



Environmental Appeal Board

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DECISION NO. 2018-EMA-021(b) & (c) [Group File: 2018-EMA-G02]

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53

BETWEEN:	GFL Environmental Inc.	APPLICANT (APPELLANT)
AND:	District Director, <i>Environmental Management Act</i>	APPLICANT (RESPONDENT)
AND:	Michael Dumancic, Nathalie McGee, Meaghan Lyall, Margaret & Foster Richardson, Wendy Betts, David Frame, Carol Ann La Croix, Joss Rowlands, Shelley Lee, Barry Mah, Trish Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and Michael W. Betts	THIRD PARTIES
AND:	City of Delta	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on May 3, 2019 (2018-EMA-021(b)), and May 10, 2019 (2018-EMA-021(c))	
APPEARING:	For GFL Environmental Inc.: For the District Director:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel Gregory Nash, Counsel Alex Little, Counsel

DOCUMENT DISCLOSURE APPLICATIONS

[1] On August 1, 2018, Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver")¹, issued air quality management permit GVA1090 (the "Permit") to Enviro-Smart Organics Ltd., which

¹ Metro Vancouver was previously the "Greater Vancouver Regional District". Its name was changed by Order in Council No. 023, Approved and Ordered January 30, 2017.

is now GFL Environmental Inc. ("GFL")². The Permit, which was issued under both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act") and the Greater Vancouver Regional District *Air Quality Management Bylaw No. 1082, 2008* (the "Bylaw"), authorizes GFL to discharge air contaminants to the air from its aerobic composting operation in Delta, BC.

[2] GFL appealed various terms and conditions in the Permit. In addition, the Board received 19 separate appeals filed by local residents (the "Resident Appellants") against the Permit, two of which have since been withdrawn. The appellants in those appeals are Third Parties in GFL's appeal.

[3] The City of Delta has also been added as a Third Party in GFL's appeal.

[4] A 15-day hearing of all of the appeals has been scheduled to commence on June 3, 2019.

[5] On April 29, 2019, the District Director applied to the Board for an order that GFL be required to disclose certain documents or categories of documents to the District Director.

[6] On May 6, 2019, GFL applied to the Board for an order that the District Director be required to disclose certain documents or categories of documents to GFL.

[7] The applications for document disclosure were conducted by way of written submissions.

BACKGROUND

The Facility

[8] GFL operates a turf and composting operation on 29 acres of farmland specifically zoned by the City of Delta for composting operations ("the Facility"). The total property is approximately 57.4 hectares. The Facility receives organic solid waste from Metro Vancouver and municipalities in the surrounding region for processing to produce compost, the majority of which is utilized for turf/sod farming at the Facility.

[9] The Facility has been licensed to operate as a composting facility for a number of years, but the volume received on-site in the early days was significantly less than its current volume of approximately 150,000 tonnes of compost material per year.

[10] The initial stage of the composting process at the Facility is carried out "using the aerobic pile method, within two large, free-span covered buildings" (i.e., not enclosed). Organic waste feedstock is piled onto the building's concrete floor. An excavator or other means is subsequently used to turn the windrows as needed to optimize the primary composting process.

² On January 1, 2018, Enviro-Smart Organics Ltd. was amalgamated into GFL. For the purposes of this Decision, only GFL will be referenced even if, at the time, it was Enviro-Smart's operation.

[11] The first building was constructed in 2007. Primary composting and reduction of the organic waste biomass in this building is supported by a "fixed-in-place, positive pressure aeration system" that enhances the process.

[12] As municipal organic recycling within Metro Vancouver expanded and composting demands increased, a new building (building #2) was constructed in 2014 to accommodate 200,000 tonnes per annum of additional organic material. This is a "positive-negative aeration system primary composting building" which has an "advanced integrated system of compost aeration, odour/leachate capture, and biofilter technology."

[13] GFL, in its present corporate form, has carried on operations at the Facility since October of 2016.

[14] The Facility holds a licence issued by the Greater Vancouver Sewerage and Drainage District to accept the following for composting: food waste, yard waste, soiled paper, packaged organic waste, as well as certain industrial organic wastes, certain agricultural organic wastes, and bulk liquids. Other materials may be specifically authorized in writing by the Solid Waste Manager for Metro Vancouver. The licence was originally issued in 2011. It was amended in 2016, in part to address Metro Vancouver's increased organics processing needs.

[15] The licence sets out "quantity limits" that apply to the Facility, "regardless of the state, condition, or form" of the compostable material:

- The maximum weight of Compostable Material that may be accepted at the Facility shall not exceed **1,298 tonnes per day**; and
- The annual average weight of Compostable Material that may be accepted at the Facility shall not exceed **411 tonnes per day**.
- The total volume of Compostable Material that may be at the Facility at any given time shall not exceed **124,670 cubic metres**.

[Emphasis in licence]

[16] It should be noted that the licence does not contain a monthly limit on the amount of compostable material that may be received at the Facility.

[17] The licence requires GFL to report the quantity (tonnes) and type of compostable material received at the Facility, and the quantity (tonnes) of finished compost, recyclable material and residual waste for disposal, shipped from the Facility each day. Records of monthly quantities of compostable material received, finished compost shipped, and residual waste disposed from the Facility must be tabulated and submitted to Metro Vancouver's Solid Waste Manager on a quarterly basis by the end of January, April, July and October for the preceding quarter of operation.

[18] There is no dispute that composting is an aerobic process, meaning that it occurs in the presence of oxygen. There is also no dispute that oxygen reduces the production of odorous air contaminants and, conversely, a depletion of oxygen can produce odours.

[19] The Facility is currently an "open-air" operation. The operation is succinctly described in a July 25, 2017 memorandum by Envirochem Services Inc. as follows.

The Enviro-Smart [GFL] operation includes two main compost buildings that provide cover and wind protected storage for the primary composting operations. Both buildings use floor aeration systems, but building #1 can only positively aerate the compost windrows (air blown through the pile from the bottom) while building #2 can positively and negatively aerate (air drawn through the pile from the top) the compost windrows depending on the chosen program.

Building #2 processes approximately 65% of the infeed compost material and is equipped with individually computer controlled and biofiltration emission control technology. Air is drawn through the composting windrows and then passed through the biofiltration system ... The compost exhaust air stream entering the filter is both warm and moist, maintaining optimal conditions for microbial growth in the biofilter media.

