BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2002-WAS-007(a)

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

BETWEEN:	Westcliff Management Ltd. Morris Kowall	**APPELLANTS**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair Fred Henton, Member Phillip Wong, Member	
DATE:	November 19, 2002	
PLACE:	Vancouver, B.C.	
APPEARING:	For the Appellants: Robert M. Lonergan, Counsel For the Respondent: Dennis A. Doyle, Counsel	

APPEAL

This is an appeal of the May 7, 2002 decision of Doug Walton, Assistant Regional Waste Manager (the "Regional Manager"), to issue a Final Determination pursuant to section 26.4 of the *Waste Management Act* (the "*Act*"). The Final Determination states that the property located at 1150 Lakeside Drive, Nelson, B.C., "is a contaminated site," because the site contains concentrations of Total Phenols in the groundwater that exceed the standards set out in Schedule 6 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*CSR*").

The legal description of the property at issue is:

> Lot 1, District Lots 95, 3868, and 6004 Kootenay District, Plan 12215, Except Part included in Plan 16451;
>
> Lot 12, Block 77, Plan 9500, District Lot 95, Kootenay Land District.

The Environmental Appeal Board has the authority to hear these appeals under section 11 of the *Environment Management Act* and section 26.4(5) and Part 7 of the *Act*. Section 47 of the *Act* provides that the appeal board may:

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

The Appellants seek a reversal of the Final Determination. They also request that the Board make a determination that the site is not contaminated under the *Act,* or that the north and north-west portion of the site is not contaminated.

BACKGROUND

Great-West Life Assurance Company is the registered owner of the property.

The property is located on the south bank of the west arm of Kootenay Lake. It is roughly rectangular in shape and is approximately 55,600 square metres.

The majority of the site is paved and is used as a parking lot. The section of the property immediately south of the parking lot is occupied by a retail shopping centre, the Chahko-Mika Mall.

History of the site

The property was created through a reclamation project in which a portion of the lakefront was "reclaimed" through dyking and landfilling. Once dykes were in place, the lake was displaced with wood waste from the Kootenay Forest Products sawmill and plywood plant in Nelson, as well as from excavated earth. An impervious clay layer was required for the base of the landfill.

The reclamation was conducted in two phases pursuant to a waste permit issued in the early 1970s. In 1974, the then Pollution Control Branch issued waste permit PR-3703 to the Corporation of the City of Nelson to reclaim land below the high water level of the shoreline along the west arm of Kootenay Lake. The permit was amended in 1976 to allow further reclamation to occur to create a second landfill cell.

In 1975, shortly after the filling began, the site was investigated due to concerns that leachate was passing through the dyke and entering Kootenay Lake. A plastic liner system was installed in or around the fall of 1995. Similar concerns regarding leachate were raised and addressed between 1976 and 1978.

The landfill was completed in the late 1970s.

In 1979, the Chahko-Mika Mall was constructed on a portion of the original landfill site.

On February 20, 1986, the then regional manager, cancelled the permit to dispose of wood waste at the site pursuant to section 23 of the *Act*.

Events leading to the Final Determination

The Final Determination at issue in this case was made at the request of Keystone Environmental Ltd. ("Keystone") on behalf of the Great West Life Assurance Company.

Keystone was retained by Great West Life to perform a number of tests and assessments at the site. Of significance to this appeal is Keystone's July, 2001 Environmental Site Assessment titled *Environmental Site Assessment. Chahko Mika Mall, 1150 Lakeside Drive, Nelson BC. Project 7129*. The importance of this assessment is that the groundwater analytical results for 1999 and 2001 showed the level of Total Phenols in some monitoring wells as 600 to 800 times the acceptable *CSR* level of 10 µg/L[1]. The monitoring well with the highest concentrations was located in the north-west corner of the site.

In addition, the assessment showed concentrations of volatile petroleum hydrocarbons ("VPH") in the soil samples exceeded the acceptable standard set out in Schedule 4 of the *CSR*, which is 200 µg/g.

In a letter dated November 9, 2001, Keystone requested a final determination of the contaminated site. The letter contains some relevant background to the request for determination:

> On July 18, 2001 Keystone Environmental submitted an application for a Conditional Certificate of Compliance for the Chahko Mall property. The Site Profile, preliminary and detailed investigation reports and risk assessment accompanied the application. … The investigation report confirmed that site soil contained VPH at a concentration exceeding the Contaminated Sites Regulation commercial land use standards. Groundwater at the site contained ammonia, total phenolics, LEPH [light extractable petroleum hydrocarbons], VPH and zinc at concentrations exceeding the Contaminated Sites Regulation aquatic life standards.
>
> We request that the Ministry make a preliminary determination under Section 26.4 of the Waste Management Act, and subsequently following receipt of comment regarding the preliminary determination, make a final determination of whether the site is a contaminated site…. We also enclosure for your reference in consideration of WMA Section 26.4(2)(iv) a list of persons who may be responsible persons.

An Application Form for a "determination of contaminated site" was attached to the letter.

