits that "any ambiguity or doubt as to a right of appeal should be resolved in favour of an appellant whose rights are impacted by the decision challenged." It argues that an appellant should not be forced to conclude a final determination hearing before "proceeding to establish whether that hearing should even occur."

Hagman Holdings generally adopts the submissions of Imperial Oil. It also submits that it is important for a preliminary determination to be an appealable "decision," because it is a "critical threshold decision which is necessary to engage the liability provisions of the contaminated sites legislation." It refers the Board to *Swamy* v. *Tham Development Ltd.* ((2001), 38 C.E.L.R. (N.S.) 1, B.C.J. No. 721 (Q.L.) (S.C.)) (hereinafter *Swamy No. 2*) as support for that proposition.

Sanbo submits that "both the definition of 'decision' in section 43 and the overall context of the *Act* demonstrate that a preliminary determination pursuant to section 26.4(2)(a) is not a decision under the *Act*."

The Panel has considered clauses (a), (b) and (c) of section 43 separately.

Section 43(a): "the making of an order"

Imperial Oil

Imperial Oil submits that a preliminary determination fits the definition of "order" in section 1 as "an order made or given under this Act." It further argues that the term "order" has "always been applied both to determinations of judges and statutory decision-makers," and refers the Panel to the definition of "order" in *Black's Law Dictionary* (7th Ed.):

> **Order, *n***. 1. A command, direction, or instruction. 2. A written direction or command delivered by a court or judge - Also termed *court order, judicial order.*
>
> "An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings" 1 Henry Campbell Black, *A Treatise on the Law of Judgments* para. 1 at 5 (2d Ed. 1902) (emphasis added).

Imperial Oil submits that this definition applies because the Regional Manager made an order for a preliminary determination as a "necessary prerequisite" to proceeding to a final determination hearing and decision.

Imperial Oil asserts that the term "order" is "universally understood in the British Columbia Supreme Court" to be any decision of a judge, and that a preliminary determination is no less an "order" because it is issued by a statutory decision-maker. Imperial Oil submits that "the Legislature intended the term 'order' in the *Act* to have a meaning no less restricted" than the meaning found in the *Court of Appeal Act*, R.S.B.C. 1996, c.77. The definition of "order" in that Act includes "an opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made" (emphasis added). Imperial Oil also refers the Panel to section 8 of the *Court of Appeal Act*, where the term "order" applies to appeals from statutory decision-makers to the Court of Appeal.

Hagman Holdings, Bri-Don and Otto Hagman

Bri-Don, Hagman Holdings and Otto Hagman make no specific submissions with respect to section 43(a).

Sanbo

Sanbo submits that the meaning of "order" is clear from the *Act's* definition of the term and the context in which it is used. It is neither necessary nor appropriate to go outside the *Act* to define the term.

Sanbo argues that there is no ambiguity in the *Act*'s definition of "order." It submits that "an order made or given under this Act" refers to the numerous sections of the *Act* that expressly refer to "orders" made by a manager, director or district director. It refers the Panel to sections 8(3), 8(4), 12(3), 12(4), 15, 18(8), 22(3), 22(4), 24(4), 26.1(9), 26.2(1), 27.1, 27.5, 28(3)(c), 31 and 33(2) of the *Act*.

Section 43(b): "the imposition of a requirement"

Imperial Oil

Imperial Oil submits that a preliminary determination under section 26.4(2)(a) of the *Act* "imposes" at least three "requirements" for the purpose of section 43(b):

1. the requirement for all potentially responsible persons for the site to make submissions within the time frame stipulated by the Regional Manager;

2. the requirement for the Regional Manager to give reasons; and

3. the requirement for the Regional Manager to make a final decision within the time limits stipulated under section 15 of the *Regulation.*

Hagman Holdings

No specific submission was made by Hagman Holdings on this point.

Bri-Don and Otto Hagman

Bri-Don and Otto Hagman submit that the Regional Manager's preliminary determination that the Site is a "contaminated site" imposes the requirement of a costly and time consuming determination process on potentially responsible persons.