Building #1 composts the remaining infeed (35%), which is equipped with a positive floor aeration system (uses the same blower system) that control the composting of each area individually. On an as needed basis, a biofilter layer of compost screenings is added to the top of the primary compost pile.

[20] The memorandum goes on to note that only the “active phase” of the composting process takes place in the buildings (approximately 21 days). It is then moved for “long term curing” out in the yard windrow areas.

The Permit

[21] The District Director swore an affidavit on November 27, 2018, in response to a stay application that was filed by GFL. In it, he provided much of the background to the issuance of the Permit.

[22] On August 3, 2017, GFL applied for a permit to authorize “the discharge of air emissions” from the composting Facility. A description of the composting operation and the emission sources were identified as part of the application.

[23] According to the District Director, the permit application underwent “extensive consultation with GFL, a consideration of expressions of public concerns about the Facility, and recommendations from Metro Vancouver staff”. In the spring of 2018, Metro Vancouver provided GFL with draft permits for comment. In response, GFL provided the District Director with a five-page set of “Proposed Criteria” for an air discharge permit that would allow GFL “to continue operating our composting business in the interim while we move forward in a timely manner towards fully enclosing our operations.” In the cover letter to the Proposed Criteria, GFL states:

Please consider this covering letter and attachment as a formal proposal for permit conditions for an interim permit as well as commitments with respect to timelines of implementation and deliverables.

[24] In addition, in July of 2018, GFL provided the District Director with an Odour Management Plan prepared by Envirochem Services Inc.

[25] On August 1, 2018, the District Director issued the Permit. The Permit is effective for a term of five years, expiring on September 30, 2023. It is 43 pages long and contains prescriptive and detailed operating requirements, requirements for design and engineering plan approvals, and 97 submission requirements, including those for 13 plans and 15 types of ongoing performance/progress reports.

[26] GFL's stated intention is to upgrade the Facility. It has committed to constructing a new fully enclosed composting facility by February 28, 2020, subject to the necessary government approvals to construct and operate the new facility on an expedited basis. GFL states that the new enclosed facility is designed to include advanced odour abatement equipment; however, in the interim, odour reduction measures "have been and will continue to be applied by GFL at the current operation."

GFL's Appeal

[27] On August 29, 2018, GFL appealed the Permit. GFL's Notice of Appeal provides several grounds for appeal, which the Panel has summarized as follows:

- The District Director erred and exceeded his jurisdiction by including "unduly prescriptive and unnecessary requirements" in the Permit (including at pages 21 to 41 of the Permit) which are:
 - not advisable for the protection of the environment;
 - fail to consider the principles of sustainability;
 - fail to give rise to material benefit;
 - will add unnecessary cost; and
 - may, and likely will, delay the GFL odour-abatement upgrade program at the Facility.
- The requirements on pages 4 to 17 of the Permit "will interfere with the operation under best operating practices, add significant and unnecessary cost, interfere with the odour abatement processes, and may, and likely will, delay the GFL odour-abatement upgrade program at the Facility".
- The term of the Permit is "unreasonable and onerous given the very substantial capital investment GFL will be making in installing the GFL odour-abatement program at the Facility."
- The odour compliance unit requirement in the Permit (including the odour unit standard of 1.0) is capricious and unreasonable, and too imprecise and unreliable to be used as a compliance mechanism.
- The monthly volume restriction requirement is not advisable for the protection of the environment, will not assist in odour abatement, and is onerous and unreasonable.
- The terms of the Permit prohibiting emissions from sources 1, 2, 3, 4(a) and (b), 5 and 6 after February 28, 2020, are onerous, unreasonable, capricious and arbitrary, including for the reason that they may, and likely will, delay the completion of the GFL odour-abatement upgrade program.

- The District Director erred and exceeded his jurisdiction by requiring GFL to submit 13 plans and 15 types of ongoing performance/progress reports, totaling approximately 97 submissions, not including required monthly reports.

[28] GFL asks the Board to vary the Permit to address the numerous issues identified in its Notice of Appeal.

GFL's stay application

[29] In its Notice of Appeal, GFL requested a stay of two categories of Permit terms, pending a decision on the merits of its appeal, which GFL described as:

- Contradictory and inappropriate Permit terms with respect to aeration; and
- Permit terms restricting monthly volumes of compostable materials that may be received at the Delta Facility, which restrictions are inconsistent with the Delta Facility's Licence ... and which prevent the Delta Facility from meeting its contractual commitments in seasons with high volumes of green yard waste.

[30] In support of its stay application, GFL provided two affidavits sworn by Brian King, P.Eng., Director of GFL and the Project Manager for the Facility upgrades, dated November 8, 2018 and December 4, 2018. GFL submitted that Mr. King's November 8, 2018 affidavit provided evidence that: GFL has contracts with Metro Vancouver municipal and commercial customers, who deliver compostable materials to the Facility; more green (leaf and yard) organics are delivered in the fall and spring months; and, these contract demands likely could not be met under the Permit's monthly limits, resulting in irreparable financial and reputational damage to GFL.

[31] On December 10, 2019, the Board denied GFL's stay application (Decision No. 2018-EMA-021(a)). Among other things, the Board found that GFL had provided insufficient evidence to establish that it would likely suffer irreparable harm if a stay was denied. At para. 93, the Board stated:

... Mr. King did not provide any specific information regarding the nature of GFL's contracts, any deadlines or penalties that apply, or any specifics regarding the volume of compostable material that GFL is required to accept under each contract. Nor did he provide any month-by-month volume data from past years that would show the seasonal variations identified as an issue. Such data would provide some indication of the extent to which GFL would be in "non-compliance" with its contracts if the stay is not granted. This type of evidence/information is important for the Panel to properly assess GFL's claim of financial impact from, in particular, the monthly volume restrictions. As it stands, there is only sworn evidence that contracts to accept compostable materials exist; nothing more.

Parties' pre-hearing exchange of documents

[32] On March 18, 2019, GFL, the Resident Appellants, and the District Director each provided separate notices of their intent to tender expert evidence at the appeal hearing, and provided copies of their respective reports. GFL's reports included one prepared by Dr. Pamela Dalton.

[33] On April 29, 2019, GFL and the District Director provided separate notices of their intent to submit reply expert evidence, and provided copies of their respective reports.

[34] On May 3, 2019, GFL provided its Statement of Points, which indicates that GFL intends to call several witnesses at the appeal hearing including Mr. King and Dr. Dalton. GFL's Statement of Points states, in part:

The central issue arising on this appeal flows from the common ground between Metro Vancouver ("Metro") and GFL ... in supporting a Permit which allows effective and efficient odour mitigation.