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[1] The Appellants' evidence is that Total Phenol or total phenolics is a water test that uses the 4-aminoantipyrene method. It is referred to as a "gross parameter" because it does not measure specific compounds, but rather a broad family of compounds with varying characteristics. Total phenol includes natural and synthetic compounds that generally contain a phenol moiety, so it will detect phenol and various substituted phenols with varying degrees of response.

In a February 25, 2002 Technical Review of the application, Glenn Harris, PhD, Regulatory Toxicologist, Contaminated Sites Remediation Unit, Ministry of Water, Land and Air Protection, sets out the background to the application as follows:

> The Great-West Assurance Company Select Produce Company Ltd. submitted a CSR application for a Conditional Certificate of Compliance (CCoC) for the subject site …. The applicant is adding a small addition to the mall and requires a CCoC prior to site redevelopment. Concurrently with the CCoC application, the applicant requested a Site Determination….
>
> While outstanding issues are being addressed by Keystone regarding the adequacy of the investigation report in support of the CCoC, the Ministry has agreed to proceed with a review of the report in support of the Site Determination application.

At the conclusion of his Technical Review, Mr. Harris recommended that a "positive Preliminary Site Determination be issued for the site." His Technical Report was reviewed and approved by the Regional Manager.

It is unclear whether a preliminary determination was issued or was "dispensed with" pursuant to section 26.4(4) of the *Act*.

On May 7, 2002, the Regional Manager issued the Final Determination which is the subject of this appeal. The Regional Manager based his Final Determination on the 2001 Keystone Report. He states in his determination:

> The information contained in this report indicated that concentrations of VPH exceeded the applicable CSR Schedule 4 standard in the south corner of the site. Further, concentrations of Total Phenols in groundwater exceeded the applicable Schedule 6 standard across the north and north-west portions of the site.
>
> Therefore, the information provided to date indicates that the site contains concentrations of substances that exceed Contaminated Sites Regulation standards;
>
> - In soil for **Commercial Land Use (CL)**
> - In groundwater for the **Protection of Aquatic Life (AW)**
>
> [bold in original]

The appeal

On May 29, 2002, the Appellants filed an appeal of the Regional Manager's decision. They seek a reversal of the Final Determination that the property is a contaminated site by reason of elevated levels of Total Phenols in the north and north-west portions of the site. They appealed on three grounds. In their Statement of Points, they abandoned the first two grounds. The final ground of appeal is as follows:

The Regional Manager erred in determining that a permitted landfill was a "contaminated site" within the meaning of Part 4 of the *Act*.

Specifically, the Appellants argue that the reported findings of phenols cannot form the basis of a determination that the site is contaminated because:

1. the land and groundwater within the confines of a permitted landfill are "works" rather than "land," "water" or the "environment" within the meaning of the *Act*; and

2. the concentrations of phenols reported are within the limits effectively prescribed by the permit authorizing the operation of the wood waste landfill. Consequently, that portion of the site is not "contaminated" by phenols. This is because:

   a) in issuing the permit, the Regional Manager "prescribed" a limit for Total Phenol equal to or in excess of that which would result from leaching within the landfill; or, alternatively

   b) in allowing woodwaste to be placed and left in the landfill, and by allowing, if not requiring, phenol leachate to accumulate within it, the "local background concentration" of that substance was intentionally allowed to rise to the levels found. The site is not contaminated because the levels do not exceed that local background level: see s. 11(3) of the *CSR*.

This second argument is essentially that the property cannot be a "contaminated site" within the meaning of Part 4 of the *Act* because a permitted landfill cannot be "contaminated" by the very substance it was designed to accept, albeit by way of leaching.

The Respondent submits that the site is an area of land within the meaning of the *Act* and the historical use of the property as a landfill under permit is irrelevant to its current status under the *CSR*. The relevant consideration in this case is whether the groundwater contains levels of Total Phenols that are in excess of the standards outlined in the *CSR*, which is the case in the present situation. He argues that the Board should confirm the decision of the Regional Manager.

Events subsequent to appeal

In June of 2002, Keystone prepared a second report for GWL Realty Advisors Inc. titled *Additional Stage 2 Preliminary Site Investigation, Chahko-Mika Mall, Nelson, British Columbia, Project 7129*. This report confirmed that the levels of Total Phenols in the groundwater at the site exceeded the standards set out in the *CSR*. However, Keystone removed VPH from the list of contaminants because they were below the *CSR* standards.

On the basis of these findings, the Regional Manager updated the Final Determination on October 16, 2002. He states that the site is a contaminated site

under section 26.4 of the *Act*, but he removed the reference to soil contamination. He states:

> The information contained in these reports indicated that concentrations of Total Phenols in groundwater exceeded the applicable Schedule 6 standard across the north and north-west portions of the site. Therefore, the information provided to date indicates that the site contains concentrations of substances that exceed *CSR* standards;
>
> - in groundwater for the Protection of Aquatic Life (AW)

ISSUES

There is no dispute that the level of Total Phenols in the groundwater exceed the standards set out in Schedule 6 of the *CSR*. There is also no dispute that Kootenay Lake supports aquatic life.