Sanbo

Sanbo opposes Imperial Oil's characterization of section 26.4(2)(a) as "requirements" for the purpose of section 43(b). It submits that the opportunity to comment provided by section 26.4(2)(c) is an opportunity, not a "requirement," and implies that a person has the option of choosing whether to comment or not. Sanbo argues that section 43(b) refers to "requirements" which are "imposed" upon persons who have a subsequent right of appeal under section 44 of the *Act*.

Sanbo submits that the meaning of the phrase "imposition of a requirement" must be derived from its context in the *Act.* It refers the Board to sections in which the word "require" is used in relation to a manager taking action that imposes a requirement upon a person: sections 10(1), 19(2), 19(3), 28(3) and 28.1(4). It notes that section 26.4 does not contain the words "require" or "requirement," in contrast to other sections of the *Act*.

Section 43(c): "an exercise of a power"

Imperial Oil

Imperial Oil submits that a preliminary determination is "an exercise of power expressly conferred by section 26.4 of the *Act*." It submits that "the question of whether a decision is an exercise of power arises in the context of judicial review

proceedings." To support its submission, it refers the Panel to section 2(b) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241, which enables a court to grant relief from proceedings in relation to "the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power." (emphasis added)

It further argues that the British Columbia Supreme Court affirmed that "the making of a decision authorized under a statute that leads to a proceeding or hearing is an exercise of a statutory power" in *Weldwood of Canada Ltd.* v. *British Columbia* (*Workers' Compensation Board*) ((1998), 56 B.C.L.R. (3d) 297, [1998] B.C.J. No. 2430 (Q.L.)) (hereinafter *Weldwood*, cited to Q.L.) (at paras. 40-41, 54).

Hagman Holdings

Hagman Holdings made no specific submission concerning section 43(c).

Bri-Don and Otto Hagman

Bri-Don and Otto Hagman submit that, in making a preliminary determination, a manager is exercising a statutory power under section 43(c) which may have "very serious consequences" for persons ultimately found to be "responsible persons."

Sanbo

Sanbo submits that the phrase "exercise of a power" in section 43(c) refers to the explicit use of those particular words in other sections of the *Act*: sections 21, 31, 32, 33 and 34.

Sanbo refers the Panel to its previous interpretation of the phrase "exercise of a power" in *Darcy McPhee* v. *Deputy Director of Waste Management* (Appeal No. 95/08 - Waste, December 14, 1995, [1995] B.C.E.A. No. 52 (Q.L.)) (hereinafter *McPhee*). As discussed in *McPhee* in considering this phrase in an earlier version of the *Act*,

> What subsection 25(b) [now section 43(c)] applies to is the powers which a manager may exercise under sections 16.3 [now 21] and 22(4) [now 31(5)]. For example in subsection 22(4) [now 31(5)], it states explicitly that the "powers given by this section (section 22) are exercisable" by the manager. Similarly in section 16.3 [now 21] of the Act it states that a manager "may exercise a power or authority in relation to an operational certificate in the same manner and to the same extent as provided by this Act with respect to a permit." Thus from its statutory context it seems clear that subsection (b) "the exercise of a power" must be one of the positive acts referred to in these sections just as each of the other subsections refer to a positive action in the other appealable sections.
>
> "Exercise of a power" has a broader meaning than simply the making of an order. The additional meaning is indicated by section 22(3) [now 31(4)] where it is provided that a manager may "amend or cancel an order." In section 22.1 [now 32], the ability to issue, cancel or amend orders is

> characterized as an "exercise of powers." This is what section 25(b) [now 43(c)] refers to.

In response to Imperial Oil's reference to the *Judicial Review Procedure Act*, Sanbo submits that the Board in *McPhee* decided that the definition of "exercise of power" in the *Judicial Review Procedure Act* is irrelevant to the appeal process under the *Act*. Sanbo refers the Panel to the finding in *McPhee* that the *Judicial Review Procedure Act* definition is "purposively much broader than that contemplated in the *Act*."

b. *Whether section 26.4 of the* Act *indicates that a preliminary determination is a decision that may be appealed to the Board*

To consider fully whether a preliminary determination is a decision pursuant to section 43, the Panel finds that section 43 must be read in conjunction with section 26.4, and subsections (2) and (5) in particular.

Section 26.4(2)

Imperial Oil, Bri-Don and Otto Hagman

Imperial Oil, Bri-Don and Otto Hagman made no specific submissions regarding section 26.4(2).

