BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NOS. 2002-WAS-025(a) and 2003-WAS-004(a)

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

BETWEEN:	Houweling Nurseries Limited	**APPELLANT**
AND:	District Director of the Greater Vancouver Regional District	**RESPONDENT**
AND:	Roger Emsley	**THIRD PARTY**
AND:	Corporation of Delta	**PARTICIPANT**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
Dr. Robert Cameron, Member
Phillip Wong, Member

DATE: July 8-10, December 8-11 and 19, 2003, and March 22-23, 2004

PLACE: Vancouver, BC

APPEARING:

For the Appellant:	Robert W. Grant, Counsel Ryan M. Patryluk, Counsel
For the Respondent:	M. Kevin Woodall, Counsel Ian M. Carter, Counsel
For the Third Party:	Roger and Angela Emsley
For the Participant:	Verne Kucy

APPEAL AND ISSUE OF JURISDICTION

Houweling Nurseries Limited ("HNL") appealed two separate decisions issued by Nancy Knight, District Director of Air Quality (the "District Director") for the Greater Vancouver Regional District (the "GVRD"): a pollution prevention order issued to HNL on October 29, 2002 (the "Order"); and a decision dated December 20, 2002, refusing HNL's application to amend air quality permit GVA 0349, as previously amended (the "Permit"). The Permit authorizes the discharge of air emissions from HNL's greenhouse operation located in Delta, British Columbia.

HNL's appeals were heard together by a Panel of the Environmental Appeal Board.

During the hearing, the Panel requested that the parties address an issue concerning the Board's jurisdiction to hear the appeal of the District Director's refusal to amend the Permit. Specifically, the Panel asked the parties whether a refusal to amend a permit is an appealable "decision" under sections 43 and 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*").

After considering the parties' submissions on the jurisdictional issue, the Panel issued an oral decision, with written reasons to follow, concluding that the Board has no jurisdiction to hear an appeal of a refusal to amend a permit issued under the *Act*. The Panel's written reasons for that decision are provided below.

The parties also provided full submissions concerning the merits of the appeal of the Order. The Panel's decision on the merits of that appeal is provided below.

The Board has the authority to hear the appeal of the Order under section 11 of the *Environment Management Act* and section 44 of the *Act.* The Board may send the matter back to the person who made the decision with directions; confirm, reverse, or vary the decision appealed from; or make any decision that the person whose decision is appealed could have made and that the Board considers appropriate under the circumstances.

HNL requests that the Board reverse the Order.

BACKGROUND

HNL operates a greenhouse at 2776 - 64th Street, Delta, British Columbia (the "Delta Greenhouse"), where it cultivates flowers, tomatoes, and other plants. In the past, it has also grown cucumbers and sweet peppers. Casey Houweling is the principal of HNL.

The Third Party, Roger Emsley, owns property near the Delta Greenhouse. Mr. and Mrs. Emsley reside at, and operate a horse boarding operation on their property located at 2920 - 64th Street in Delta.

In 1985, HNL began operations in Delta. HNL's Delta Greenhouse currently consists of 4 greenhouse buildings with approximately 50 acres of greenhouse space. The greenhouses are heated to enhance plant growth. HNL chose to install wood fired heaters when it began its Delta Greenhouse operations due to the volatility in the price of natural gas during the early 1980's. The wood fired heaters installed in 1985 use multiclones[1] to control air emissions. There are currently 3 wood fired heaters and 6 natural gas fired heaters supplying heat, as needed, to the Delta Greenhouse operation. These "heaters" are also often referred to as "boilers."

Under section 24 of the *Act*, the GVRD, its board of directors, and the District Director have certain powers in regard to "the service of air pollution control and air quality management" within the boundaries of the GVRD, which includes the area where the Delta Greenhouses are located. In particular, under section 24(2) of the

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[1] A multiclone is a type of mechanical dust collector, which removes particles from emissions as a result of inertial impaction in multiple small cyclones.

Act, "The board of the Greater Vancouver Regional District must appoint… a district director… who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a manager under this Act and the regulations." Under section 24, the GVRD may also pass bylaws on certain matters pertaining to air contaminants.

All of the wood fired heaters used by HNL were originally installed and operated under permits issued by the GVRD. Other greenhouses in the GVRD, including Bevo Farms, Darvonda Nurseries, and Milner Greenhouses, currently use wood fired heaters. However, no other greenhouse in the GVRD has ever had a permit to operate a wood fired heater. Several greenhouses have filed applications for such permits with the GVRD, but decisions had not been made regarding those applications when the appeal hearing concluded.

On September 20, 1985, the GVRD granted HNL a permit to discharge contaminants from its heaters (the "Original Permit"). The Original Permit allowed a maximum particulate concentration of 180 milligrams per cubic metre ("mg/m^3") and a maximum opacity[2] of 20 percent for emissions from HNL's wood fired heaters.