However, the Appellants argue that despite the presence of contaminants, the Regional Manager erred in declaring the site a "contaminated site" for a number of reasons. Their reasons involve a consideration of various provisions of the *Act* and the *CSR*, as well as the role and legal effect of the original waste permit.

The issues raised by the Appellants' arguments are as follows:

1. Whether the landfill constitutes "works" under the *Act*. If so, whether "works" can also be a "contaminated site" as defined in the *Act*.

2. Whether a landfill permitted under Part 2 of the *Act* can also be the subject of the contaminated sites provisions set out in Part 4 of the *Act*.

3. Whether the terms of the waste permit become the "prescribed" standards or conditions for the purposes of assessing whether the property is a contaminated site.

4. Whether the levels of Total Phenols found in the groundwater exceed the "local background concentration" as referenced in section 11(3) of the *CSR*.

RELEVANT LEGISLATION

The power of the Regional Manager to issue a final determination is found in section 26.4 of the *Act*. The provisions in force at the time the decision was made are as follows:

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;

...

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

...

(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.

(4) The lack of a determination under subsection (2) or (3) does not mean that a site is not a contaminated site.

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

"Contaminated site" is defined in section 26(1) of the *Act* as follows:

26 (1) **"contaminated site"** means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

...

(b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

For the purposes of subsection 26(1)(b) (above), the *CSR* states as follows:

Definition of contaminated site

11 (1) Subject to section 12 and subsections (2), (3) and (4) of this section, the definition of **"contaminated site"** in section 26(1) of the Act, for the purposes of paragraph (b) of that definition, means a site at which

...

(b) the surface water or groundwater which is located on the site, or flows from the site, is used, or has a reasonable probability of being used, for aquatic life, irrigation, livestock or drinking water use, and the concentration of any substance in the surface water or groundwater is greater than or equal to the concentration of that substance specified for that use in Schedule 6

…

(3) A site is not a contaminated site with respect to a substance in the soil, surface water or groundwater if the site does not contain any substance with a concentration greater than the local background concentration of that substance in the soil, surface water or groundwater respectively.

(4) A site is not a contaminated site with respect to a substance in the soil if

(a) the site has been used for the application of

(i) sewage sludge,

(ii) composted organic materials, or

(iii) products derived from the materials described in subparagraphs (i) or (ii),

in compliance with the Organic Matter Recycling Regulation or an authorisation given under the Act, and

(b) the site has not been used for any commercial or industrial purpose or activity listed in Schedule 2.

The other provisions relevant to the issues in this appeal will be set out in the discussion portion of the decision as required.

DISCUSSION AND ANALYSIS

1. Whether the landfill constitutes "works" under the *Act*. If so, whether "works" can also be a "contaminated site" as defined in the *Act*.

For a property to fall within the definition of "contaminated site" in section 26(1) of the *Act*, it must be "an area of land." Section 1 of the *Act* defines land as "the solid part of the earth's surface and includes the foreshore and land covered by water."

The Appellants argue that the property in this case is a wood waste landfill – it is not land. They submit that, in granting the original permit for the landfill, the regulatory intention was to create a place within which wood waste and its leachate were to be permanently held, and thereby controlled – they are permanent "works." Section 1 of the *Act* defines "works" as including:

1 …

> (b) a device, equipment, *land* and a structure that
>
> (i) measures, handles, transports, stores, treats or destroys waste or a substance that is capable of causing pollution, or
>
> (ii) introduces into the environment waste or a substance that is capable of causing pollution,
>
> (c) an installation, plant, machinery, equipment, *land* or a process that *causes or may cause pollution* or is designed or used to measure or control the introduction of waste into the environment or to measure or control a substance that is capable of causing pollution, or
>
> …
>
> [emphasis added]

The Appellants note that the elevated levels of Total Phenols were observed in an area that would not exist but for the creation of a wood waste landfill. They argue that the definition of "works" therefore applies to the facts of this case: the landfill in question is **land** (e.g., the landfill), that **stores** or **treats waste** (e.g., wood waste), which is **capable of causing pollution** (e.g., the leaching of phenols).

As "works," the Appellants submit that the property cannot be "an area of land" for the purposes of section 26. They make a number of arguments in support of this.

First, the Appellants submit that "land" is broadly defined and is a general term. However, "works" is a specific term that includes the general term within it. The Appellants argue that the principles of statutory interpretation require the Panel to interpret the general provision so as to exclude the specific text. Therefore, they submit that the "works" should be excluded from the general definition of "land" for the purposes of a contaminated site determination.

The Appellants refer to Cote's *The Interpretation of Legislation in Canada*, 3rd Edition, at page 312:

> In order to give an effect to special provisions, it is often necessary to interpret general provisions so as to exclude the situations dealt with in the specific texts…. An enabling provision of general scope may be construed as not applying to matters covered by a more specific enabling provision.
>
> A special provision in conflict with a general one will be interpreted as an exception to the general one: *specialia generalibus derogant*. In the event of conflict, the specific provision takes precedence.