Hagman Holdings

Hagman Holdings submits that the Regional Manager must consider certain matters and do certain things in making a preliminary determination. It argues that the Regional Manager cannot use the procedure respecting the final determination to cure defects in the making of the preliminary determination. If the Regional Manager errs in the making of a preliminary determination, it submits that the correct time to appeal is after the preliminary determination in which the error occurred, and not after the final determination.

Sanbo

Sanbo submits that "the wording of section 26.4 establishes a clear procedure for a manager to determine whether a site is a contaminated site and for an interested person to appeal a final determination under that section to the Board." It describes the actions required of a manager pursuant to section 26.4(2), and notes that section 26.4(5) permits interested persons to appeal to the Board. It submits that the manager has the discretion to determine what evidence to require prior to making a preliminary determination, what potentially responsible persons should receive notice, what interested persons should receive the opportunity to comment, and how much time to allow for comment.

Sanbo submits that a preliminary determination is not a decision as defined in section 43, because it is "one of a series of procedural steps" in section 26.4(2) of the *Act* which a manager must carry out leading up to the final determination. It

asserts that a previous decision of the Board has held that "procedural matters are not decisions that may be appealed" (*7437 Holdings Ltd.* v. *British Columbia (Ministry of Environment, Lands and Parks)*, Appeal No. 95/44, August 28, 1996, [1996] B.C.E.A. No. 39 (Q.L.)) (hereinafter *7437 Holdings*).

Section 26.4(5)

Subsection (5) provides that:

26.4 (5) A final determination made under this section is a decision that may be appealed under Part 7 of this Act.

Imperial Oil, Hagman Holdings, Bri-Don and Otto Hagman

Imperial Oil, Hagman Holdings, Bri-Don and Otto Hagman made no specific submissions regarding subsection (5).

Sanbo

Sanbo submits that "the wording of subsection (5) demonstrates that the Legislature intended that only a final determination under section 26.4 be construed as a 'decision' for the purpose of Part 7 of the *Act.*" To support its argument, Sanbo refers the Panel to two rules of statutory interpretation cited in *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994):

1. The "presumption against tautology," which states that each word included in a statute is presumed to have a meaning; and

2. The rule of implied exclusion or "expressio unius est exclusio alterius," which states that the legislature is presumed to have deliberately excluded something from the ambit of its legislation if it failed to expressly include it.

Sanbo argues that if a preliminary determination were a "decision" pursuant to section 43, section 26.4(5) would be "devoid of any meaning." It submits that this finding would violate the presumption against tautology.

Sanbo submits that section 43 should be read in context with section 26.4(5). It argues that the most reasonable interpretation of section 26.4(5) is that the Legislature meant to distinguish between preliminary determinations and final determinations for the purpose of an appeal under Part 7 of the *Act*.

In Sanbo's submission, the presumption against tautology also applies to the Legislature's choice of the word "final" in section 26.4(5). If the Legislature had intended to make any determination under section 26.4 subject to appeal under Part 7, it argues, then it "could easily have excluded the word 'final'…. Its choice of the adjective 'final' to define the scope of the word 'determination' necessarily excludes preliminary determinations… because meaning must be given to the word 'final'."

Sanbo further submits that the rule of implied exclusion supports its argument that a preliminary determination is not appealable under Part 7. When the Legislature failed to expressly state in subsection 26.4(5) that a preliminary determination may also be appealed, it created the presumption, according to Sanbo, that it had deliberately excluded a preliminary determination from subsection 26.4(5).

Sanbo submits that when the Legislature added the contaminated sites remediation provisions in Part 4 in 1997, it added a new term to the *Act*: "determination." By expressly stating in section 26.4(5) that a "final determination" is a decision that may be appealed, Sanbo argues, the Legislature "by necessary inference" recognized that a preliminary determination was not a decision as defined in section 43.

Sanbo also refers the Panel to two other sections of the *Act,* which, it argues, are like section 26.4(5), because they allow the appeal of certain governmental actions that do not fall under section 44.

22 (5) A person affected by an order of a sewage control manager under this section may appeal the order under Part 7 in the same manner as if the order were a decision of the director, and Part 7 applies.

24.1 (7) Part 7…appl[ies] to a decision of the Administration Board of the Greater Vancouver Sewage and Drainage District, or a decision of…the Greater Vancouver Regional District….