Between 1985 and 1990, HNL expanded its Delta Greenhouse operations, and added 3 wood fired heaters and one natural gas fired heater to heat the increased greenhouse space. HNL obtained permit amendments from the GVRD each time a new wood fired heater was added to its operations.

In 1990, HNL further expanded its Delta Greenhouse operations and installed natural gas heaters, both to increase the heating available to the greenhouses and to produce carbon dioxide, a by-product of natural gas burning. Increased carbon dioxide concentrations result in increased plant productivity.

In 1995, HNL began further expansions, and applied to the GVRD for a permit amendment to authorize installation of a natural gas fired heater, the Saskatoon boiler (the "1995 Amendment Application"). As part of the 1995 Amendment Application, HNL agreed to shut down its wood fired heaters within 2 and a half years. HNL agreed to this after its representatives were advised that the GVRD intended to shut down the wood fired heaters unless HNL made significant improvements to its emissions control technology.

In the course of evaluating the 1995 Amendment Application, the GVRD conducted testing on the Delta Greenhouse operations and requested public comments on the proposed amendment. The results of the GVRD's assessment were summarized in a memo dated September 26, 1997, by Steve Skoko of the GVRD (the "1997 Memo"). The 1997 Memo states that Mr. Emsley opposed the amendment, and that the GVRD had received 205 complaints about HNL's operations since the Original Permit was issued, of which approximately 95 percent were from neighbours later identified as the Emsleys.

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[2] "opacity" means the degree to which an emission reduces the passage of light or obscures the view of an object in the background, and is expressed numerically from 0 percent (transparent) to 100 percent (opaque): section 1, *Wood Residue Burner and Incineration Regulation*, B.C. Reg. 519/95.

On October 3, 1997, the GVRD issued an amended permit to HNL (the "1997 Permit"), which required HNL to cease using its wood fired heaters by December 31, 1999. The 1997 Permit allowed the same maximum emissions from the wood fired heaters as the Original Permit. It also includes a condition that the 20 percent opacity limit for the wood fired heaters "may be exceeded for a total of 3 min./hr until Dec. 31, 1999."

By May 1999, HNL had not installed the Saskatoon boiler. Consequently, HNL requested, and was granted, an extension of the December 31, 1999 deadline to March 31, 2000.

In or around March 2000, HNL installed the Saskatoon boiler at the Delta Greenhouse. Between March and September 2000, HNL experienced problems with the new heater and was granted further extensions by the GVRD to address those problems. HNL shut down its wood fired heaters on September 4, 2000, and switched to the gas fired heaters. During that time, the price of natural gas increased rapidly and, by September 2000, had reached record levels. As a result, HNL reactivated the wood fired heaters in or around October 2000.

On October 27, 2000, Richard Switzer, an employee of HNL, wrote to the GVRD on behalf of HNL to request that the GVRD not suspend HNL's wood-burning permit.

On December 14, 2000, Robert Smith, the former Assistant District Director of Air Quality with the GVRD, wrote to HNL advising that, as of September 28, 2000, HNL was no longer authorized to burn wood, and HNL would have to submit a permit amendment application if it wished to reactivate its wood fired heaters.

In a letter dated January 11, 2001, HNL wrote to Mr. Smith explaining that the requirement to switch to natural gas threatened the survival of HNL's business and the 300 to 400 jobs that HNL provides.

In or about May 4, 2001, HNL was charged with burning wood without a valid permit.

On June 8, 2001, Mr. Switzer submitted an application for a permit amendment to allow HNL to use its wood fired heaters. The application contemplated the use of 4 wood fired heaters with multiclones and a common electrostatic precipitator for particulate removal, with additional heat provided by natural gas/fuel oil fired heaters.

In or around May 2002, HNL and the GVRD settled the 2001 charges in a Plea Agreement, whereby HNL agreed to pay a $1,000 fine and fund a $50,000 study to assess the impact of burning wood on air quality in the GVRD. Under the Plea Agreement, HNL is also allowed to burn wood under the terms of its previous permit, until it exhausts its appeals of the District Director's refusal to amend the Permit.

On August 22, 2002, Mr. Emsley complained to the GVRD that soot and ash was being deposited on his property from HNL's Delta Greenhouse operations. On the same day, GVRD staff attended the Emsley property and observed soot and ash.

Subsequent investigations by GVRD staff, and a letter dated August 30, 2002 from Ernest Devries on behalf of HNL, confirmed that the soot and ash was discharged

by HNL's Delta Greenhouse as a result of a plugged multiclone on wood fired heater No. 4.

