BRITISH COLUMBIA

# Environmental Appeal Board

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## APPEAL NO. 2003-WAS-002(a)

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

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| **BETWEEN:** | Beazer East, Inc. | **APPELLANT** |
| **AND:** | Assistant Regional Waste Manager | **RESPONDENT** |
| **AND:** | Atlantic Industries Limited and Michael Wilson<br>Canadian National Railway Company<br>North Fraser Port Authority<br>Province of British Columbia | **THIRD PARTIES** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on February 7, 2003 | |

**APPEARING:** For the Appellants:

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| Beazer East, Inc. | Nicolas Hughes, Counsel |
| For the Respondent: | Angela Westmacott, Counsel |
| For the Third Parties: | |
| Atlantic Industries Limited and Michael Wilson | James Sullivan, Counsel |
| Canadian National Railway | Ravi R. Hira, Counsel |
| North Fraser Port Authority | Craig P. Dennis, Counsel |
| Province of British Columbia | Elizabeth Rowbotham, Counsel |

## PRELIMINARY ISSUE OF JURISDICTION

Beazer East, Inc. ("Beazer") filed an appeal against a December 9, 2002 Amended Remediation Order (the "Amended Order") issued by Alan McCammon, Assistant Regional Waste Manager (the "Assistant Manager") Ministry of Water, Land and Air Protection. In the Amended Order, the Assistant Manager changed the identification of responsible persons by using the word "persons" in place of the word "companies," and required all responsible persons Beazer, Michael Wilson, Atlantic Industries Ltd. ("Atlantic") and Canadian National Railway ("CNR"), to prepare a performance-monitoring program by February 28, 2003, and post financial security for the replacement costs and operating and maintenance costs of the remediation work by March 31, 2003.

Beazer appeals the Amended Order on a number of grounds including that the Assistant Manager erred by failing to consider whether parties in addition to Michael Wilson should be added to the Amended Order; specifically, the North Fraser Port Authority ("NFPA") and the Provincial Crown (the "Province"). Alternatively, Beazer appeals on the ground that the Assistant Manager erred by failing to name NFPA and the Province in the Amended Order. Among other things, Beazer requests that the Amended Order be further amended to add the Province and the NFPA as responsible persons.

By a letter dated January 14, 2003, the Board offered the parties the opportunity to provide written submissions in respect of whether the failure to name the NFPA and the Province is an appealable "decision" under sections 43 and 44 of the *Waste Management Act* (the "*Act*"), and whether to the Board has the jurisdiction to add the Province and NFPA to the Amended Order.

All parties were given an opportunity to respond in writing to this preliminary issue.

## BACKGROUND

The Amended Order is made in relation to a contaminated site located at 8335 Meadow Avenue, Burnaby, BC. There is a lengthy history of orders and appeals leading to the issuance of the Amended Order. Only a portion of that history is relevant to this preliminary issue.

On December 19, 1997, Douglas Pope, Regional Waste Manager (the "Regional Manager"), issued a remediation order under section 27.1 of the *Act* to Beazer, Atlantic and CNR. Under the remediation order, and amendments made to it prior to issuance of the Amended Order, CNR, Atlantic and Beazer were required to carry out the remediation of the contaminated site.

In or around April 2001, Atlantic stopped contributing towards the remediation costs for the site. By a letter dated August 27, 2001, the Regional Manager advised that Atlantic was in non-compliance with its obligations under the remediation order.

On September 20, 2001, the Regional Manager advised Atlantic that it could bring itself into compliance with the order by providing one-third of the remediation costs from April 11, 2001 to September 20, 2001. At that time, the Regional Manager also advised Atlantic that he intended to amend the remediation order by adding Mr. Wilson, a director of Atlantic, as a "responsible person." Atlantic appealed the Regional Manager's letter of September 20, 2001. On January 31, 2002, the Board held that the Regional Manager's letter dated September 20, 2001 did not constitute an appealable "decision" within the meaning of section 43 the *Act* (*Atlantic Industries Ltd. v. Regional Waste Manager,* Appeal No. 2001-WAS-032(a), [2002] B.C.E.A. No.7 (Q.L.)).