The point of divergence, and the central issue for the Board, is how to best accomplish that common ground goal in an effective and efficient manner.

...

... GFL is investing tens of millions of dollars to transform the Delta facility into a fully-enclosed composting facility utilizing state of the art technology resulting in effective odour abatement. GFL is undertaking this significant project in order to effectively mitigate odour. A highly prescriptive Permit will not assist in that endeavor; it will interfere with that endeavor. Indeed, a highly prescriptive Permit will not assist in, and will impede, managing odours in the interim period before the new fully enclosed facility is fully operational early next year.

...

The issue for the board in this Appeal ... is whether particular Permit provisions advance or are necessary and appropriate for effective and efficient odour mitigation. ...

District Director's application for document disclosure

[35] In letters dated February 22, March 20, and April 18, 2019, the District Director requested that GFL voluntarily disclose certain categories of documents. Those letters are included in an appendix to the District Director's April 29, 2019 application for document disclosure.

[36] On April 29, 2019, the District Director applied to the Board for an order that GFL disclose certain categories of documents by May 10, 2019.

[37] In a submission dated May 1, 2019, 2019, GFL advised that it would voluntarily disclose (without conceding relevance) the following documents on May 3, 2019:

- documents requested in the April 18, 2019 letter except those relating to Dr. Dalton's visit to the Facility and neighbourhood on March 3 and 4, 2019;
- documents requested in the March 22, 2019 letter; and
- documents requested in para. 13 of the February 22, 2019 letter (relating to steps taken by GFL/Enviro-Smart staff or consultants to confirm the existence of odours emanating from the Facility off site).

[38] GFL also asserted that those documents are “subject to solicitor and client privilege.”

[39] In a reply submission dated May 3, 2019, the District Director advised that he was requesting “all categories” of requested documents despite GFL’s agreement to voluntarily produce certain documents. The District Director submitted that no solicitor client privilege attaches to those documents, and they should be included in the Board’s order for production.

[40] The 21 categories of documents that were requested by the District Director are set out later in this decision, under “Discussion and Analysis”.

GFL’s application for document disclosure

[41] On February 25, 2019, GFL requested that the District Director voluntarily disclose several categories of documents. On March 25, 2019, GFL requested that the District Director voluntarily disclose several additional categories of documents.

[42] In a letter dated April 30, 2019, GFL advised that the District Director had voluntarily provided some, but not all, of the requested documents, and it was unclear whether he had fully complied with the document disclosure request.

[43] On May 6, 2019, GFL applied to the Board for an order requiring the District Director to disclose the following categories of documents:

- a) Protocols, and all documents relating to the development of such Protocols, of Metro Vancouver for qualification of a person acting as an “Approved Person” under the Permit and protocols for the “Approved Person” identifying and differentiating odours in the impacted areas and all documents relating to training and monitoring of Approved Persons.
 - GFL asserted that it had only received protocols for an “Approved Person” identifying and differentiating odours. GFL requested Metro Vancouver’s training protocols and procedures for Approved Persons.
- b) All records with respect to odour complaints in the designated Metro Vancouver Complaint Area in which GFL is located in Delta, BC, for the time period December 19, 2018 to present.
- c) Any documents with respect to details of steps taken by Metro Vancouver staff to corroborate or verify the basis of the odour complaints in the area in which GFL is located for the time period December 19, 2018 to present, and the results thereof.
- d) Any documents with respect to details of steps taken and investigations made by Metro Vancouver staff to assess other odour sources in the area in which GFL is located for the time period December 19, 2018 to present.
 - GFL asserted that Metro Vancouver has provided the documents in paragraphs b), c), and d) up to December 19, 2018. GFL sought more recent complaint data.
- e) All reports, documents, notes, memoranda, emails and other written communications between Mr. Tom van Harreveld and Metro Vancouver or any employees of Metro Vancouver previous to August 19, 2018 with respect to or

relating in any way to odour or odour measurement (subject to any solicitor and client privilege).

- According to GFL, Mr. van Harreveld appeared before the Metro Vancouver Climate Action Committee to discuss odour units and odour detection thresholds, and provided advice to Metro Vancouver regarding GFL's Permit prior to the appeal. GFL requested pre-August 19, 2018 documents in this category, as later documents may be part of Mr. van Harreveld's retainer as an expert witness in the appeal.

RELEVANT LEGISLATION AND THE LEGAL TEST

[44] The Board has the authority under section 34(3)(b) of the *Administrative Tribunals Act* ("ATA") to make orders to produce a document or other thing:

Power to compel witnesses and order disclosure

34 (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) ...

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

[underlining added]

f) Section 34(3)(b) should be considered together with section 40 of the ATA, which states:

Information admissible in tribunal proceedings

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

[underlining added]

[45] In previous decisions on applications for document disclosure (for example, see: *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(f) and 010(f), issued December 3, 2014, at para. 18), the Board adopted the following findings from its decision in *Seaspan ULC v. Domtar Inc.* (Decision Nos. 2010-EMA-004(a), 005(a), 006(a) and 2011-EMA-003(a), issued June 11, 2013):

In paras. 56 to 64 of *Seaspan*, the Board identified the key considerations for ordering document disclosure in a pre-hearing context, as follows: (1) whether it is reasonable to suppose that the requested documents may be relevant to proving or responding to an issue in the appeal, based on the issues raised in the applicant's Notice of Appeal and (if available) statement of points; (2) whether the requested documents are admissible (i.e., whether the requested documents are subject to a recognized form of privilege); and (3) whether the person who is being asked to disclose the documents has possession and control of the documents. If there is no evidence before the Board regarding possession or control, the Board will consider the applicant's submissions on the basis of whether "the person is reasonably likely to be able to supply the information."

[46] The Panel adopts and relies on the findings above for the purposes of deciding whether to grant the present applications.

[47] It should also be noted that the Board has the discretion to receive evidence to the exclusion of the public or a party. Sections 41 and 42 of the *ATA* state:

Hearings open to public

41 (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

Discretion to receive evidence in confidence

42 The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

[underlining added]

ISSUES

[48] The issues to be decided are:

1. Whether the Panel should grant the District Director's application for an order requiring GFL to produce certain categories of documents.
2. Whether the Panel should grant GFL's application for an order requiring the District Director to produce certain categories of documents.

DISCUSSION AND ANALYSIS

1. Whether the Panel should grant the District Director's application for an order requiring GFL to produce certain categories of documents.