Applying that principle, the Appellants argue that the term "works" would cease to have meaning if it is not read as an exception to the general term "land." To make sense of the definition of contaminated site, permitted landfills must be "read-out" of the general definition of "land."

The Appellants also cite the B.C. Court of Appeal decision in *R. v. Enso Forest Products Ltd*., [1993] B.C.J. No. 2409 (hereinafter *Enso*). In *Enso*, the Court ruled that a ditch into which bunker C oil accidentally spilt was functioning as a "works" and not as "environment." The Court stated at paragraph 10: "…the appellate judge was correct in his interpretation of the definitions of "environment" and "works" in holding that these definitions are mutually exclusive." Likewise, the Appellants in the case argue that the landfill was functioning as a "works," not as "land," and that these terms are also mutually exclusive.

The Respondent argues that the site is an "area of land" within the meaning of the *Act*, and that the historical use of the land as a permitted landfill is irrelevant to the current status of the site under the *CSR*. Similarly, the Respondent submits that the distinction between "works" and "land" is not relevant to the ultimate determination of whether or not a site is contaminated under section 26.4 of the *Act*. He notes that in section 11(1)(b) of the *CSR*, "contaminated site" is further defined for the purposes of section 26 of the *Act* as a site at which:

> …the surface water or groundwater which is located on the site, or flows from the site, is used, or has a reasonable probability of being used, for aquatic life, irrigation, livestock or drinking water use, and the concentration of any substance in the surface water or groundwater is greater than or equal to the concentration of that substance specified for that use in Schedule 6…

The Respondent submits that under these definitions, any site, including "works" on a site, is open for classification as a contaminated site under Part 4. Once the threshold is met, the manager can declare the site to be contaminated. He submits that this is done in the interest of public health and the protection of the environment.

The Respondent also contends that if the Legislature had intended the permitted landfill to be exempt from scrutiny under Part 4, then "wood waste landfill," or a more general waste management term that "wood waste landfill" would be a subset of, would have been excluded under section 11(4) of the *CSR*.

The Panel notes that the wood waste on the subject property was inserted into the landfill cell over a period of time and "fillers" were added to give the resulting formation permanence. The property, although it mainly functioned as a disposal site at one time, took on the characteristics of "a solid part of the earth's surface" over time. Even if the site was once a landfill site, it is now land by virtue of its current physical state and use: as a mall site, not as a waste site. In any event, the landfill area was clearly constructed upon a solid part of the earth's surface – i.e., "the foreshore and land covered by water," and therefore, the site meets the general definition of "land" in the *Act*.

The Panel acknowledges that the property is also capable of fitting within the broad definition of "works." However, the Panel rejects the argument that "works" must be viewed as an exception to the definition of "land" or that the terms must be read as mutually exclusive in this case. The Panel distinguishes *Enso* as that decision

was based upon an interpretation of the definition of "environment." *Enso* was being prosecuted for the introduction of waste into the environment. The Court determined that, in the context of that case, to include "works" in the definition of "environment" would lead to an absurdity.

Conversely, the case before the Panel involves the definitions of "works" and "land." More importantly, it involves these definitions in the context of the contaminated sites regime.

In the Panel's view, there is no reason at law or on the facts to exclude, as a general rule, something that is "works" from the definition of "land" for the purposes of section 26.4 of the *Act*. Unlike *Enso*, there is no absurdity. In the Panel's view, to exclude all works involving land from being a contaminated site would be contrary to the overall legislative scheme, which is intended to protect the environment and human health from the effects of waste.

Further, the *specialia generalibus derogant* principle is more commonly known as the "implied exception rule." The Panel finds that there must be a conflict in the provisions for the rule to apply. According to *Driedger on the Construction of Statutes*, 3rd Edition, at page 178:

> Normally, where overlapping provisions have different purposes or are concerned with different aspects of a matter, they are not found to conflict with one another…

The Panel finds that no conflict exists if "works" can be a "contaminated site" under section 26.4 of the *Act*.

Further, the Panel agrees that if the Legislature wants to exempt certain types of "works" from the contaminated site definition, it may do so under section 11(4) of the *CSR.* This is an exhaustive list of the "works" that the Legislature excluded from the definition of "contaminated site." A wood waste landfill is not included as one of the exempted operations, and section 11(4) leaves no room for adding it as an exception.

Finally, even if the Panel is incorrect in its finding that "works" and "land" are not mutually exclusive in the context of the contaminated sites provisions, the Panel finds on the facts that the landfill is no longer "works" because the permit authorizing those works has been cancelled. This is supported by the findings of the B.C. Court of Appeal in *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc., Burns Development Ltd., Burns Development (1993) Ltd., Fauna Landfill Ltd. (1997*), 150 D.L.R. (4th) 193. In that case, one of Alpha's arguments was that if the material at issue was "waste" under the *Act*, and if it was introduced into the land, it was still not introduced into the "environment" because the operation constituted "works" and, according to *Enso*, "works" cannot be part of the "environment."