On November 5, 2001, the Regional Manager amended the remediation order by adding Mr. Wilson as a responsible party. On December 1, 2001, Atlantic and Mr. Wilson filed an appeal against, and sought a stay of, the amendment on the grounds that the Regional Manager erred in naming Mr. Wilson to the order. After requesting the stay, neither Mr. Wilson nor Atlantic responded to correspondence

with the Board. By a letter dated March 12, 2002, the Board advised that "[t]o date, no response has been received…with respect to the stay issue. Therefore, the Board is assuming that Atlantic no longer wishes to pursue its stay application and will take no further action in this regard."

Meanwhile, on September 21, 2001, counsel for CNR wrote to the Regional Manager requesting that four parties be added to the order as persons responsible for remediation: the Province (as represented by the Minister of Water, Land and Air Protection), Land and Water B.C. Inc., NFPA, and the Federal Crown as represented by Environment Canada. On October 16, 2001, the Regional Manager notified the parties that he was referring CNR's application to the Deputy Director of Waste Management (the "Deputy Director") due to a potential conflict of interest.

On July 25, 2002, the Deputy Director issued a letter denying CNR's request to have additional parties added to the order. On August 23, 2002, both CNR and Beazer appealed the Deputy Director's letter. On October 23, 2002, the Board dismissed the appeals on the basis that the decision in the Deputy Director's letter did not constitute an appealable "decision" within the meaning of section 43 of the *Act* (*Beazer East, Inc. and Canadian National Railway v. Director of Waste Management,* Appeal Nos. 2002-WAS-016(a) and 2002-WAS-017(a), [2002] B.C.E.A. No.65 (Q.L.)).

On December 9, 2002, the Assistant Manager issued the Amended Order. The portions of the Amended Order that differ from the remediation order, as previously amended, are summarized as follows:

- In accordance with section 27.1 of the *Act*, each of the above named persons (Michael Wilson, Atlantic, CNR, and Beazer) is ordered to undertake remediation of the contaminated site at the Property. (The word "companies" was in the November 5, 2001 amended order. This December 9, 2002 Amended Order changed the word "companies" to "persons").
- The remediation plan shall be implemented by November 30, 2003.
- The performance-monitoring plan shall be submitted by February 28, 2003.
- Prepare a remediation completion report by January 31, 2004.
- Post financial security pursuant to the *Act* and *Regulations* by March 31, 2003 for the replacement costs and operating and maintenance costs of the remediation works. Ministry approval of the amount and form of the financial security shall be obtained by January 31, 2003. In the absence of such approval, the Ministry will impose requirements for financial security on the basis of information it has received to date.

Beazer filed an appeal against the Amended Order on January 9, 2003. Beazer appeals the Amended Order on the grounds that:

1. the Manager erred in failing to consider whether parties in addition to Michael Wilson should be added to the Amended Order, including failing to add NFPA and the Province to the Amended Order;
2. alternatively, the Manager erred by failing to name NFPA and the Province to the Amended Order;

3. the Manager erred by ordering that financial security be posted in circumstances in which financial security is inappropriate and not required;
4. the Manager erred by failing to address Atlantic's non-compliance with the Amended Order; and
5. such other and further grounds as counsel may advise.

Beazer requests that the Amended Order be amended to add the Province and NFPA as responsible persons; the Amended Order be amended to delete the requirement for financial security; and such further, other or alternative orders as counsel may advise at the hearing of this matter.

By a letter dated January 14, 2003, the Board offered the parties the opportunity to provide written submissions in respect of whether the failure to name NFPA and the Province is an appealable "decision" under the *Act,* and whether the Board has the jurisdiction to add the Province and NFPA to the order. In particular, the Board noted that:

> …the Board's jurisdiction over this remedy should be addressed as a preliminary matter since the December 9, 2002 Amended Order contains no decision on the addition of parties, nor is there any indication that this matter was before the Assistant Regional Waste Manager at the time. Rather, the Board notes that the Director of Waste Management specifically refused to add these parties to the Order in his decision dated July 25, 2002, which both Beazer and Canadian National Railway appealed to the Board.

The Board received submissions on this preliminary question of jurisdiction from Beazer, the Assistant Manager, the Province, NFPA, and CNR.

CNR adopted the submissions made by Beazer on the jurisdictional issue.

The Board did not receive submissions from Atlantic and Mr. Wilson on the jurisdictional issue, although Atlantic and Mr. Wilson also appealed the Amended Order.

## ISSUE

Whether the Assistant Manager's failure to name, or failure to consider naming, the Province and NFPA in the Amended Order is an appealable "decision" within the meaning of section 43 of the *Act* and if so, whether the Board has the jurisdiction to add the Province and NFPA to the order.