On October 29, 2002, the District Director issued the Order to HNL, along with a letter stating her reasons for issuing the Order. That letter states, in part:

> The [GVRD] is responsible for controlling emissions into the atmosphere under authority of GVRD Air Quality Management Bylaw No. 937, 1999 and the [*Act*].
>
> On August 22, 2002, visual observations of soot (particulate matter) deposition were made at the home and property of Mr. and Mrs. Roger Emsley… Subsequently, discussions were held with representatives of [HNL] to determine the cause of the particulate matter emissions.
>
> On August 23, 2002, a second complaint was received from Mr. Roger Emsley. Follow-up telephone conversations with HNL staff determined that the problems were experienced with woodwaste boiler No. 4, resulting in the excessive soot emissions observed by my staff. This has been confirmed in correspondence from HNL dated August 30, 2002.
>
> Pursuant to Section 6.2 of the Bylaw and Section 33 of the [*Act*], I am requiring you to take actions that will prevent further occurrences of such pollution from woodwaste-fired combustion equipment at your nursery facility, and to monitor and report on the relevant emissions as indicated in the attached Pollution Prevention Order.

The Order states, in part:

> Pollution Prevention Objective
>
> HNL is hereby Ordered to prevent occurrences of pollution from its [Delta Greenhouse] and comply with the following requirements:
>
> Emission Monitoring Requirements
>
> By no later than December 31, 2002 and every three (3) months thereafter - conduct emissions testing to determine the discharge rate and concentration of contaminants in the emissions from woodwaste-fired boilers Numbers 4, 5 and 6.
>
> Unless otherwise approved by the District Director prior to any sampling or analysis, all emission measurements shall be performed by an independent agency…
>
> Reporting Requirements
>
> HNL is Ordered to conduct the following reporting program and submit written reports to the District Director, by no later than November 30, 2002, and at monthly intervals thereafter detailing:
>
> a) Results of quarterly emission testing, if the most recent quarterly test took place during the preceding month;

b) The amounts and types (source and description of woodwaste) of fuel burned, and the hours of operation, for each woodwaste boiler;

c) The most recent date(s) of inspection of each woodwaste boiler and related emission control equipment, and details of maintenance performed.

HNL is further Ordered that forthwith after becoming aware of any event that has caused, is causing, or may cause:

a) pollution within the meaning of the [*Act*] or *G.V.R.D. Air Quality Management Bylaw No. 937, 1999*; or

b) a violation of the terms of G.V.R.D. Air Quality Permit GVA0349 that were in force immediately before December 31, 1999, other than by using three wood-fired heaters to a combined total of 19,500 hours per year.

HNL shall provide an oral reporting of such occurrences to [GVRD staff]… Further, a written report… must be submitted to the District Director no more than 24 hours after becoming aware of such an occurrence.

On November 28, 2002, HNL appealed the Order to the Board, on the following grounds:

1. The GVRD lacks the jurisdiction to issue the Order;
2. The Order is improperly issued because it is in respect of an activity or operation that is in compliance with a permit, approval, order or emission regulation under GVRD Bylaw No. 937 or an authorization made under the *Waste Management Act* or the regulations thereunder;
3. The District Director did not have reasonable grounds for being satisfied that an activity or operation has been or is being performed by a person in a manner that is likely to release an air contaminant that will cause pollution to the environment, as required under the Bylaw;
4. The terms of the Order are not reasonable; and
5. The District Director breached the rules of procedural fairness with respect to the decision to issue the Order, and the Order itself.

HNL requests that the Board reverse the Order.

The District Director requests that the Board uphold the Order.

Mr. Emsley requests that the Board uphold the Order.

The Corporation of Delta takes no position with regard to the appeal of the Order.

On December 20, 2002, the District Director issued her decision refusing HNL's application for an amendment to the Permit.

On January 17, 2003, HNL appealed the refusal to amend the Permit.

By a letter dated February 13, 2003, the Board granted Mr. Emsley's request for full party status in both of the appeals.

By a letter dated February 24, 2003, the Board granted the Corporation of Delta's request for participant status in the appeal of the refusal to amend the Permit.

HNL submits that the Board has jurisdiction to hear the appeal of the refusal to amend the Permit.

The District Director submits that the Board has no jurisdiction to hear the appeal of the refusal to amend the Permit.

Mr. Emsley and the Corporation of Delta take no position with regard to the jurisdictional issue.

ISSUES

1. Whether the Board has jurisdiction under sections 43 and 44 of the *Act* to hear an appeal of a refusal to amend a permit.
2. Whether the Board should reverse the Order.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to the jurisdictional question:

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,

(d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and

(e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

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 following sections of the *Act* and the *Agricultural Waste Control Regulation*, B.C. Reg. 131/92 (the "*Regulation*"), to which the *Code of Agricultural Practice for Waste Management, April 1, 1992* (the "*Code*") is attached, are relevant to the appeal of the Order:

The *Act* prohibits the introduction of waste into the environment:

Waste disposal – strict liability

3 (2) ...a person must not, in the course of conducting an industry, trade or business, introduce or cause or allow waste to be introduced into the environment.