The Court in *Alpha* considered *Enso* and rejected Alpha's argument. The Court states at paragraph 23:

> I reach the conclusion therefore that the meaning of the *Act* is that works are distinct from environment within the authority of the *Enso Forest Products* case *only while the works are allowed by permit or approval under the Act.* Once the *permit is cancelled or the approval is withdrawn, the works cease to be works as defined in the Act.* If it were otherwise, the Minister charged with the operation of the *Act* to control pollution would, once a permit to construct works was granted, lose his power to control their operation.
>
> [emphasis added]

Accordingly, if the landfill is to be excluded or exempt from a determination that it is a contaminated site, it must be found elsewhere in the legislation.

In summary, the Panel finds that the property is "land" and falls within the definition of "contaminated site." Even if the property can also be characterized as "works," this does not change the result. The Panel finds the definitions of "works" and "land" are not mutually exclusive for the purposes of the definition of "contaminated site." Unlike *Enso*, no absurdity results from this interpretation.

In any event, the permit authorizing the "works" has been cancelled, and, according to the Court's decision in *Alpha*, the "works" cease to be works as defined in the *Act*.

Therefore, the Panel finds that even if the property is characterised as "works" under the *Act*, this cannot exempt the property from designation as a "contaminated site."

2. Whether a landfill permitted under Part 2 of the *Act* can also be the subject of the contaminated sites provisions set out in Part 4 of the *Act*.

Part 2 of the *Act* is titled "Prohibitions and Permits." Part 4 of the *Act* is titled "Contaminated Site Remediation."

The Ministry issues permits to discharge waste into the environment under what is now Part 2 of the *Act*. The Appellants note that under section 3(5) of that Part, it is not a violation to discharge waste in accordance with a permit. In this case, wood waste was discharged in accordance with a permit, although the permit has since been cancelled.

The Appellants submit that it is inconsistent to view the landfill, permitted under Part 2 of the *Act*, as a site that is subject to the contaminated sites remediation provisions in Part 4. They argue that the legislators have created a system where the best means of dealing with waste is to manage its introduction into the environment through permits - the government allows individuals to contaminate areas under Part 2 through the issuance of a permit. They maintain that it is then inconsistent, and unfair, for the government to make those same individuals responsible for remediating those sites under Part 4 of the *Act*.

The Appellants refer to the B.C. Court of Appeal decision in *Hosseini v. Oreck Chernoff* (1999), 65 B.C.L.R. (3d) 182 in support of their position. In that case, the Court referred to a decision of the Supreme Court of Canada, *Novak v. Bond*, [1999] 1 S.C.R. 808 at paragraph 63 where Madame Justice McLachlin, as she then was, notes that statutes must be interpreted in a manner that avoids absurdities and furthers the objects of the legislation. The Appellants argue that if the permit provisions of Part 2 are to be given their full effect, then permitted landfills must be excluded from the contaminated sites provisions of Part 4. They state that this is consistent with the decision in *Friends of Old Man River v. Canada*, [1992] 2 S.C.R. 3, where the Court held that an interpretation capable of reconciling two legislative enactments should be preferred.

In addition, the Appellants refer to the Environmental Appeal Board decision in *Imperial Oil Limited et al. v. Assistant Regional Waste Manager (Sanbo Developments Limited, Third Party)* (Appeal No. 2001 WAS-014(a)/017(a)/018(a)/020(a)/021(a), January 23, 2002). In that case, the Board states that the purposes of the *Act* are the prevention of pollution and the remediation of contaminated sites. The Appellants note that Part 4 serves to identify sites in need of remediation. They state that if a landfill is permitted under Part 2, then there is no need to identify it as being contaminated.

The Respondent submits that, contrary to the Appellants' arguments, a "contaminated site" does not always require remediation. A determination of a contaminated site is simply the application of the appropriate criteria to the soil and/or groundwater. The Respondent states that determining that a site is contaminated does not "trigger" any remediation requirements, although it may have that effect in the future.

The Respondent also submits that Parts 2 and 4 of the *Act* can be found to work in harmony; they are not inconsistent. Part 4 creates a regulatory tool to "restrict the use" of certain sites. A designation of "contaminated site" carries with it restrictions in relation to future land uses. These restrictions are generally in the interests of protecting public health and the environment. For example, the Respondent notes that a permit may be issued authorizing someone to put waste on land. However, one of the consequences of the permit is that the person may have to live with certain "land use restrictions;" for example, the person may not be able to use the land as a public park. In this way, it is clear that the sections work together and are not in conflict.

The Respondent also submits that permits issued under Part 2 of the *Act* are not "licences" to contaminate beyond Part 4 levels. Parts 2 and 4 of the *Act* deal with different aspects of waste disposal. Individuals are granted limited rights to dispose of waste under Part 2. However, where the limitations are exceeded, they may be required to remediate under Part 4.