## RELEVANT LEGISLATION

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

### Remediation orders

**27.1** (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation…

…

(10) A manager may amend or cancel a remediation order.

**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.

**DISCUSSION AND ANALYSIS**

**Whether the Assistant Manager's failure to name, or failure to consider naming, the Province and NFPA in the Amended Order is an appealable "decision" within the meaning of section 43 of the *Act* and if so, whether the Board has the jurisdiction to add the Province and NFPA to the order.**

*Beazer and CNR*

Beazer and CNR submit that in issuing the Amended Order, the Assistant Manager imposed a requirement on Mr. Wilson to remediate the site along with the other named parties. They argue that in issuing the Amended Order, the Assistant Manager assessed whether requirements under the order should be imposed on additional parties. Beazer and CNR submit that the Assistant Manager should have considered which additional parties aside from Mr. Wilson to impose obligations on. They maintain that the question of whether the Assistant Manager's exercise of power was appropriate is an appealable decision, as is the question of whether the Assistant Manager should have named the Province and NFPA to the order.

Beazer and CNR submit that the present appeal is distinguishable from the appeal of the Director's July 25, 2002 letter. In that case, the Director declined to exercise

his jurisdiction to add additional parties to the order. On appeal, the Board held that declining to exercise jurisdiction or refusing to amend an order is not an appealable decision within the meaning of section 43 of the *Act*. (*Beazer East, Inc. and Canadian National Railway v. Director of Waste Management,* Appeal Nos. 2002-WAS-016(a) and 2002-WAS-017(a), [2002] B.C.E.A. No.65 (Q.L.)). They submit that the present appeal is different because the Assistant Manager considered imposing obligations on Mr. Wilson, and therefore should have considered the question of whether additional parties should have been added. Beazer and CNR submit that changing the word "companies" to "persons" in the Amended Order imposed new obligations on Mr. Wilson.

They submit, therefore, that the decision to amend the order is an appealable "decision" under sections 43(b), (c) and (e) of the *Act*. Specifically, the decision may be characterized as an "imposition of a requirement," an "exercise of power," and the "inclusion in any order… of any requirement or condition."

*The Assistant Manager*

The Assistant Manager submits that the Board lacks jurisdiction to deal with the appeal because he has not made an appealable decision in relation to the Province or NFPA. The Assistant Manager submits that when the Regional Manager advised the parties of his intention to add Michael Wilson to the order, he was not asked to consider adding the Province or NFPA. Rather, the request to add additional parties to the order had already been considered and rejected by the Director, and formed the subject of another appeal which was dismissed.

The Assistant Manager submits that even if a request to add additional parties had been made to the Regional Manager when he considered adding Mr. Wilson, the refusal to add additional parties does not constitute an appealable decision within the meaning of the *Act*. Section 43 of the *Act* is not triggered by the refusal to exercise discretion, or by the decision to decline to take requested regulatory action. To be an appealable decision under section 43, with the exception of section 43(d), there must be an affirmative act by the decision-maker. The Assistant Manager submits that section 43(d) refers to the "refusal…of a permit, approval or operational certificate". The refusal to amend an order is not an appealable decision within the meaning of section 43.

The Assistant Manager refers to *Imperial Oil Ltd. v. B.C. (Ministry of Water, Land and Air Protection)*, [2002] B.C.J. No. 295 (S.C.), expressly approving *McPhee v. Deputy Director of Waste Management,* Appeal No. 98/08 [1995] B.C.E.A. No. 52 (Q.L.), where the Board held that the refusal to add a party was not a decision falling within the scope of sections 43(a), (b) or (e). The Board further held that the decision to decline to add additional parties did not fit within section 43(d) because it did not constitute a "refusal…of a permit, approval or operational certificate" nor was the decision to refuse to amend the order an "exercise of power" within the meaning of section 43(c).