(3) ...a person must not introduce or cause or allow to be introduced into the environment, waste produced by any prescribed activity or operation.

(4) Subject to subsection (5), a person must not introduce waste into the environment in such a manner or quantity as to cause pollution.

(5) Nothing in this section or in a regulation made under subsection (3) prohibits any of the following:

(a) the disposition of waste in compliance with a valid and subsisting permit, approval, order or regulation, or with a waste management plan approved by the minister;

...

(d) the discharge of air contaminants authorized by a bylaw made under section 24 (3) (d);

...

(l) emission of an air contaminant from combustion of wood or fossil fuels used solely for the purpose of comfort heating of domestic, institutional or commercial buildings;

...

The *Regulation* exempts agricultural operations from section 3 of the *Act* if they operate in accordance with the attached *Code*:

Exemptions

2 A person who carries out an agricultural operation in accordance with the Code is, for the purposes of carrying out that agricultural operation, exempt from section 3(2) and (3) of the *Waste Management Act*.

The *Code* describes practices for using, storing and managing agricultural waste in an environmentally sound manner. It includes a section addressing emissions from wood fired boilers:

Wood fired boilers

18 Emissions from a wood fired boiler must not exceed 180 mg per cubic metre of particulate matter and 20% opacity, except that

(a) for a permanent wood fired boiler installed before April 1, 1992 and not operating under a waste management permit, emissions must not exceed 230 mg per cubic metre of particulate matter and 20% opacity, and

(b) or a permanent wood fired boiler installed before April 1, 1992 and operating under a waste management permit, the emission levels under that permit apply unless those levels are higher than the levels specified in (a).

Where an operation does not comply with the *Regulation* (which includes the *Code*) a pollution prevention order may be issued under section 33 of the *Act*:

Pollution Prevention Order

33 (2) If a manager is satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution of the environment, the manager may order a person ... at that person's expense, to do any of the following:

(a) provide to the manager information the manager requests relating to the activity, operation or substance;

...

(c) acquire, construct or carry out any works that are reasonably necessary to prevent the pollution.

...

(5) The powers of a manager under this section may not be exercised in relation to any part of an activity or operation that is in compliance with the regulations or a permit...

Under section 1(1) of the Act, "pollution" "means the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment."

The powers of the GVRD and the District Director are set out in section 24 of the *Act*:

Control of air contaminants in Greater Vancouver

24 (1) Despite anything in its letters patent or supplementary letters patent, the Greater Vancouver Regional District may provide the service of air pollution control and air quality management and, for that purpose, the board of the regional district may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants.

(2) The board of the Greater Vancouver Regional District must appoint

...

(b) a district director and one or more assistant district directors who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a manager under this Act and the regulations.

(3) Without limiting subsection (1), a bylaw under this section may do one or more of the following:

(a) provide that contravention of a provision of the bylaw that is intended to limit the quantity of air contaminants or that specifies the characteristics of air contaminants that may be discharged into the air is an offence...

(b) provide that a contravention of a provision of the bylaw, other than a provision referred to in paragraph (a), is an offence...

(c) require the keeping of records and the provision of information respecting air contaminants and their discharge;

(d) exempt from the application of section 3 (2) and (3), in relation to the discharge of air contaminants, any operation, activity, industry, trade, business, air contaminant or works that complies with the bylaw, if it also complies with any further restrictions or conditions imposed by this Act or a regulation, permit, order or approved waste management plan under this Act;

(e) establish different prohibitions, regulations, rates or levels of fees, conditions, requirements and exemptions

(i) for different persons, operations, activities, industries, trades, businesses, air contaminants or works, and

(ii) for different classes of persons, operations, activities, industries, trades, businesses, air contaminants or works.

(4) A district director may, by order, impose on a person further restrictions or conditions in relation to an operation, activity, industry, trade, business, air contaminant or works covered by a bylaw under subsection (3) (d) in order that the person may qualify for an exemption under that subsection, including a condition that the person obtain a permit.

Other relevant legislation is set out in the body of the decision.

DISCUSSION AND ANALYSIS

1. Whether the Board has jurisdiction under sections 43 and 44 of the *Act* to hear an appeal of a refusal to amend a permit.

HNL acknowledges that that the definition of "decision" in section 43 of the *Act* is exhaustive. HNL submits that, under section 43(d), the Board has jurisdiction over this appeal. It submits that this appeal involves the refusal of a "permit", rather than the refusal to amend a permit. HNL submits that, for the purposes of section 43(d), the meaning of "permit" must be considered in light of the substance of the applicant's request, and not the formalities of the request. HNL maintains that it applied for a permit to burn wood, not an amendment to a permit. HNL submits that a refusal of a request for fresh consideration of a matter subject to a permit, as opposed to a reconsideration of previous facts or issues, is akin to a request for a permit. Therefore, the District Director's refusal was a refusal of a permit, not a refusal of an amendment to a permit.