Sanbo submits that section 26.4(5) should be interpreted in context with these two sections. It argues that all three provisions create a right of appeal from actions that would otherwise not be appealable under Part 7 of the *Act*.

In summary, Sanbo submits that because neither section 26.4(5), nor section 43, expressly includes a preliminary determination as a decision that may be appealed under Part 7, a preliminary determination cannot be appealed to the Board pursuant to section 44 of the *Act*.

c. *Whether procedural fairness requires that a preliminary determination should be appealable to the Board.*

The Appellants submit that procedural fairness requires that a preliminary determination should be found to be a "decision" within the meaning of section 43 of the *Act.* In addition, the Parties provided submissions on the question of whether the Regional Manager created an unfair process by failing to provide adequate reasons in compliance with section 15 of the *Regulation*.

Imperial Oil

Imperial Oil submits that "if a proper and fair preliminary determination is not rendered then potentially responsible persons…are subjected to an unreasonable and unfair hearing process leading up to the final determination of a contaminated site." Imperial Oil argues that "a full and fair hearing prior to a Final

Determination…is of critical importance to a potentially responsible person…," who is subject to "liability for the cost of remediating the site regardless of fault as it is normally recognized by the law, and being ordered to carry out extremely expensive remediation work on pain of a heavy fine or imprisonment."

Imperial Oil submits that a preliminary determination has two important components that may affect the rights of a potentially responsible person, as follows:

1. The decision triggers an obligation on a potentially responsible person to assemble the best case possible…in no more than 60 days.

2. The content of a preliminary determination is the only means by which the potentially responsible person knows the case it must answer. Ministry staff never present a case for responsible persons to answer in a final determination….

Imperial Oil argues that these two important components "point to two grave errors that can be committed by a manager in making a preliminary determination," as follows:

1. The manager can make a preliminary determination on an inadequate, mistaken or biased evidentiary foundation, thus triggering a hearing where the potentially responsible persons… many of whom will have no access to the proposed site, have no time to respond… except in reliance on a flawed evidentiary foundation.

2. The manager can make an error in substance or procedure in making a preliminary determination and thereby trigger an unnecessary or fundamentally unfair final determination hearing.

Imperial Oil further submits that a potentially responsible person must rely solely on the proceeding before the manager for a "full and fair determination of a contaminated site." It submits that the British Columbia Supreme Court concluded in *Swamy No. 2* that a contaminated site determination by a manager cannot be challenged in a civil liability proceeding.

One example of the potential impact of an unfair determination, Imperial Oil argues, is "an overly broad contaminated site definition," which "may lead to completely arbitrary liability." It refers the Panel to sections 26.5, 27 and 27.1 of the *Act*, which, it submits, make a responsible person liable "for the site" with "no words of limitation confining liability to the portion of the site to which the person may be directly connected." It further submits that the "complex" site in this matter greatly complicates the liability issues.

In conclusion, Imperial Oil submits that a preliminary determination can have "very serious negative implications for a potentially responsible person and can essentially ensure they are subjected to an unfair hearing process with serious consequences." It therefore submits that "these consequences render such a

determination a meaningful 'decision'… which is subject to a right of appeal like all other decisions in order to protect affected persons from the adverse consequences."

Hagman Holdings

Hagman Holdings generally adopts the position of Imperial Oil. It made no specific submission regarding procedural fairness.

Bri-Don and Otto Hagman

"[G]iven the staggering sanctions" of the *Act*, Bri-Don and Otto Hagman submit that procedural fairness requires that a potentially responsible person should have the opportunity in a preliminary determination to persuade a manager that it should not be drawn into "this costly and time consuming process." They refer the Board to *Imperial Oil Ltd.* v. *Oldham* (1998), 51 B.C.L.R. (3d) 93, [1998] B.C.J. No. 79 (Q.L.) (S.C.) (hereinafter *Oldham*).

Similarly, they submit that procedural fairness requires the Board to hear potentially responsible persons at the "earliest possible stage," to give them the opportunity to argue that they should not be drawn into the "costly and time consuming process" of a preliminary determination.