In addition, the Assistant Manager references *Britannia Mines and Reclamation Corp. v. Director of Waste Management,* (Appeal No. 2002-WAS-008(a), [2002] B.C.E.A. No. 51 (Q.L.)) and *Beazer East, Inc. and Canadian National Railway v. Director of Waste Management,* (Appeal Nos. 2002-WAS-016(a) and 2002-WAS-

017(a), [2002] B.C.E.A. No.65 (Q.L.)). In those appeals, a named party had requested that the Director add potentially responsible persons to the order, and the Director refused to do so. The Board dismissed those appeals on the grounds that there was no appealable decision. The Assistant Manager submits:

> …the circumstances in this case are even more compelling because the named parties had not requested the Manager to add the Provincial Crown or the NFPA during the exchange of correspondence which led up to the amendment adding Mr. Wilson. The addition of Mr. Wilson to the order arose in the context of Beazer and CNR's request that the Manager take regulatory action in response to Atlantic's non-compliance with the Order. The addition of Mr. Wilson does not open the door to challenge an earlier decision made by another decision-maker, Mr. Partridge (the Director), not to add the Provincial Crown, NFPA and other parties to the Order.

The Assistant Manager submits that while the decision to add Mr. Wilson constitutes an appealable decision under the *Act*, it does not open up the entire order to appeal on grounds unrelated to the addition of Mr. Wilson. There is no aspect of the decision which is appealable in relation to the Province or to the NFPA within the meaning of section 43 of the *Act*. The Assistant Manager submits that the Board should dismiss the appeal on the basis that it does not have jurisdiction to hear the matter in the absence of an "appealable" decision in relation to the Province and the NFPA.

*North Fraser Port Authority*

NFPA submits that the Board does not have jurisdiction to hear an appeal with respect to the naming of NFPA or the Province to the Amended Order. NFPA submits that the Amended Order had nothing to do with whether NFPA or the Province should be included in the order. Their inclusion in the order simply was not considered or addressed by the Assistant Manager. NFPA submits that the right of appeal extends only to the subject of the decision, and the Amended Order did not involve a decision in respect of NFPA or the Province.

NFPA contends that its submissions accord with common sense, because "were it otherwise, every time a remediation order was amended, any party could appeal any subject of the matter, regardless of whether or not the subject of the proposed appeal had anything to do with the amendment."

NFPA requests that grounds 1 and 2 of Beazer's Notice of Appeal be struck and that the request that the Province and NFPA be added to the Amended Order also be struck from its Notice of Appeal.

*The Province*

The Province submits that the Amended Order contains no "decision" on the addition of parties, and that the matter of adding parties was not before the Assistant Manager when he issued the Amended Order.

The Province submits that on December 9, 2002, the Assistant Manager amended the order on the basis that many of the requirements and deadlines in the November 5, 2001 remediation order were no longer valid. In the context of

updating the order, the Assistant Manager changed the word "companies" in the text of the fourth paragraph and the sixth sub-paragraph of paragraph 5 of the order to "persons." The Province submits that the change in the Amended Order from "companies" to "persons" is not a substantive change and does not impose any new requirements on any party; rather, it is merely the correction of a mistake in the previous order.

The Province submits that a decision-maker can alter an order to correct mistakes or errors in expressing the intention of the decision-maker. The Province referred to decisions of the Supreme Court of Canada which state that, as a general rule, once a tribunal has reached a final decision on a matter before it, the tribunal cannot change the decision unless there has been a slip in drawing it or unless there has been error in expressing "the manifest intention of the court" (*Chandler et al. v. Alberta Association of Architects*, 62 D.L.R. (4th) 577 (S.C.C.) and *Paper Machinery Ltd. v. Ross Engineering Corp*, [1934] S.C.R. 196). The Province submits that the Assistant Manager has the authority to correct mistakes and that such a change does not constitute a new decision.

The Province submits that pursuant to section 47 of the *Act*, the Board has jurisdiction to make any decision that the Assistant Manager could have made and the Board considers appropriate in the circumstances. However, the Province submits that the remedial power in section 47 of the *Act* does not arise unless there is an appealable decision within the meaning of the *Act*. While the Province recognizes that the Amended Order imposes new obligations that could constitute an appealable decision, the new obligations are in relation to the implementation of the remedial plan and have nothing to do with the issue of who is a responsible person.

The Province submits that the Board has jurisdiction to decide that a matter is beyond the scope of an appeal and refuse to consider irrelevant matters. The Province refers to *Philip Fleisher et al. v. Assistant Regional Waste Manager et al.* (Appeal No. 98-WAS-29(b)), [1999] B.C.E.A. No.29 (Q.L.), where the Board considered whether to limit the scope of the appeals to exclude submissions and evidence on substances not expressly subject to the permit amendments at issue. The Board stated:

> The Panel accepts…that its jurisdiction in this matter is restricted to considering issues related to the "decision" that is being appealed, and that the time for appealing clauses of the Permit, which are not the subject of that decision, has long since passed. For this reason, this Panel is not prepared to allow argument or evidence that deals specifically with clauses 2.5, 3.4.1, or any other clause of the Permit that could have been, but was not, addressed in the Regional Manager's decision to amend the Permit.