In support of those submissions, HNL refers to the Canadian Oxford Dictionary, which defines "refusal" and "refuse" as follows:

> **Refusal** **1** the act or instance of refusing; the state of being refused…
>
> **Refuse** … **4** decline to give (to a person something requested); deny…

HNL also refers to the decision of Latchford, J. in *Kime v. Hamilton Radial Electric R. W. Co.* [1921] O.J. No. 85 (C.A.). Each of the 4 judges in that case wrote separate decisions, with Meredith C.J.C.P. dissenting. At paragraph 26, Latchford J. states:

> … This is all the more evident when the use of the word "refusal" subsequently in the regulation is considered. There can be no refusal unless there is a request or demand:

HNL distinguishes previous decisions of the Board that involved consideration of what is an appealable "decision" under the *Act*, including *Atlantic Industries Ltd. v. Regional Waste Manager* (Appeal No. 2001-WAS-032(a)), [2002] B.C.E.A. No. 7 (Q.L.) (hereinafter *Atlantic*); *Canadian National Railway Co. v. Regional Waste Manager* (Appeal No. 2001-WAS-025), [2002 B.C.E.A. No. 31 (Q.L.) (hereinafter *CNR*); and, *Beazer East, Inc. and Canadian National Railway Co. v. Director of Waste Management* (Appeal Nos. 2002-WAS-016(a), 2002-WAS-017(a)), [2002] B.C.E.A. No. 65 (Q.L.) (hereinafter *Beazer*). HNL argues that those decisions addressed orders under sections 43(a), (b) and (c), and did not squarely address permits under section 43(d). HNL further submits that the Board has noted the different treatment of permits under section 43(d) (then section 25(d)) of the *Act*: see *McPhee v. Deputy Director of Waste Management* (Appeal No. 98/08), [1995] B.C.E.A. No. 52 (Q.L.) (hereinafter *McPhee*), at page 6.

Finally, HNL submits that the Legislature would want the Board to interpret its jurisdiction to include matters such as the present case, which are within its technical expertise.

The District Director submits that, in this case, the matter under appeal is a refusal to amend a permit, which is not an appealable "decision" under the *Act*. The District Director submits that, before looking at any policy considerations as to why the Board should have jurisdiction over a matter, one must first, as a principle of statutory interpretation; consider the plain meaning of the words in the *Act*.

In particular, the District Director notes that section 43(d) refers to "the issue, amendment…refusal or cancellation of a permit," and not the "refusal of an amendment" or a "refusal of an amended permit." She maintains that section 43(d) sets out a list of verbs or actions, followed by a list of nouns or instruments. Those verbs include "refusal" and "amendment" but not "refusal to amend," while those instruments include "permit" but not "amended permit."

The District Director also notes that section 10 of the *Act* sets out a manager's authority for issuing permits, while section 13 sets out the authority for amending permits. The District Director submits that "permit" is defined in a very specific manner in the *Act*, as follows:

> **"permit"** means a permit issued under section 10 or under the regulations;

The District Director submits that those statutory provisions together indicate a clear legislative intent to distinguish between the act of issuing or refusing a "permit" under section 10, and the act of amending a permit under section 13. The District Director submits, therefore, that if the Legislature had intended for the act of refusing to amend a permit to be appealable to the Board, it would have included specific language to indicate so. In that regard, the District Director notes the very specific definition of "decision" in section 43 of the *Act* and the broad definitions of "decision" in section 15(1) of the *Pesticide Control Act*, R.S.B.C. 1996, c. 360, and

the *Judicial Review Procedure Act*. The *Pesticide Control Act* defines decisions that may be appealed to the Board as follows:

> **15** (1) For the purpose of this section, **"decision"** means an action, decision or order.

Section 1 of the *Judicial Review Procedure Act* defines decisions that may be subject to judicial review as follows:

> **"decision"** includes a determination or order;

In support of those submissions, the District Director refers to a number of decisions of the Board and one decision of the British Columbia Supreme Court: *McPhee*; *Beazer*; *Atlantic*; *CNR*; and, *Imperial Oil Ltd. v. British Columbia (Ministry of Water, Land and Air Protection*), [2002] B.C.J. No. 295 (S.C.) (hereinafter *Imperial Oil Ltd.* v. *B.C.*) at paragraphs 38-50 expressly approving *McPhee*.

The District Director also submits that, for policy reasons, section 43(d) of the *Act* should not be interpreted as providing the Board with jurisdiction over appeals of refusals to amend permits. She notes, for example, that hearing appeals of refusals to amend permits could result in mischief and abuse of the appeal process by parties who have failed to appeal a permit within the limitation period, and then try to get around that by requesting an amendment to the permit.