Sanbo

Sanbo submits that nothing in section 26.4 is "inherently unfair or a breach of natural justice." It submits that the preliminary determination provides "a mechanism for notifying and hearing potentially affected persons prior to the final determination being made." Therefore, it argues, the preliminary determination that the Site is a contaminated site "does not prejudice any party." Sanbo submits that the process in section 26.4 "ensures that such persons as Imperial have a full and fair opportunity" to make submissions to the Regional Manager, and appeal the final determination to the Board. It further submits that neither Imperial nor Bri-Don has demonstrated any unfairness in the preliminary determination process.

In response to Imperial Oil's submission that a potentially responsible person must rely solely on the preliminary determination procedure before a manager for a full and fair determination, Sanbo submits that Imperial Oil is not left without a remedy because it can appeal the final determination to the Board.

Sanbo responds to Bri-Don's submission that *Oldham* supports its argument that procedural fairness requires a potentially responsible person to have the opportunity in a preliminary determination to persuade a manager that it should not be drawn into the process. Sanbo argues that *Oldham* is distinguishable based on its facts, because "the Court held it was unfair for the Ministry to impose sanctions… without [providing] the opportunity to make submissions." In this matter, the preliminary determination imposes "no sanctions or requirements," and all Parties, as potentially responsible persons, "have been given the opportunity to make comments on the preliminary determination prior to a final determination."

Sanbo submits that allowing appeals of preliminary determinations would cause "the contaminated site determination process to be more time consuming and expensive by making the two stages of the determination process subject to an appeal process."

The adequacy of the Regional Manager's reasons for the preliminary determination

Imperial Oil

Imperial Oil submits that section 15 of the *Regulation* recognizes the importance of a "proper and fair" preliminary determination by requiring that a manager give reasons. It argues that "the corollary of this requirement is an expectation by the Legislature that those reasons will be…challenged where appropriate."

In its submissions, Imperial Oil states that the "sole case for a potentially responsible person to answer is the preliminary determination itself." However, as is the case in this matter, it argues, managers routinely ignore this requirement and provide "inadequate reasons which offer a simple conclusion, a cursory citing of reports without any analysis whatever…." Imperial Oil argues that potentially responsible persons are expected, "on short notice, to analyze lengthy and complicated reports without any guidance as to what a manager considers important…." It further argues that potentially responsible persons must deal with the fact that these reports are "generally prepared on behalf of other parties who… have no obligation to make full disclosure of their work to the ministry, and who have a vested interest in defining a site in such a way as to cast blame upon others." One difficulty is that potentially responsible persons may have "little or no access to these sites, and certainly cannot perform their own investigatory work within the 60-day maximum time frames mandated under the Act for a final site determination."

Imperial Oil submits that a preliminary determination "which does not comply with a manager's obligations to provide proper reasons… can essentially ensure that [a potentially responsible person] is subjected to an unfair hearing process with serious consequences."

Hagman Holdings, Bri-Don, and Otto Hagman

Hagman Holdings, Bri-Don and Otto Hagman made no specific submission concerning the adequacy of the Regional Manager's reasons.

Sanbo

Sanbo submits that the Regional Manager provided clear reasons for his preliminary determination in his June 5, 2001 letter, which made reference to the O'Connor Reports. Sanbo argues that Imperial Oil has "suffered no prejudice" by the Regional Manager's conduct of the determination process. Sanbo submits that Imperial Oil has had notice of this issue for a minimum of two years. Sanbo states that it provided copies of the O'Connor Reports to Imperial Oil in 1999, as part of

the document production process in its cost recovery action against Imperial, Bri-Don and others. Further, Sanbo notes that on June 28, 2001, it provided the Parties with copies of the additional background materials that it had sent to the Regional Manager with its request for a determination.

Sanbo also notes that the Regional Manager waived the deadline of July 15, 2001, for comment on the preliminary determination at Imperial Oil's request, allowing it "ample time" for comment.–

The Panel's findings

The Panel has considered the meaning of the relevant statutory provisions in accordance with commonly accepted principles of statutory interpretation. For guidance, the Panel has referred to the Supreme Court's decision in *Beazer East, Inc.* v. *Environmental Appeal Board et al* (2000), 84 B.C.L.R. (3d) 88, [2000] B.C.J. No. 2358 (Q.L.) at para. 169 (S.C.) (hereinafter *Beazer*, cited to Q.L.), which relies upon *Haida Nation* v. *British Columbia (Ministry of Forests)* (1997), B.C.L.R. (3d) 80, [1997] B.C.J. No. 2480 (Q.L.) (C.A.) (hereinafter *Haida Nation*, cited to Q.L.) (at para. 67).