The Parties' submissions

[49] The District Director submits that the documents and categories of documents requested from GFL are admissible, and are, or may be, relevant to the issues arising in the appeals. The District Director also submits that it is unclear whether GFL's voluntary disclosure was complete.

[50] The District Director's April 29, 2019 application states that the requested documents fall within four broad categories, which are relevant, as follows:

GFL's grounds for appeal clearly put GFL's financial performance and the financial consequences of GFL's compliance with the terms and conditions of the Permit directly at issue, and the requested financial documents are relevant or may potentially be relevant to that issue. ...

Certain further Requested Documents relate to GFL's ability to comply with the terms of the Permit, and the environmental and other effects of compliance with the terms of the Permit. These documents are also relevant to the allegations that the terms of the Permit are "unduly prescriptive and unnecessary requirements" which will "interfere with the operation under best operating practices [and] the odour abatement process."

Certain further Requested Documents relate to the permit application process, including the consultations and communications between GFL, the residents of Delta, and Metro Vancouver staff about the Facility and the terms and conditions of the Permit. Documents pertaining to this process are clearly relevant to GFL's allegation that the Permit includes "unduly prescriptive and unnecessary requirements", "fail to give rise to material benefit", and "will interfere with the operation under best operating practices."

Finally, certain Requested Documents relate to the opinion evidence of Dr. Pamela Dalton, an expert retained on behalf of GFL. Dr. Dalton bases her conclusions, in part, on her visits to GFL's Facility and the surrounding neighbourhood. The documents Dr. Dalton created or relied upon and any other documents related to those visits, and the operation of the Facility at the time of those visits, are clearly relevant to the issues raised in GFL's Notice of Appeal.

[51] Based on the District Director's submissions and the February 22, March 20, and April 18, 2019 letters appended to the District Director's application, the District Director submits that GFL should be ordered to disclose the following:

February 22, 2019 requests (as listed in GFL's May 3, 2019 submission)

- 1(a) Documents relating to the statement in para. 10 of Brian King's affidavit sworn on November 8, 2018 (the "King Affidavit") that Permit provisions will "not only serve to not diminish odours but will likely increase odours".
- 1(b) Documents relating to the statement in para. 10 of the King Affidavit that Permit provisions "will cause irreparable harm to GFL".

The District Director submits that these categories of documents are connected to GFL's assertions that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and, the "odour unit compliance requirement ... is unreasonable and capricious" and the "monthly volume restriction requirement ... is not advisable for the protection of the environment [and] will not assist in odour abatement".

- 2) Documents relating to the statement in para. 13 of the King Affidavit that "the Permit restrictions on GFL's ability to achieve positive aeration will cause, and already have caused, oxygen depletion in the composting process such that representative oxygen levels in the primary processing composting windrows at the Facility are significantly below the industry standard recognized 10% representative oxygen levels.
- 3) Documents relating to the statement in para. 14 of the King Affidavit that "[s]imilarly, the Permit provision for emission sources ES03, ES04A, ES04B and ES05 that restricts turning the windrows inhibits oxygen and could contribute to odours.

The District Director submits that these categories of documents are connected to GFL's assertions that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and, the "terms of the Permit prohibiting emissions from sources 1, 2, 3, 4(a) and (b), 5 and 6 ... are onerous, unreasonable, capricious and arbitrary."

- 4(a) Documents relating to the statement in para. 15 of the King Affidavit that "[t]hese Permit provisions which restrict the ability to achieve positive aeration will cause reputational harm to GFL".
- 4(b) Documents relating to the statement in para. 15 of the King Affidavit that "[i]f the Permit provisions with respect to restrictions on GFL's ability to achieve positive aeration apply on a continuing basis through the appeal of this matter, this will also increase significantly the time required for GFL to produce a quality compost product".
- 4(c) Documents relating to the statement in para. 15 of the King Affidavit that "This will cause irreparable financial harm to GFL. The time to produce a quality compost product consistent with the quality of product produced by GFL will increase significantly".

The District Director submits that these categories of documents are connected to GFL's assertions that the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", "interfere with the operation under best operating practices [and] the odour abatement processes", and "will add unnecessary cost".

- 5) Documents relating to the statement in para. 21 of the King Affidavit that GFL is unable to meet its contractual obligations as a result of the "arbitrary Permit limits on receipt of compostable material", which will result in ... "significant irreparable financial harm" to GFL; this includes but is not limited to financial statement, contracts, correspondence with customers, internal correspondence or balance sheets or any other documents existing before and after the issuance of the Permit.
- 5(b) Documents relating to the recording, summarizing and/or categorizing of GFL's revenues from 2014 to present regarding the Facility.
- 10) Documents relating to the tipping fees charged by GFL/Enviro-Smart from 2014 to the present.
- 11) Documents relating to the costs incurred by GFL/Enviro-Smart in respect to odour control technology and management from 2014 to the present.

The District Director submits that GFL has put the magnitude of its costs and investment, and its cost structure, in issue in the appeal, and these categories of documents are directly relevant to the issues raised by GFL in its Notice of Appeal and its submissions. The District Director submits that these documents are required to provide context for the alleged financial consequences of complying with the Permit, and may be produced under a "suitable confidentiality order" as was contemplated in *Houweling Nurseries Ltd. v. British Columbia (Ministry of Environment)*, [2007] B.C.E.A. No. 4, (Decision No. 2003-WAS-004(b), January 11, 2007).

- 6) Documents relating to the statement that "Demands for receipt of compostable material" to "actual monthly tonnages received" and to "average actual monthly tonnages" (as those assertions were made in para. 23 of the King Affidavit), and any Documents related to the ratios of waste types received at the Facility from 2014 to present.

The District Director submits that this category of documents is connected to GFL's assertions that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and the "monthly volume restriction requirement ... is not advisable for the protection of the environment, will not assist in odour abatement, and is onerous and unreasonable."

- 7) Documents relating to public consultations between GFL/Enviro-Smart and City of Delta residents.

- 8) Documents relating to conferences and discussions between GFL/Enviro-Smart or its consultants and Metro Vancouver staff except where such conferences or discussions were held on a "Without Prejudice" basis.

The District Director submits that these categories of documents are connected to GFL's assertions that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and the term of the Permit is "unreasonable and onerous."

- 9) Documents relating to the Permit GVA 1090 application process created by, or exchanged between, GFL/Enviro-Smart staff and/or between GFL/Enviro-Smart and consultants from 2015 to Present.