The Province submits that the Board's reasoning in *Fleisher* applies to this case. In addition, the Province argues that to hold otherwise would enable a party to an order to appeal any provision of an order any time some part of the order was amended, which would render the 30-day appeal limitation period meaningless, and would undermine the effective and efficient operation of the statutory scheme. The

Province submits that time and resources are better directed towards the remediation of the site, than towards endless appeals to the Board.

The Province maintains that, in this case, the issue of whether or not to add new parties was not before the Assistant Manager when he issued the Amended Order. In addition, it was not within the Assistant Manager's jurisdiction when he issued the Amended Order to add new parties to the order because the issue was properly before the Director earlier in 2002. When the Amended Order was issued on December 9, 2002, there were no submissions before the Assistant Manager on the issue of adding new parties.

The Province, therefore, submits that the Board is without jurisdiction to add the Province to the Amended Order.

*Beazer in reply*

In reply, Beazer submits that since September 21, 2001, Beazer and CNR have sought to have additional parties added to the order and have sought to have the Regional Manager address the failure or refusal of Atlantic to fund its share of the remediation costs. Both of these requests arose in relation to CNR and Beazer having funded the entire remediation cost since April 2001.

Beazer submits that the change of the word "companies" to "persons" is an appealable decision because it imposes an obligation on Mr. Wilson to carry out remediation, which the November 5, 2001 order did not. Beazer submits that while the November 5, 2001 order was addressed to Mr. Wilson, the order imposed no obligations on Mr. Wilson because the operative sentence in the order stated that "the above companies are ordered to undertake remediation of the Site."

Beazer requested that the Assistant Manager rectify the order to make it binding on Mr. Wilson because, in the absence of an obligation, a person named in an order has not been ordered to do anything. Beazer submits that the Amended Order is the first order that imposes obligations on Mr. Wilson. Therefore, the issue of the appropriateness of imposing obligations on additional parties was not appealable until the Amended Order was made.

Beazer submits that in addition to imposing new obligations on Mr. Wilson, the Amended Order also contains a number of new provisions relating to post-remediation performance monitoring and the financial security to be posted for the maintenance and replacement of the completed remediation works. Beazer submits that given that these obligations will extend far into the future, it was timely and appropriate for the Assistant Manager to assess which parties should bear the long-term obligations regarding the site.

Beazer submits that the question of who should be added to an order can appropriately arise at a number of points in the administration of a remediation order. Additional parties can be added, for example, when the order is issued or when obligations under the order are imposed on additional parties.

Beazer submits that the issues of whether the Assistant Manager should have considered adding additional parties and whether additional parties should have been added to the Amended Order are both within the jurisdiction of the Board.

*The Panel's findings*

Section 43 of the *Act* defines decision as:

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of 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.

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 decision to be appealed must be included within one of the subsections of section 43.

Beazer submits that this is an appealable decision under subsections 43(b), (c) and (e). Accordingly, it is unnecessary that the Panel consider whether subsection 43(a) or (d) apply.

In *Canadian National Railway v. Regional Waste Manager* (Appeal No. 2001-WAS-025 [2002] B.C.E.A. No.31 (Q.L.)) (hereinafter *Canadian National Railway*), the Board considered whether a manager's decision not to amend or cancel a remediation order was a decision as contemplated by the *Act*. In considering how to interpret section 43 of the *Act*, the Board stated:

> In the context of the *Act*, the legislature has given a fairly detailed definition of decision. This is unlike many other enactments, which also define "decision" and/or establish a right of appeal. For instance, the *Pesticide Control Act*, R.S.B.C. 1996, c. 360, defines decision as an "action, decision or order." Further, it is relatively common to find an appeal provision where specified people are given the right to appeal an "action", "order", "decision", "ruling" or "determination" of certain government officials, or a combination thereof. By providing a more detailed definition of decision in the *Act*, it is reasonable to believe that the legislature was attempting to narrow the categories or types of decisions from which it would provide a right of appeal.
>
> When there is a more detailed description of what can be appealed, it is not uncommon for the legislature to list the decision in the positive and the negative (e.g., both the act and the refusal to act). For instance, section 8(4) of the *Health Act*, R.S.B.C. 1996, c. 179, states that if a person is aggrieved "by the issue or the refusal of a permit," the person may appeal. Section 46 of the *Hospital Act* allows appeals from certain decisions as well as a "failure or refusal of a board of management to consider and decide an application for a permit." The *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, allows affected parties to appeal certain determinations, broadly defined as "any act, omission, decision, procedure, levy, order or other

determination made under this Act…." It also specifically authorizes the Forest Practices Board to appeal a "failure to make a determination" under specific sections.