Finally, the District Director submits that her refusal was not an "exercise of a power" under section 43(c) of the *Act*. She submits that there was no positive act in refusing HNL's amendment application, and the Board has previously concluded that an "exercise of a power" under section 43(c) does not include a refusal to exercise a power: *McPhee*; *CNR*.

There is no dispute that the definition of "decision" in section 43 is exhaustive. Thus, for the Board to have jurisdiction over an appeal, the matter being appealed must be included in section 43. The Panel finds that the District Director's refusal does not fall within subsections 43(a), (b), (c) or (e), because there is no:

> "making of an order,"
>
> "imposition of a requirement,"
>
> "exercise of a power," or
>
> "inclusion in an order, permit, approval or operation certificate of any requirement or condition."

In addition, the Panel finds that the refusal does not fit within section 43(d) because it is not a "refusal… of a permit." In her letter dated December 20, 2002, the District Director states as follows:

> This letter conveys our decision on your *application to amend your air quality permit, GVA0349… The application to amend your permit is denied*.
>
> [italics added]

Similarly, a memo attached to that letter states as follows:

> In considering the *application for a permit amendment* to allow [HNL] to change from burning natural gas as a fuel to burning wood as a fuel type…

The Panel disagrees with HNL's submission that the substance of the application, namely, the request to switch to a different primary fuel type, is determinative of whether HNL was applying for a "permit" as opposed to making an application to amend an existing permit. When HNL submitted its application in 2001, it was seeking an amendment to Permit No. GVA0349, which was originally issued in 1985 when the Delta Greenhouse began to operate wood burning heaters. The Permit had already been amended several times, when HNL sought amendments to expand its wood burning operations and, later, to operate a natural gas fired Saskatoon boiler as its primary heat source. The Panel also notes that HNL's application to amend the Permit to allow operation of the Saskatoon fired boiler was granted. The Permit was later amended to extend the time by which HNL was to complete its switch to natural gas as the primary fuel source.

Thus, in 2001, HNL effectively applied for a further amendment to allow it to continue doing what it had been doing since 1985, except for a brief interruption: burn wood as its primary fuel source. The main differences between the heating operations proposed in the 2001 application and HNL's existing heating operations are with regard to the use of natural gas as a secondary fuel source, and the use of improved technology for controlling emissions from the wood fired heaters. Consequently, HNL's 2001 application cannot properly be characterized, as an application for a new permit. It is an application to amend HNL's existing Permit No. GVA0349.

Section 43(d) of the *Act* clearly does not refer to a refusal "to amend" a permit or a refusal of "an amended permit" as an appealable decision. The Panel agrees with the District Director that the Legislature intended to distinguish between the issuance of a "permit," under section 10, and the act of amending a permit under section 13. It is clear that the act of refusing a "permit" under section 10 is distinct from the act of refusing to amend a permit under section 13.

The Panel also agrees with the District Director that, if the Legislature had intended the Board to hear appeals of "refusals to amend permits," or "refusals of amended permits," it would have expressly included "refusal to amend a permit" or "refusal of an amended permit" in section 43 of the *Act*. Alternatively, the Legislature could have used a broader definition of "decision" in the *Act*, as it has in the *Pesticide Control Act* and the *Judicial Review Procedure Act*.

The Panel notes that the Board has previously ruled on whether a failure or refusal to exercise a power is an appealable decision under section 43. For example, in *CNR*, the Board considered whether a manager's decision not to amend or cancel a remediation order was an appealable decision. In considering how to interpret section 43 of the *Act*, the Board stated:

> In specifying the types of decisions that could be appealed in the *Act*, the Panel notes that the legislature only set out one power in the "negative;" subsection 43(d) includes the "**refusal or cancellation** of

> a permit, approval or operational certificate: [emphasis in original]. The other subsections, including subsection 43(c), are framed in the positive. Despite the many examples where the legislature has specifically authorized appeals from a "failure or refusal" to act, it did not do so in subsections 43(a)(b)(c) and (e). The Panel finds that this indicates that the legislature did not intend for those subsections to include the negative. The Panel adopts the following findings in *McPhee*:
>
> > A reading of section 25 [now section 43] seems to clearly indicate that there must generally be a positive act, which would constitute an appealable provision. Each enumerated head under the section refers to a specific exercise of statutory power. The Board agrees… that if a refusal to make a decision were to be included under this section the legislature would have specifically stated it.

Although the Panel is not bound by previous decisions of the Board, the Panel finds the reasoning in *CNR* is applicable to the District Director's refusal. Specifically, the Panel finds that the wording of subsection 43(d) of the *Act* does not provide for the "refusal" to amend a permit.