The District Director submits that this category of documents is connected to GFL's assertions that: the Permit terms are "unreasonable", "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", will "interfere with the operation under best operating practices [and] the odour abatement processes"; and "may and likely will delay the GFL odour-abatement upgrade program" at the Facility.

- 12) Documents relating to the planning, building and/or implementation of Buildings #1 and #2 (the CASPs) at the Facility.

The District Director submits that this category of documents is connected to GFL's assertions that "requirements with respect to ... works and procedures [are] vague", the Permit will "interfere with the operation under best operating practices [and] the odour abatement processes", "will add unnecessary cost", and "may and likely will delay the GFL odour-abatement upgrade program".

- 13) Documents relating to the steps taken by GFL/Enviro-Smart staff or consultants to confirm the existence of odours emanating from the Facility off site.

GFL agreed to voluntarily produce this category of documents by May 3, 2019.

- 14) Documents relating to emissions testing conducted at the Facility not disclosed to Metro Vancouver from 2014 to present.

The District Director submits that this category of documents is connected to GFL's assertions that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment, fail to consider the principles of sustainability", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and the "monthly volume restriction requirement ... is not advisable for the protection of the environment, will not assist in odour abatement, and is onerous and unreasonable."

- 15) Documents relating to staff and corresponding positions and employment duration at GFL/Enviro-Smart from 2014 to present.

The District Director submits that this category of documents is connected to GFL's assertions that the Permit "may and likely will delay the GFL odour-abatement upgrade program" at the Facility. The District Director submits that if, in fact, there is such a delay, the causes could include inadequate staffing by GFL.

March 20, 2019 requests

- All documents relating to any and all odour assessments conducted by GFL (including, without limitation, odour surveys) with respect to the Facility.

GFL agreed to voluntarily produce this category of documents by May 3, 2019.

April 18, 2019 requests

- Any documents (except for communications with counsel) relating to Dr. Dalton's "visit to the Enviro-Smart facility" on March 3, 2019 and her "three separate drives around the neighbourhood" on March 3 and 4, 2019 including, but not limited to, photographs, reports, written observations, notes and geotracking mapping data;
- Any documents relating to operating times of positive and negative aeration, blower, and screening procedures at the Facility for March 3 and 4, 2019;
- Any documents relating to meteorological data from the Facility's weather station for March 3 and 4, 2019 including, but not limited to, data relating to temperature, wind direction, wind speed and rainfall;
- Any documents relating to total tonnage of material received at the facility in February 2019, and daily tonnage amounts for material received from February 15, 2019 to March 5, 2019; and
- Any documents relating to odour complaints received by GFL on March 3, 4 and 5, 2019.

GFL agreed to voluntarily produce this category of documents by May 3, 2019, except for those relating to Dr. Dalton's visit to the Facility and neighbourhood on March 3 and 4, 2019.

[52] GFL submits that the District Director's application fails to establish the relevance of the requested documents to the issues in the appeal. GFL also submits that sensitive and confidential financial information ought not to be ordered to be produced. In addition, GFL maintains that the documents it intended to voluntarily disclose on May 3, 2019, are "subject to solicitor and client privilege."

[53] Moreover, GFL submits that the District Director's April 18, 2019 requests are asking for "the abrogation or imposed waiver of privilege" related to particular documents, if any, in Dr. Dalton's file.

[54] In reply, the District Director submits that he is requesting "all categories" of documents, despite GFL's agreement to voluntarily produce certain documents. The District Director submits that no solicitor client privilege attaches to the documents, and they should be included in the Board's order for production.

The Panel's findings

[55] In deciding this application, the Panel has first considered whether each requested category of documents may be relevant to proving or responding to an issue in the appeal, based on the issues raised in GFL's Notice of Appeal and the subsequent submissions. If so, then the Panel considered whether the party is reasonably likely to be able to supply the requested documents, and whether a form of privilege may apply to the requested documents.

Categories of documents requested on February 22, 2019

category 1(a) Documents relating to the statement in para. 10 of the King Affidavit that Permit provisions will "not only serve to not diminish odours but will likely increase odours".

[56] The Panel finds that the documents in category 1(a) may be relevant to GFL's grounds of appeal that: the Permit terms will "interfere with the operation under best operating practices [and] the odour abatement processes", and the "monthly volume restriction requirement ... is not advisable for the protection of the environment [and] will not assist in odour abatement". It appears that documents of this nature are likely to be in GFL's possession and control, given that Mr. King is an employee of GFL. However, given that Mr. King's affidavit was prepared as part of the appeal process, some or all of the documents in this category may be subject to solicitor and client privilege. Accordingly, the Panel orders GFL to disclose such documents, subject to any solicitor and client privilege that may apply.

category 1(b) Documents relating to the statement in para. 10 of the King Affidavit that Permit provisions "will cause irreparable harm to GFL".

[57] The Panel notes that the issue of whether the Permit may cause "irreparable harm" to GFL was relevant to the stay application, because the legal test for seeking a stay required GFL to prove that it would likely suffer "irreparable harm" if a stay was denied. However, GFL's grounds of appeal regarding the merits of the Permit do not allege that GFL may suffer "irreparable harm" as a result of the Permit. For example, GFL's grounds of appeal allege that implementing the Permit "will add significant and unnecessary cost" and will delay its own odour-abatement plan, but this is not the same as alleging that the Permit will cause irreparable harm to GFL.

[58] The Panel concludes that the District Director has not established that this category of documents is relevant to the issues raised in the appeal of the Permit. The District Director's request for an order requiring GFL to produce this category of documents is denied.

category 2) Documents relating to the statement in para. 13 of the King Affidavit that "the Permit restrictions on GFL's ability to achieve positive aeration will cause, and already have caused, oxygen depletion in the composting process such that representative oxygen levels in the primary processing composting windrows at the Facility are significantly below the industry standard recognized 10% representative oxygen levels.

category 3) Documents relating to the statement in para. 14 of the King Affidavit that "[s]imilarly, the Permit provision for emission sources ES03, ES04A, ES04B

and ES05 that restricts turning the windrows inhibits oxygen and could contribute to odours.