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* [*Darcy McPhee v. Deputy Director of Waste Management*, (Appeal No.95/08, December 14, 1995)(unreported).

> 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.

Accordingly, the Panel finds that the failure or refusal to "exercise a power" is not an appealable decision.

The Panel further notes that, if the legislature had wanted to allow an appeal from a refusal to amend an order, it could have simply amended subsection 43(d) by adding the words "or application for amendment" so that the phrase would read "refusal … of a permit, approval, operational certificate, **or application for amendment**." The fact that these words are not included is simply another indication that the legislature did not intend such decisions to be appealable to the Board.

The Panel also finds that its interpretation is supported on policy grounds. As argued by the Regional Manager and Beazer, the 30-day appeal period could become a meaningless date if a party could simply request an amendment to the decision and then appeal to the Board if that request for an amendment is denied.

Although the Panel is not bound by its previous decisions, the Panel adopts its reasoning in *Canadian National Railway.* The Panel finds that the failure or refusal to amend an order to included new previously unnamed parties is not the "imposition of a requirement," an "exercise of a power" or the "inclusion of a requirement or condition" and is not an appealable decision.

In addition, the Panel notes that in *Canadian National Railway* a named party requested that the order be amended to remove it from the order and the manager refused to do so. In contrast to the present appeal, there was no request to add additional parties to the order before the Assistant Manager. Rather, the Assistant Manager's decision to amend the order arose in the context of the request by CNR and Beazer to enforce Altantic's non-compliance with the remediation order and, specifically, with Beazer's concern that the order did not impose obligations on Michael Wilson as a result of the use of the word "companies". Consequently, the Panel agrees with the Assistant Manager that there is no aspect of the decision that relates to whether NFPA or the Province should be added to the Order. These issues were not before the Assistant Manager, he did not address them in the Amended Order, and they cannot form the basis of an appeal of the Amended Order. Even if the decision to amend the order by changing "companies" to "persons" constitutes an appealable decision because it technically results in Mr. Wilson being added to the order as a responsible person, that does not open the entire Amended Order to appeal on grounds unrelated to the amendments that were made.

Finally, the Panel notes that the issue of whether additional parties should be added to the order was considered by the Director on July 25, 2002. At that time, the Director refused to add parties on the basis that he was not convinced such action was necessary to ensure that the remediation objectives were achieved. The Director's decision was appealed and the Board dismissed the appeal on the basis that there was no appealable decision. The Panel finds that the issue of whether to add additional parties to the order was simply not before the Assistant Manager on December 9, 2002.

For all of these reasons, the Panel finds that the failure to name, and the failure to consider naming, additional parties in the Amended Order is not an appealable "decision" within the meaning of section 43 of the *Act*. Therefore, the Panel has no jurisdiction over grounds 1 and 2 of Beazer's grounds of appeal. In addition, the Panel finds that it does not have jurisdiction over the first remedy requested by Beazer; namely, that the Amended Order be amended to add the Province and NFPA as responsible persons. However, the Panel notes that the Amended Order was appealed by Beazer and Atlantic and Mr. Wilson on a number of additional grounds. Accordingly, the appeals may proceed on those remaining grounds of appeal.

## DECISION

In making this decision the Panel has considered all of the evidence and arguments before it, whether or not they have been specifically reiterated here.

For the reasons provided above, the Panel finds that the failure to name or to consider naming additional parties to the order is not an appealable decision within the meaning of section 43 of the *Act*. Accordingly, the Panel finds that it has no jurisdiction over those particular grounds of appeal and the corresponding relief requested. Therefore, the grounds of appeal that are the subject of this preliminary decision are hereby dismissed. However, the appeal may proceed on the remaining grounds of appeal.

Alan Andison, Chair
Environmental Appeal Board

February 5, 2004