For all of these reasons, the Panel finds that the appeal of the District Director's refusal to amend the Permit is not an appealable decision within the meaning of sections 43 and 44 of the *Act*. Accordingly, the Panel has no jurisdiction over that appeal, and is not prepared to make any findings on the merits of the refusal to amend the Permit.

2. Whether the Board should reverse the Order.

Section 33(2) of the *Act* states that a pollution prevention order may be issued if a manager:

> is satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution of the environment.

HNL submits that the District Director had insufficient evidence to issue the Order. HNL maintains that the Order was issued based solely on the August 22, 2002 visual observations, and that there was no testing of the emissions from the Delta Greenhouse to determine if HNL was complying with the terms of a valid and subsisting permit, namely, the Permit as approved by the Plea Agreement. HNL maintains that the Plea Agreement extends the expiry of the 1997 Permit until either HNL stops burning wood or HNL exhausts all of its appeals of the District Director's amendment refusal. HNL submits that the Plea Agreement, therefore, is effectively a permit, and that HNL was complying with that "permit" when the Order was issued.

HNL submits that the District Director had no evidence that the emissions in question constituted "pollution," as defined in the *Act*, or exceeded permitted levels under the *Regulation*, including the *Code*, or the Permit as approved under the Plea Agreement. Specifically, HNL submits that there was no evidence that particulate

emissions exceeded the 180 mg/m^3 threshold set out in the *Code*, or that NHL's activites were not in compliance with the Permit as approved under the Plea Agreement which also sets a particulate limit of 180 mg/m^3.

HNL maintains that the incident that occurred on August 22, 2002, was an "upset condition" and not a continuing activity or operation that is likely to cause pollution. HNL refers to the August 30, 2002 letter from Ernest Devries, on behalf of HNL, to the GVRD, concerning the cause of the incident. HNL submits that the incident was caused by a wet ash plug in the multiclone bank, which was caused by a small tube leak. The plug resulted from exhaust gases from the heater channeling through the unplugged tubes, resulting in an air flow velocity that was too high to efficiently remove particles. HNL maintains that it immediately took steps to rectify the problem. HNL denies that the incident was caused by poor maintenance, as suggested by the District Director, noting that Mr. Devries' letter states as follows:

> … regular, quarterly inspection of the tubes is conducted during each scheduled heater shutdown as well as at 1-3 week intervals depending upon the extent of the use of the given heater. In addition, the ash system at the rear of the fire tubes is visually inspected each day. Visible water leaking from this area is indicative of a tube leak that can potentially cause tube plugging from wet ash.

Consequently, HNL submits that it was not, and is not, performing an activity or operation that is likely to release an air contaminant that will cause pollution of the environment. HNL further submits that there is no evidence that the Order continues to be necessary at the present time, or that any similar incidents have occurred since the Order was issued.

In support of those submissions, HNL refers to section 33(5) of the *Act*, which states:

> **33** (5) The powers of a manager under this section may not be exercised in relation to any part of an activity or operation that *is in compliance with the regulations or a permit*, approval, order, waste management plan or operational certificate or an authorization made under the regulations.
>
> [italics added]

HNL submits that section 33(5) indicates that a pollution prevention order may not be issued with regard to an activity that "is," when such an order is issued, in compliance with the regulations or a permit. HNL submits that there is no evidence that HNL was not in compliance with the Permit as approved by the Plea Agreement or the *Regulation* when the Order was issued. HNL notes that the District Director issued the Order on October 29, 2002, over 2 months after GVRD staff observed soot at the Emsley's property. HNL submits that the Delta Greenhouse was not causing pollution, and was in compliance with the *Regulation* and the Plea Agreement, when the Order was issued.

The District Director submits that the August 2002 incident was caused by poor maintenance, and she ordered HNL to conduct stack tests on a quarterly basis in order to encourage maintenance and to obtain emissions data. The District Director

maintains that HNL presented no evidence that the monitoring and reporting requirements in the Order are unduly onerous.

The District Director further submits that pursuant to section 33(2) of the *Act*, she was "satisfied on reasonable grounds" that HNL's operations caused pollution during the incident in question. She maintains that "reasonable grounds" is a low threshold, below the standard of proof on a balance of probabilities or even a *prima facie* case, and that the test for issuance of the Order is a subjective one; namely, that she, in her own mind, must be satisfied on reasonable grounds. She argues that HNL had not denied that it caused the soot and ash observed on the Emsley's property, and, in fact, HNL wrote a letter to the District Director explaining what caused the incident.

The District Director further submits that HNL was not in compliance with a valid and subsisting permit when the incident occurred. The District Director maintains that the Plea Agreement provides that the 1997 Permit, as it was on December 31, 1999, remains in force until HNL stops burning wood or exhausts its rights of appeal. That Permit provides a maximum particulate limit of 180 mg/m^3, and maximum opacity of 20 percent. It does not authorize the emission of "pollution." The District Director submits that, if an operation is emitting visible soot and ash, it is reasonable to conclude that it must be exceeding the limits in the Permit and causing pollution.