[59] The Panel finds that the documents described in categories 2) and 3) may be relevant to GFL's grounds of appeal that: the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment", and will "interfere with the operation under best operating practices [and] the odour abatement processes"; and, the "terms of the Permit prohibiting emissions from sources 1, 2, 3, 4(a) and (b), 5 and 6 ... are onerous, unreasonable, capricious and arbitrary." It appears that documents of this nature are likely to be in GFL's possession and control, given that Mr. King is an employee of GFL. However, given that Mr. King's affidavit was prepared as part of the appeal process, some or all of the documents in this category may be subject to solicitor and client privilege. Accordingly, the Panel orders GFL to disclose any documents that fall within categories 2) and 3), subject to any solicitor and client privilege that may apply.

category 4(a) Documents relating to the statement in para. 15 of the King Affidavit that "[t]hese Permit provisions which restrict the ability to achieve positive aeration will cause reputational harm to GFL".

category 4(b) Documents relating to the statement in para. 15 of the King Affidavit that "[i]f the Permit provisions with respect to restrictions on GFL's ability to achieve positive aeration apply on a continuing basis through the appeal of this matter, this will also increase significantly the time required for GFL to produce a quality compost product".

category 4(c) Documents relating to the statement in para. 15 of the King Affidavit that "This will cause irreparable financial harm to GFL. The time to produce a quality compost product consistent with the quality of product produced by GFL will increase significantly".

[60] Regarding categories 4(a) and (c), the Panel notes that the issue of whether the Permit may cause "reputational harm" and/or "irreparable harm" to GFL was relevant to the stay application, because the legal test for seeking a stay required GFL to prove that it would likely suffer "irreparable harm" if a stay was denied, and irreparable harm may include reputational harm that cannot be compensated. However, GFL's grounds of appeal regarding the merits of the Permit do not allege that GFL may suffer "reputational harm" or "irreparable harm" as a result of the Permit. For example, GFL's grounds of appeal allege that implementing the Permit "will add significant and unnecessary cost" and will delay its own odour-abatement plan, but this is not the same as alleging that the Permit will cause irreparable harm to GFL. The Panel concludes that the District Director has not established that the documents are categories 4(a) and (c) are relevant to the issues raised in the appeal of the Permit. The District Director's request for an order requiring GFL to produce these categories of documents is denied.

[61] Regarding category 4(b), the Panel finds that these categories of documents are connected to GFL's grounds of appeal that the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment", "interfere with the operation under best operating

practices [and] the odour abatement processes”, and “will add unnecessary cost”. It appears that documents of this nature are likely to be in GFL’s possession and control, given that Mr. King is an employee of GFL. However, given that Mr. King’s affidavit was prepared as part of the appeal process, some or all of the documents in this category may be subject to solicitor and client privilege. Accordingly, the Panel orders GFL to disclose any documents that fall within category 4(b), subject to any solicitor and client privilege that may apply.

category 5) Documents relating to the statement in para. 21 of the King Affidavit that GFL is unable to meet its contractual obligations as a result of the “arbitrary Permit limits on receipt of compostable material”, which will result in ... “significant irreparable financial harm” to GFL; this includes but is not limited to financial statement, contracts, correspondence with customers, internal correspondence or balance sheets or any other documents existing before and after the issuance of the Permit.

[62] The Panel has already found that the issue of whether the Permit may cause “irreparable harm” to GFL was relevant to the stay application, because the legal test for seeking a stay required GFL to prove that it would likely suffer “irreparable harm” if a stay was denied, but GFL’s grounds of appeal regarding the merits of the Permit do not allege that GFL may suffer “irreparable harm” as a result of the Permit. GFL’s grounds of appeal allege that implementing the Permit “will add significant and unnecessary cost” and will delay its own odour-abatement plan, but this is not the same as alleging that the Permit will cause irreparable harm to GFL.

[63] The Panel concludes that the District Director has not established that this category of documents is relevant to the issues raised in the appeal of the Permit. The District Director’s request for an order requiring GFL to produce this category of documents is denied.

category 5(b) Documents relating to the recording, summarizing and/or categorizing of GFL’s revenues from 2014 to present regarding the Facility.

[64] When this category of requested documents is viewed in its original context in the District Director’s February 22, 2019 letter, it is apparent that this category relates directly to GFL’s submissions on its stay application, and particularly the statements in para. 21 of Mr. King’s affidavit that the Permit’s limits on the receipt of compostable materials will prevent GFL from meeting its contractual obligations, and will result in GFL suffering a loss of customers, reputational damage, and unrecoverable financial damage.

[65] While this category of documents may have been relevant to GFL’s stay application, the Panel finds that the Director has not clearly identified how such documents may be relevant to the issues raised by the appeal. For example, the District Director has not explained how documents of this nature relate to any specific ground of appeal. GFL’s grounds of appeal allege that implementing the Permit “will add significant and unnecessary cost”, but it is unclear how the Facility’s revenues for the past five and a half years can shed any light on the cost of implementing the Permit. It is also unclear to the Panel how the Facility’s revenues prior to the Permit have any relevance to GFL’s appeal of the Permit. The

District Director's request for an order requiring GFL to produce this category of documents is denied.

category 10) Documents relating to the tipping fees charged by GFL/Enviro-Smart from 2014 to the present.

[66] Similarly, the Panel finds that the District Director has not clearly identified how this category of documents may be relevant to the issues raised by the appeal. For example, the District Director has not explained how these documents relate to any specific ground of appeal. GFL's grounds of appeal allege that implementing the Permit "will add significant and unnecessary cost", but it is unclear how the Facility's tipping fees for the past five and a half years can shed any light on the cost of implementing the Permit. It is also unclear to the Panel how the Facility's tipping fees prior to the Permit have any relevance to GFL's appeal of the Permit. The District Director's request for an order requiring GFL to produce this category of documents is denied.

category 11) Documents relating to the costs incurred by GFL/Enviro-Smart in respect to odour control technology and management from 2014 to the present.

[67] The Panel finds that this category of documents is, in part, relevant to GFL's ground of appeal alleging that implementing the Permit "will add significant and unnecessary cost", but should be focused more specifically on the costs associated with the Permit. Specifically, the Panel finds that "documents relating to the costs incurred by GFL/Enviro-Smart in respect to odour control technology and management associated with implementing the Permit requirements" are relevant to the issues in the appeal.

[68] Accordingly, the Panel orders GFL to disclose any documents that fall within the Panel's re-formulated version of category 11. GFL is at liberty to request that the Board make these documents subject to a confidentiality order under sections 41(2)(a) and/or 42 of the ATA.

category 6) Documents relating to the statement that "Demands for receipt of compostable material" to "actual monthly tonnages received" and to "average actual monthly tonnages" (as those assertions were made in para. 23 of the King Affidavit), and any Documents related to the ratios of waste types received at the Facility from 2014 to present.