The Regional Manager testified that only landfills that pose an established risk to human health or to the state of the environment will fall under the scrutiny of Part 4. He stated that not all permitted landfills under Part 2 will fall under the

remediation provisions of Part 4. He also stated that he had no intention of issuing a remediation order for this particular contaminated site.

The Panel rejects the Appellants argument that the legislation should be read so that landfills permitted under Part 2 are exempt from the provisions of Part 4. Section 27 of the *Act* deals with "general principles of liability for remediation." Subsection 27(3)(b) specifically addresses liability for remediation of a contaminated site where a permit is involved. It states:

27 (3) Liability under this Part [Part 4 - Contaminated Site Remediation] applies

...

(b) despite the terms of any *cancelled*, expired, abandoned *or current permit* or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

[emphasis added]

Section 27(3) of the *Act* must be read to give effect to its purpose. The Panel finds that the Legislators use the word "despite" in subsection (b) to indicate that permits, approvals, and waste management plans cannot be used as a "shield" when contamination issues arise.

The Panel finds that the overall purpose of the *Act* cannot be met unless the properties subject to a waste permit can be scrutinized under the provisions of Part 4.

In *Friends of Granby Environmental Society v. Assistant Regional Waste Manager and Roxul (West) Inc.*, (Environmental Appeal Board, Appeal Nos. 1999-WAS-022 & 2001-WAS-031, May 3, 2002), the Board considered the role of the Regional Manager in issuing and amending permits for the release of air contaminants. The Board concluded that:

> ...one of the main purposes of the *Act* is to allow discharges of substances in a manner that will protect the environment, and that this purpose must be taken into account when issuing and amending permits that authorize the discharge of air contaminants. The Panel also agrees that it would be unreasonable to interpret the language concerning protection of the environment in sections 10 and 13 in such a way that managers would be unable to deal with real world situations...

Managers must be able to act for the protection of the environment and to safeguard public health. The standards set out in the *CSR* assist managers to meet these two goals. Activities that may not be considered harmful when the permit is first issued may enter the realm of prohibited conduct over time.

In addition, the Panel rejects the proposition that the system of issuing permits is unfair if the permitted activity is subject to Part 4 of the *Act*. The *CSR* sets standards that are overarching. When a permit holder contaminates beyond the acceptable levels, the interests of the public outweigh the rights of the permit holder. Furthermore, the Panel accepts the Respondent's argument that Part 4 operates to restrict the use of land that meets the definition of a "contaminated site." Being designated as a contaminated site under Part 4 does not necessarily result in remediation obligations, and that is the situation in this particular case.

The determination process was used in this case because of the owner's desire to alter the existing development in some respect, albeit through a minor change (the mall addition). The owner asked the Ministry to make the determination as part of its request for a Conditional Certificate of Compliance. According to the Regional Manager, a Conditional Certificate of Compliance has now been issued.

The Panel finds that the purpose of effective waste management is not defeated by including permitted waste disposal sites under Part 4 of the *Act*. The Panel finds that no conflict exists between the Parts of the *Act* in general, or on the particular facts of this case.

3. Whether the terms of the waste permit become the "prescribed" standards or conditions for the purposes of assessing whether the property is a contaminated site.

The permit

There is no dispute that the waste permit authorizing the landfill does not set out limits or parameters for phenols. The Appellants' expert, Mr. Gaherty, agrees that there were no parameters in the permit for Total Phenols.

However, the Appellants submit that in issuing and administering the permit, the "pollution" that the regulator was seeking to control may have been wood waste, but the regulator knowingly and intentionally permitted wood waste and its leachate, including phenols, to remain within the landfill permanently. They argue,

- the reported findings of elevated phenols are limited to groundwater within the confines of a permitted wood waste landfill;
- the introduction of phenols into the groundwater is a natural and expected consequence of the introduction of wood waste into a permitted wood waste landfill; and
- the presence of Total Phenol in the concentrations reported is entirely consistent with the introduction of wood waste into a permitted wood waste landfill.

The Appellants tendered an expert report by William Gaherty, M.S., P. Eng. of Pottinger Gaherty Environmental Consultants Ltd., dated October 18, 2002. Mr. Gaherty is an environmental engineer specializing in "contaminant fate,

environmental chemistry, and clean up." He was qualified by the Panel to give opinion evidence at the hearing.

Mr. Gaherty reviewed the 2001 Keystone Report and considered a number of questions, including "are the phenol concentrations found within the basin of landfill, as reported by Keystone, the result of wood waste debris leaching in the woodwaste landfill." He testified that when the permit was issued in 1974, the risks of the expulsion of leachates from wood waste were well known. According to Mr. Gaherty, the levels of Total Phenols recorded in the 2001 Keystone Report are the expected outcomes of creating a wood waste landfill. In his report, and his testimony before the Panel, Mr. Gaherty confirmed the following:

a) "Total Phenol" or "total phenolics" is a gross parameter test for the presence of phenol compounds;

b) Total Phenol compounds will leach from wood waste;

c) Total Phenol concentrations will be elevated in groundwater beneath a wood waste landfill if the wood waste is in contact with groundwater or the wood waste is subject to leaching from above (i.e., rain percolating down through wood waste above the water table); and

d) The Total Phenol concentrations reported by Keystone are well within the range observed at wood waste landfills.