In *Haida Nation*, the Court of Appeal determined that the following passage from the second edition of *Driedger on the Construction of Statutes* (Toronto: Butterworths, 1983) governs statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

To assist in determining the appropriate context for interpreting the language in the relevant provisions of the *Act*, the Panel notes the definition of "context" affirmed by the Court of Appeal (at para. 15):

> It is the immediate context of the subsection and the general context of the act. That is the traditional definition of "context" in relation to legislative interpretation, and it has always been accepted that words must be read in their context as so defined.

In considering the submissions of the Parties concerning preliminary determinations, the Panel has considered the overall context of the contaminated site remediation provisions set out in Part 4 of the *Act*.

To assist in determining the intention of the Legislature with respect to the interpretation of Part 4 of the *Act*, the Panel notes the finding in *Beazer*, that "the purposes of the Act are the prevention of pollution and the identification and remediation of contaminated sites. …It is the latter purpose which is the focus of Part 4 of the Act" (at para. 56). Specifically, the Court in *Beazer* found that the purpose of Part 4 is "the expeditious and complete remediation of contaminated sites" (at para. 169).

The Panel further notes the following reasoning in *Beazer* with respect to the need for expeditious action in remediating contaminated sites:

> In *Swamy*, Hunter J. concluded that the principles set out in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 by the Supreme Court of Canada applied to our legislation. In that case, the Court held that the purpose of the legislation before it was to prevent and remedy environmental contamination. The Court also said the following about the remediation purpose:
>
> > Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible... (para. 59)
>
> Similarly, the purpose of remediation under the Act encompasses the need for expeditious action. The Act empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. The ultimate allocation of responsibility is left by the Act to a more time-consuming court process unless there is a voluntary remediation agreement among all responsible persons. (at para. 57)

The Panel has considered the Legislature's intention with respect to the meaning of "decision" and the purpose of section 26.4 of the *Act* in light of the overall purposes of the scheme set out in Part 4 of the *Act*.

The Panel agrees with Sanbo's submission that a preliminary determination is "one of a series of procedural steps" that must be followed under section 26.4(2) in determining whether a site is a contaminated site. Once a preliminary determination procedure under section 26.4(2) begins, no decision is made with respect to whether a site is contaminated or who are responsible persons until after a final determination hearing. It is the *final* determination that a site is contaminated that has serious consequences for responsible persons, and is, appropriately, expressly appealable to the Board pursuant to section 26.4(5).

The Panel finds support for this finding in the wording of section 26.4(2)(b) of the *Act*, which lists persons who must receive notice of a preliminary determination. For example, section 26.4(2)(b)(iv) requires that notice of a preliminary determination be given to "any person known to a manager who <u>may</u> be a responsible person under section 26.5 <u>if the site is finally determined to be a contaminated site</u>." (emphasis added). In addition, section 26.4(2)(c) requires a manager to provide an opportunity "for any person to comment on the preliminary determination." Section 15(1) of the *Regulation* requires a manager to provide persons who receive notice under section 26.4(2)(b) of the *Act* with an opportunity to submit written comments to the manager. Thus, the Panel finds that these

provisions indicate that a preliminary determination provides notice of an impending final determination, and provides a basis for persons to respond and be heard by a manager before he or she makes a final determination.

It is instructive to compare the notice requirements under section 26.4(2)(b) with those under section 26.4(2)(e) to highlight the fact that a preliminary determination is not intended to be a conclusive decision as to whether a site is a contaminated site. After making a final determination under section 26.4(2)(d), a manager must give written notice of the final determination to a list of persons described under section 26.4(2)(e), including "any person known to the manager who may be a responsible person" (section 26.4(2)(e)(iv)), and "any person who commented under paragraph (c)" (section 26.4(2)(e)(v)). Clearly, one of the purposes of section 26.4(2)(e) is to require a manager to notify persons, including those who provided submissions on the preliminary determination, of the outcome of the written hearing of the preliminary determination.