[69] The statements that the District Director refers to in para. 23 of Mr. King's affidavit relate to the amount of "green waste/yard waste" as a proportion of the total quantity of compostable material received at the Facility, on a monthly basis. The Panel finds that this category of documents is relevant to GFL's grounds of appeal that: the Permit's "monthly volume restriction requirement ... is not advisable for the protection of the environment, will not assist in odour abatement, and is onerous and unreasonable."

[70] However, the Panel notes that the Facility's licence already requires GFL to record the quantity (tonnes) and "type of Compostable Material" received at the Facility, and the monthly quantities of compostable material received, and submit the information to Metro Vancouver's Solid Waste Manager on a quarterly basis by the end of January, April, July and October. The licence also states that the Facility

may receive specific types of "Compostable Materials", including "Food Waste", Yard Waste", "Soiled Paper", Packaged Organic Waste", "waxed Corrugated Cardboard", clean wood waste, and certain other specified materials. Thus, it appears that Metro Vancouver should already possess the type of information that the District Director is requesting in category 6. The District Director should be able to obtain this information from Metro Vancouver's Solid Waste Manager. Thus, it appears to be unnecessary for the Panel to order GFL to produce such documents.

category 7) Documents relating to public consultations between GFL/Enviro-Smart and City of Delta residents.

[71] The Panel finds that this category of documents is overly broad, and the District Director has not explained how such documents may relate to the Permit or any of GFL's grounds for appeal. The District Director's request for an order requiring GFL to produce this category of documents is denied.

category 8) Documents relating to conferences and discussions between GFL/Enviro-Smart or its consultants and Metro Vancouver staff except where such conferences or discussions were held on a "Without Prejudice" basis.

[72] On the face of the District Director's description of category 8, it appears that Metro Vancouver would already possess the information described in this category. The District Director should be able to obtain the requested information from other Metro Vancouver staff. Thus, it appears to be unnecessary for the Panel to order GFL to produce such documents.

category 9) Documents relating to the Permit GVA 1090 application process created by, or exchanged between, GFL/Enviro-Smart staff and/or between GFL/Enviro-Smart and consultants from 2015 to Present.

[73] The Panel finds that this category of documents, subject to amendment to make it more specific, may be relevant to several of GFL's grounds of appeal and concerns about the terms of the Permit. Specifically, the Panel finds that documents relating to the Permit application process should be limited to the period that began when GFL began the application process, and ended when the Permit was issued.

[74] Accordingly, the Panel orders GFL to produce "Documents relating to the Permit application process created by, or exchanged between, GFL/Enviro-Smart staff and/or between GFL/Enviro-Smart and consultants from the date of the Envirochem Services Inc. memorandum that GFL submitted in support of the Permit application (i.e., July 25, 2017) to the date when the Permit was issued (i.e., August 1, 2018)."

category 12) Documents relating to the planning, building and/or implementation of Buildings #1 and #2 (the CASPs) at the Facility.

[75] Buildings #1 and # 2 are the buildings where primary composting takes place at the Facility. The Panel finds that, subject to amendment to focus the nature of the documents requested, this category of documents is relevant to GFL's ground of appeal asserting that the Permit will "interfere with the operation under best operating practices [and] the odour abatement processes". Specifically, the Panel finds that documents relating to the planning, building and/or implementation

of Buildings #1 and #2 (the CASPs) at the Facility should be limited to those that address the compost operations and odour abatement processes for those buildings.

[76] Accordingly, the Panel orders GFL to produce "Documents relating to the planning, building, and/or implementation of the compost operations and odour abatement processes of Buildings #1 and #2 (the CASPs) at the Facility."

category 13) Documents relating to the steps taken by GFL/Enviro-Smart staff or consultants to confirm the existence of odours emanating from the Facility off site.

[77] GFL agreed to voluntarily produce this category of documents by May 3, 2019. Therefore, it is unnecessary for the Panel to order GFL to produce such documents.

category 14) Documents relating to emissions testing conducted at the Facility not disclosed to Metro Vancouver from 2014 to present.

[78] The Panel finds that, subject to amendment to focus the nature of the documents requested, this category of documents is relevant to GFL's grounds of appeal asserting that the Permit terms are "unduly prescriptive and unnecessary requirements which are not advisable for the protection of the environment", and will "interfere with the operation under best operating practices [and] the odour abatement processes". Specifically, the Panel finds that documents relating to emissions testing conducted at the Facility since the Permit was issued, and that have not yet been not disclosed to Metro Vancouver, would be relevant to the issues in the appeal. The District Director has not explained how emissions testing that pre-dates the Permit would be relevant to the issues in the appeal.

[79] Accordingly, the Panel orders GFL to produce "Documents relating to emissions testing conducted at the Facility not disclosed to Metro Vancouver from August 1, 2018 to the date of the District Director's request on February 22, 2019."

category 15) Documents relating to staff and corresponding positions and employment duration at GFL/Enviro-Smart from 2014 to present.

[80] The Panel finds that the District Director has not clearly identified how this category of documents may be relevant to the issues raised by the appeal. GFL's grounds of appeal and submissions to date assert that the Permit, and not a lack of staff, may delay GFL's implementation of its odour-abatement upgrade program at the Facility. GFL's grounds of appeal allege that implementing the Permit "will add significant and unnecessary cost", but do not assert that GFL will need to reduce staff. The Panel finds that the District Director is speculating when he asserts that inadequate staffing may be a cause of such delay.

[81] Accordingly, the Panel denies District Director's request for an order requiring GFL to produce this category of documents.

Categories of documents requested on March 20, 2019

- All documents relating to any and all odour assessments conducted by GFL (including, without limitation, odour surveys) with respect to the Facility.

[82] GFL agreed to voluntarily produce this category of documents by May 3, 2019. Therefore, it is unnecessary for the Panel to order disclosure of these documents.

Categories of documents requested on April 18, 2019

- Any documents (except for communications with counsel) relating to Dr. Dalton's "visit to the Enviro-Smart facility" on March 3, 2019 and her "three separate drives around the neighbourhood" on March 3 and 4, 2019 including, but not limited to, photographs, reports, written observations, notes and geotracking mapping data;
- Any documents relating to operating times of positive and negative aeration, blower, and screening procedures at the Facility for March 3 and 4, 2019;
- Any documents relating to meteorological data from the Facility's weather station for March 3 and 4, 2019 including, but not limited to, data relating to temperature, wind direction, wind speed and rainfall;
- Any documents relating to total tonnage of material received at the facility in February 2019, and daily tonnage amounts for material received from February 15, 2019 to March 5, 2019; and
- Any documents relating to odour complaints received by GFL on March 3, 4 and 5, 2019.