In addition, the District Director submits that the *Regulation* does not authorize the emission of "pollution" or provide an exemption from enforcement action under section 33 of the *Act*; rather, section 2 of the *Regulation* exempts agricultural operations from the prohibitions in sections 3(2) and 3(3) of the *Act*, which prohibit the introduction of "waste" into the environment. In this regard, the District Director notes that section 1(1) of the *Act* contains distinct definitions of "waste" and "pollution." "Waste" is broadly defined, and "includes" a number of substances including "air contaminants," which is also defined in the *Act*.

In contrast, "pollution" is defined more narrowly, as follows:

> **"pollution"** *means* the presence in the environment of substances or contaminants that *substantially alter or impair* the usefulness of the environment;
>
> [italics added]

"Environment" is also defined:

> **"environment"** means the air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed;

Mr. and Mrs. Emsley submit that the deposition of soot on their property on August 22 and 23, 2002, is not unusual. They maintain that they frequently observe soot and ash on their property, depending on which way the wind is blowing. They submit that the presence of smoke from HNL's operations impairs the use and enjoyment of their property, including the operation of their horse boarding operation, and harms their health as well as the health of their animals.

The Panel has considered the language in section 33(5) of the *Act* and is satisfied that it provides that an order under section 33 of the *Act* shall not be issued if a person is operating in compliance with a regulation or a permit issued under the *Act*. The Panel is also satisfied that if an order is issued under section 33 of the *Act*, a person must be out of compliance with a permit or regulation at the time the order is issued.

The Panel agrees with HNL that the words "is in compliance" in section 33(5) must be read in the present tense.

The Panel notes that the Order was issued on October 29, 2002. There was no evidence that HNL was out of compliance with either the *Regulation* or the Permit as approved by the Plea Agreement on that date. Therefore, section 33(5) of the *Act* precludes the District Director from issuing an Order under section 33 when those circumstances exist.

Further, even if it is accepted that section 33(5) applies to incidents that occurred prior to the issuance of a section 33 pollution prevention order, the Panel is not satisfied that the August 22 and 23, 2002 incidents can be relied on to show non-compliance with either the *Regulation* or the Permit as approved in the Plea Agreement. In particular, the Panel was not provided with any air emission monitoring results from those dates that could be relied on to make a finding that HNL was out of compliance with the *Regulation* or the Permit. A visual review of ash on the surface and oral reports of ash and soot in the air is not sufficient to make a finding of non-compliance with a permit or a regulation such that an order is authorized in this case. While these observations justify further investigation, they do not establish non-compliance with the *Regulation* or the Permit. Accordingly, the Panel finds that the District Director had no authority to issue the Order on October 29, 2002.

In addition, the Panel finds that the incident reported on August 22, 2002, was caused by an upset or irregular condition, and was not necessarily caused by poor maintenance or some other ongoing condition. This is evidenced by Mr. Devries' letter dated August 30, 2002, which states that the cause of the incident was a tube leak, and that HNL conducted "regular, quarterly inspection of the tubes… as well as at 1-3 week intervals depending upon the extent of the use of the given heater." In addition, he indicates that related equipment was visually checked on a daily basis. The District Director provided no evidence to support her assertion that the incident was caused by poor or inadequate maintenance. Although the standard of "reasonable grounds" under section 33(2) of the *Act* may be a low one, the Order was not justified unless there was at least some evidence to satisfy the District Director that HNL's wood burning operation was likely, on the day when the Order was issued, to release a substance that would cause pollution. Based on the parties' submissions and evidence, the Panel concludes that there were no reasonable grounds to justify the issuance of the Order.

Finally, the Panel notes that the requirements in the Order for quarterly monitoring and reporting do not require HNL to conduct maintenance more frequently than it was already doing, and that these requirements will not prevent the type of circumstances that may lead to similar upset conditions.

For all of these reasons, the Panel finds that there is insufficient evidence that HNL was out of compliance with the *Regulation* or the Permit. Alternatively, there is insufficient evidence that there were reasonable grounds for the District Director to conclude that HNL's wood burning operations had been or were being performed in a manner that was, on the date when the Order was issued, likely to release a substance that would cause pollution of the environment. Accordingly, the Panel finds that the decision to issue the Order should be reversed.

DECISION

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

For the reasons provided above, the Panel finds that an appeal of a refusal to amend a permit is not an appealable decision within the meaning of sections 43 and 44 of the *Act*. The Panel further finds that the decision to issue the Order should be reversed.

Accordingly, the appeal of the refusal to amend the Permit is denied for lack of jurisdiction, and the appeal of the Order is allowed.

Alan Andison, Chair
Environmental Appeal Board

April 26, 2004