The Panel finds that, when sections 26.4(2)(a) through (f) are read in sequence, they set out a logical sequence of steps in a decision-making process leading to a final determination of whether a site is a contaminated site. The preliminary stages of the process are, however, subject to section 26.4(3). That section provides that a manager may, at the request of any person and if certain conditions are met, "dispense with the procedures set out in subsection (2)(a) through (c)" and simply make a final determination about a contaminated site. In the Panel's view, the fact that the steps relating to preliminary determinations may be avoided altogether lends support to the proposition that the Legislature intended that final determinations, and not preliminary determinations, are decisions that may be appealed to the Board.

Moreover, the Panel accepts that the Legislature intended to distinguish between preliminary determinations and final determinations for the purpose of an appeal when it enacted section 26.4(5), which expressly provides that a final determination under section 26.4 may be appealed to the Board. In particular, the Panel notes that when section 26.4(5) was enacted along with Part 4 of the *Act* in April 1997, the Legislature did not amend the definition of "decision" in section 43 to include the new term, "determination." Instead, section 26.4(5) was enacted to enable an appeal from a final determination, which would otherwise not be appealable.

In this respect, the Panel finds Sanbo's submissions regarding the rule against tautology compelling. The rule against tautology directs that provisions must be read in a manner that gives effect to each provision.

The Panel is not persuaded by the Appellants' arguments that procedural fairness requires that a preliminary determination be subject to appeal to the Board.

The Panel agrees with Bri-Don and Otto Hagman's submission that a potentially responsible person should have the opportunity in a preliminary determination to persuade the manager that it should not be involved in the process. However, the Panel finds that the Regional Manager did give the Parties this opportunity when he

invited comments from them about the preliminary determination. In this matter, the Regional Manager followed the procedure set out in section 26.4(2) which provides potentially responsible persons with notice and reasons for the preliminary determination, and the opportunity to comment.

The Panel rejects Imperial Oil's submission that "the preliminary determination procedure before the manager is the sole means by which a potentially responsible person may obtain a full and fair determination of a contaminated site." The Panel notes that a potentially responsible person may appeal a final determination to the Board, if he or she does not receive a "full and fair determination" from the manager. Under section 46(2) of the *Act*, the Board may conduct an appeal as a new hearing or hearing "*de novo*". Thus, if a final determination is appealed to the Board, the Board may conduct a full hearing of the matter, which may cure any defects in the proceedings before a manager.

The Panel finds that *Oldham* does not support the position that a preliminary determination should be appealable. The Panel agrees with Sanbo that *Oldham* is distinguishable from the present matter on two points. The pollution abatement order in *Oldham* imposed responsibility for contamination and substantial remediation costs on the petitioner. By contrast, no responsibility for contamination and no remediation costs flow from a preliminary determination. Secondly, the petitioner in *Oldham* had no opportunity to make submissions on the procedural issue of whether it was a proper party to the order. In the present matter, the Appellants have received the appropriate notice of their statutory right to comment on issues of whether the Site is contaminated, and who should be a responsible person.

The Panel finds that Imperial Oil's submission that *Swamy No. 2* stands for the proposition that "a contaminated site determination by a manager cannot be challenged in a civil liability proceeding" is not relevant to the issue of whether a preliminary determination is appealable under the *Act*. The Regional Manager has placed the final determination hearing on hold, due to the commencement of these proceedings before the Board.

The Panel also rejects Imperial Oil's submission that the definition of "order" in the *Court of Appeal Act* or *Black's Law Dictionary* is helpful in this case in interpreting the term "order" as defined in section 1 of the *Act*. The Panel finds that the *Act*'s definition of "an order made or given under this Act" refers to those sections of the *Act* that expressly refer to an "order." The Panel notes that section 26.4(2) does not refer to an "order"; it refers to a "preliminary determination."