Hence, the Appellants characterise the permit as a licence to contaminate an area.

The legislation

To be a "contaminated site," the site must contain a prescribed substance that exceeds the "prescribed standards … or conditions." Section 26 of the *Act* states:

> **26 "contaminated site"** means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains
>
> …
>
> (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

The Appellants maintain that waste managers "prescribe" the environmental conditions when issuing permits and they may prescribe a limit in excess of the limits that would result in a site being a "contaminated site" under Part 4. The Appellants argue that the permit is part of an overall plan for waste management. Hence, a permit is a form of delegated legislation. They also maintain that section 10 of the *Act*, which empowers a manager to issue a permit, also authorizes the manager to override a regulation.

The Appellants argue that the permit issued for the landfill in this case "prescribes" the appropriate levels of phenols for the landfill in question. The Appellants contend that

> The 'prescribed … conditions' of the landfill are those which result from the actions of the Regulator in issuing and enforcing the terms of the Permit in accordance with the *Pollution Control Regulations* promulgated under the *Pollution Control Act, 1967*, and by necessary implication requiring the accumulation of phenol leachate within the landfill rather than allowing it to escape.

In support of their argument, the Appellants refer to the definition of "prescribed" found in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238:

29 "prescribed" means prescribed by regulation;

Section 1 of the *Interpretation Act* defines "regulation" as:

1 "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted

(a) in execution of a power conferred under an Act, or

(b) by or under the authority of the Lieutenant Governor in Council,

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

The Appellants argue that in the case now before the Board the "regulation" at issue - the waste permit - established the limits and therefore set the prescribed standards to be met. The Appellants cite various dictionary definitions in an effort to classify the permit as a regulation proper, a warrant or other instrument. They liken their permit to the airport certificate discussed in *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416. In that case, the Court noted at paragraph 48 that an airport certificate "provides statutory authority to operate an airport in a specific location."

The Appellants note, however, that permits do have limitations. For example, the permit does not authorise the pollution of Kootenay Lake; the lake was to be protected. They contend that the terms of the present permit were not overstepped in this case.

The Respondent argues that "prescribed" in section 26 means prescribed by law. The Respondent submits that it is the legislation that dictates the result in this case, not the discretion of a manager. A permit issued by a manager cannot override a regulation.

The Respondent argues that when a definition is provided by the relevant piece of legislation, it stands as the preferred means of understanding a given term. The use of "prescribed" is associated with the standards set in the Schedules to the *CSR*. The link is found in section 11(1)(b) of the *CSR*, which is reproduced for convenience below:

> **11** (1) Subject to section 12 and subsections (2), (3) and (4) of this section, the definition of "contaminated site" in section 26(1) of the Act, for the purposes of paragraph (b) of that definition, means a site at which
>
> …
>
> (b) the surface water or groundwater which is located on the site, or flows from the site, is used, or has a reasonable probability of being used, for aquatic life, irrigation, livestock or drinking water use, *and the concentration of any substance in the surface water or groundwater is greater than or equal to the concentration of that substance specified for that use in Schedule 6*.
>
> [emphasis added]

Therefore, for the purposes of the *Act*, prescribed standards are those set by the *CSR*, not those authorized by permit.

The Respondent further submits that the definition of "regulation" found in section 1 of the *Interpretation Act* excludes orders made in disputes between 2 or more persons. In the present situation, he submits that there is a permit in effect between private parties: it is not a law of general application. The permit must be subordinate to higher statutory provisions.

The Panel notes that there is no dispute that the regulator was aware of the issues regarding leachate at the time the permit was issued. In the July 18, 1974 "Technical Assessment for Permit Application," the manager states under the heading "Assessment" that

> The use of wood-waste as landfill adjacent to lake waters is not considered desirable. Nevertheless the subject landfill, if dyked and operated as proposed, is not expected to result in a serious leachate pollution problem. The construction of the dykes and the disposal operation should, however, be closely supervised to ensure that all permit conditions are met.

However, despite this knowledge and the fact that the regulator was aware that leachate may result from this particular landfill, the Panel finds that the permit does not meet the definition of "regulation."

In section 1 of the *Act*, "permit" is defined as "a permit issued under section 10 or under the regulations." Section 10 of the *Act* states that managers may issue permits "subject to requirements for the protection of the environment". Hence, a permit does not function as a broad permission applicable to the general public. It

is a specific permission to be exercised within the limits set for the protection of the environment. The Panel can find no express or implied intention on the part of the Legislature, in either the 1967 *Pollution Control Act*, or section 10 of the *Act*, for a manager to "override" a regulation through a permit.

More importantly, reading the definition of "contaminated site" in section 26(b) of the *Act*, together with the addition or clarification found in section 11(1)(b) of the *CSR*, the Panel agrees with the Respondent that the relevant "prescribed criteria, standards or conditions" are those set out in the *CSR*; specifically, Schedule 6 as it relates to groundwater.