Further, the general definition of "order" in *Black's Law Dictionary*, as referred to by Imperial Oil, clearly pertains more to court orders than administrative orders made under statutory authority. However, *Black's Law Dictionary* provides some more specific definitions under the heading "order" which may be more relevant to interpreting the meaning of "order" as used in the *Act*. For example, an "administrative order" is defined as "an order issued by a government agency after an adjudicatory hearing." An "interim order" is defined as "a temporary decree that

takes effect until something else occurs." The Panel finds that a preliminary determination under section 26.4(2) of the *Act* is neither of these types of orders. Specifically, a preliminary determination is not made after a hearing before a manager, while a final determination is, subject to section 26.4(3). Nor is a preliminary determination a decree with respect to a contaminated site that "takes effect" until a final determination is made under section 26.4 or a remediation order is issued. A preliminary determination does not mean that a site has been conclusively found to be a contaminated site, and does not trigger liability for remediation under the *Act*.

For these reasons, the Panel concludes that a preliminary determination is not an "order" as defined in section 1 of the *Act*.

The Panel finds that the meaning of "the imposition of a requirement" is also to be interpreted from the express use of those terms in the *Act* and the context in which they are used. The Panel accepts Sanbo's submission that the "imposed requirements" contemplated by section 43(b) refer to requirements imposed upon a person by a manager, director, or district director under the *Act*, and does not include duties of a decision-maker that are not requirements.

The Panel rejects Imperial Oil's submission that section 26.4(2)(a) imposes three requirements for the purpose of section 43(b). The Panel finds that section 26.4(2)(a) does not refer to a "requirement," but rather sets out the process that a manager must follow in determining whether a site is a contaminated site. The Panel also rejects the submission of Bri-Don and Otto Hagman that the Regional Manager imposed a requirement upon potentially responsible persons to participate in the preliminary determination process. In the Panel's view, participation in the preliminary determination process is voluntary, and is not a requirement imposed by a manager. Section 26.4(2) of the *Act*, together with section 15(1) of the *Regulation*, provide persons with an opportunity to be heard by a manager, and persons may or may not decide to participate in that process.

Accordingly, the Panel finds that a preliminary determination under section 26.4(2) of the *Act* is not the "imposition of a requirement" within the meaning of section 43 of the *Act*.

Similarly, the Panel finds that the meaning of the term "an exercise of a power" should be derived from the specific use of that term in the *Act*. The Panel agrees with the Board's earlier finding in *McPhee* that the definition of "exercise of power" in the *Judicial Review Procedure Act* is not relevant to this matter, because its definition is much broader than that contemplated by the *Act*. The appeal provisions of the *Act* and the provisions of the *Judicial Review Procedure Act* create distinct schemes which were intended for different purposes, even though those schemes are complementary insofar as the Supreme Court may review decisions of the Board for errors of law or jurisdiction.

While the Panel agrees with the submissions of Bri-Don and Otto Hagman that responsible persons under the *Act* may be subject to very serious consequences which should be appealable to the Board, this argument does not assist their

submission that a preliminary determination is "an exercise of power." Rather, the Panel finds that these submissions support the argument that a final determination under section 26.4, and not a preliminary determination, may be appealed, because only a final determination may have serious consequences for responsible persons under the *Act*.

In conclusion, the Panel finds that its interpretation of sections 43 and 26.4 of the *Act* is consistent with the statutory objectives of Part 4 as described in *Beazer:* "The Act empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. The ultimate allocation of responsibility is left by the Act to a more time-consuming court process…." Therefore, the Panel finds that the inability of a *potentially* responsible person to appeal a *preliminary* determination does not affect the procedural fairness of the determination procedure in section 26.4.

For all of these reasons, the Panel finds that a preliminary determination is not a "decision" pursuant to section 44 of the *Act*, and cannot be appealed to the Board.

In light of the above findings, the Panel finds that it lacks jurisdiction to determine the issues of whether the determination process was procedurally unfair due to the inadequacy of the Regional Manager's reasons, or whether the preliminary determination should be set aside due to the Regional Manager's failure to make a final determination within a 60-day time limit.

Costs

In its submissions, Sanbo requested an award of costs.

The Panel finds that no special circumstances arise in this matter to justify an award of costs. Therefore, the Panel denies Sanbo's request for award of costs.

DECISION

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

The Panel finds that a preliminary determination is not a "decision" within the meaning of section 43 of the *Act*, and is therefore not appealable to the Board under section 44 of the *Act*. Therefore, the Board does not have the jurisdiction to hear the matter.

The appeals are dismissed.

Alan Andison, Chair
Environmental Appeal Board

January 23, 2002