Regarding the Appellant's reference to the *Sutherland* case, the Panel notes that the issue before the Court in that case was whether the defence of statutory authority had been made out in a nuisance action. While the Court did find that the airport certificate was a form of "statutory authority" issued pursuant to the regulations, the Court made no findings, and did not consider whether the certificate was itself a regulation. Therefore, the Panel finds that this case does not assist the Appellants.

Finally, there are no standards for phenols in the permit. Even if an argument could be made out that the permit is a "regulation," the Panel finds that the "prescribed" standards, conditions or limits must be clearly identified in the permit for it to override the contaminated sites provisions of the *Act*. This is not the case with the landfill permit.

In conclusion, the Panel finds that the "prescribed" standards or conditions for the purposes of assessing whether the Property is a contaminated site are those in the *CSR* - they are not contained in the terms of the permit.

4. Whether the levels of Total Phenols found in the groundwater exceed the "local background concentration" as referenced in section 11(3) of the *CSR*.

Section 11 of the *CSR* clarifies the definition of contaminated site in section 26 of the *Act*. The Appellants note that section 11(3) states that a site is not contaminated if it does not exceed background levels:

> **11** (3) A site is not a contaminated site with respect to a substance in the soil, surface water or groundwater if the site does not contain any substance with a concentration greater than the local background concentration of that substance in the soil, surface water or groundwater respectively.

For the purposes of the *CSR*, "background concentration" is defined in section 1 of the CSR as:

> **"background concentration"** means the concentration of a substance in an environmental medium in a geographic area, but does not include any contribution from local human-made point sources, determined by following protocols approved by the director under section 53;

Section 53(1) states:

> **53** (1) The director may approve or adopt protocols, including protocols for any of the following:
>
> …
>
> (m) providing procedures for establishing the local background concentrations of substances at a site, class of sites or geographic area

The Appellants argue that the background concentration is not from local human-made point sources and is not "caught" by any Ministry protocol. The Appellants conclude that if a local background level exists for Total Phenols, then it exists as a matter of fact. In this regard, they submit that since the property did not exist prior to the landfill, and the landfill was created in accordance with the permit, the phenol concentrations contemplated and expected for the landfill is the local "background concentration." They state:

> …the physical characteristics of the landfill are those which the Regulator intended it to have. The Total Phenol found by Keystone is precisely what is to be expected in such a site with those physical characteristics. In effect, the sampling by Keystone amounts to a confirmation of the 'local background level' of Total Phenol in a site which has the physical characteristics of a closed woodwaste landfill. It is not a finding that Total Phenol exceeds that background level. Consequently, the north and northwest portions of the site are not a 'contaminated site.'

The Regional Manager testified that no background concentration protocols have been set for groundwater under section 53 of the *CSR*. Therefore, there are no background concentrations applicable in this case. The provision does not apply.

In any event, the Regional Manager states that there is no evidence of local background concentrations of total phenols at levels documented on the site by the 2001 or 2002 Keystone reports. Further, he submits that the source of the phenols is not natural.

The Panel has carefully reviewed section 11(3), the definition of "background concentration" and section 53. In doing so, the Panel concludes that the intention of section 11(3) is to exempt those properties from the definition of contaminated site if the characteristics of the site are such that "naturally" occurring levels of a substance are high. This is supported by the definition of "background concentration" which excludes "contributions from local human-made point sources." The Panel disagrees that the background concentration is the concentration of phenols existing as a result of the permitted landfill.

The Panel finds that the local "background concentration" is meant to be the "naturally occurring" background concentration. To find otherwise, could result in made-made sites with serious contamination issues being exempt from the contaminated sites provisions, or the remediation of those sites being severely

curtailed such that only the contaminants in excess of the man-made levels are subject to these provisions. This cannot be the Legislature's intent.

SUMMARY

The Panel finds that the Regional Manager did not err in determining that the permitted landfill was a "contaminated site" within the meaning of Part 4 of the *Act*.

There is no dispute that the Total Phenols found in the groundwater exceed the standards set out in Schedule 6 of the *CSR*.

The site is an "area of land" within the meaning of the *Act*. The permit authorizing the landfill does not preclude a subsequent determination that the same site is also contaminated, even though it is contaminated by a substance that was or could reasonably be expected to occur as a result of the permitted activity.

The permit does not and cannot "prescribe" standards or conditions for the purposes of section 11 of the *CSR*.

Finally, the Panel rejects the argument that the site is not contaminated because the levels do not exceed local background concentrations.

Ultimately, the Panel finds that the property is a "contaminated site" under Part 4 of the *Act*, despite the fact that it is contaminated as a result of a previously permitted activity.

DECISION

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

The Panel confirms the Final Determination of the Regional Manager that the site is a contaminated site by reason of elevated levels of Total Phenols in the north and north-west portions of the site.

Accordingly, the appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

October 16, 2003