[83] GFL agreed to voluntarily produce these categories of documents by May 3, 2019, except for those relating to Dr. Dalton's visit to the Facility and neighbourhood on March 3 and 4, 2019. Therefore, it is unnecessary for the Panel to order disclosure of these documents, except for those relating to Dr. Dalton's visit to the Facility and neighbourhood on March 3 and 4, 2019.

[84] The Panel finds that the documents relating to Dr. Dalton's visit to the Facility on March 3, 2019, and her drives around the neighbourhood on March 3 and 4, 2019, may be relevant to the issues in the appeal. However, given that Dr. Dalton's activities were conducted in preparation for her testifying at the appeal hearing, some or all of the documents in this category may be subject to solicitor and client privilege. Accordingly, the Panel orders GFL to disclose any documents relating to Dr. Dalton's visit to the Facility on March 3, 2019, and her drives around the neighbourhood on March 3 and 4, 2019, subject to any solicitor and client privilege that may apply.

[85] In conclusion, the Panel orders GFL to disclose documents to the District Director as directed in the Panel's reasons above, by May 24, 2019. The District Director's application for document disclosure is granted, in part.

2. Whether the Panel should grant GFL's application for an order requiring the District Director to produce certain categories of documents.

The Parties' submissions

[86] GFL submits that all of the requested documents are relevant to the issues in the appeal, and are likely to be in Metro Vancouver's possession and control. GFL

requests that the Board order the District Director to disclose the requested documents within 7 days of the date of the Board's order.

[87] The District Director submits that he has produced, or consents to produce, all of the documents requested by GFL, with the exception of the last category of documents. The District Director submits that the last category of documents are irrelevant to the issues in the appeal, and in any case, Mr. van Harreveld will be tendered as an expert witness at the appeal hearing and may be cross-examined on his expert reports.

[88] In reply, GFL acknowledges that the District Director has consented to produce the documents in categories b), c) and d) of GFL's application for document production. GFL advises that it is, for the most part, content with that assurance, but the Board should order the production of those documents "by consent".

[89] GFL submits that the District Director has not addressed the following aspects of the requested categories of documents:

- category a) – documents with respect to training protocols and procedures for an "Approved Person". GFL submits that the District Director's response does not address whether such documents exist or have not been produced. GFL submits that the Board should order such documents to be produced, and if they do not exist, the District Director may say so.
- category e) - notes of a July 31, 2018 meeting referred to in a November 6, 2018 memo, prepared by Metro Vancouver staff for the District Director, recommending the basis for the terms of the Permit. According to GFL, the November 6, 2018 memo states that it is the written form of a July 31, 2018 presentation of the Permit terms to the District Director by Metro Vancouver staff. GFL submits that there must be some contemporaneous notes or documents by Metro Vancouver staff or the District Director with respect to those recommendations, and such documents are clearly relevant to the issues in the appeal.
- category e) communications between Mr. van Harreveld and Metro Vancouver before August 1, 2018, relating to odour and odour measurement. GFL notes that the District Director's response states that "Mr. van Harreveld is a leading internationally recognized expert on odour and odour measurement and has been retained on behalf of the District Director for expert advice and opinion in specific matters unrelated to this Appeal." GFL submits that if those matters involve advice to the District Director on odour and odour measurement, then the documents ought to be produced. GFL also submits that the majority of Mr. van Harreveld's two expert reports that have been filed by the District Director prior to the appeal hearing deal with general issues regarding odour and odour measurement, such as detection thresholds and odour units, that are not specific to GFL's Facility, but are relevant to the issues in the appeal and to Mr. van Harreveld's independence as an expert witness.

The Panel's findings

[90] Given that the District Director has consented to produce the documents in categories b), c) and d) of GFL's application, and that GFL "is, for the most part, content with that assurance", there is no need for the Panel to order the production of those categories of documents.

[91] The Panel finds that the category a) documents, with respect to training protocols and procedures for an "Approved Person" to identify and differentiate odours for the purposes of the Permit, would likely be relevant to the issue of whether the odour compliance unit requirement in the Permit (including the odour unit standard of 1.0) is capricious and unreasonable, and too imprecise and unreliable to be used as a compliance mechanism. The Panel also finds that such documents, if they exist, would likely be in the possession and control of the District Director and/or Metro Vancouver. Consequently, the Panel orders the District Director to produce those documents. Alternatively, the District Director should advise GFI if there are no such documents in his or Metro Vancouver's possession and control.

[92] Regarding category e) notes of a July 31, 2018 meeting referred to in a November 6, 2018 memo, prepared by Metro Vancouver staff for the District Director, recommending the basis for the terms of the Permit. The Panel finds that such documents would likely be relevant to the issues in the appeal regarding the terms of the Permit, and the reasons for adding certain terms to the Permit. The Panel also finds that such documents would likely be in the possession and control of the District Director and/or Metro Vancouver. Consequently, the Panel orders the District Director to produce those documents. Alternatively, the District Director should advise GFI if there are no such documents in his or Metro Vancouver's possession and control.

[93] Regarding category e) communications between Mr. van Harreveld and Metro Vancouver before August 1, 2018, relating to odour and odour measurement. The District Director's response states that "Mr. van Harreveld ... been retained on behalf of the District Director for expert advice and opinion in specific matters unrelated to this Appeal" [underlining added]. On its face, it is unclear to the Panel how communications between Mr. van Harreveld and Metro Vancouver before August 1, 2018, that generally relate to odour and odour measurement, but do not relate to the Facility or the Permit, would be relevant to the issues in the appeal. In addition, the Panel finds that Mr. van Harreveld's expert reports will provide some general information about odour detection, odour measurement, and odour standards in other jurisdictions, and he will be available for cross-examination at the appeal hearing. Consequently, the Panel denies GFL's request for an order requiring the District Director to produce the category e) communications between Mr. van Harreveld and Metro Vancouver before August 1, 2018, relating to odour and odour measurement.

[94] Accordingly, the Panel orders the District Director to disclose documents to GFL as directed in the Panel's reasons above, by May 24, 2019. GFL's application for document disclosure is granted, in part.

DECISION

[95] The Panel has considered all of the submissions and arguments made by the parties, whether or not they have been specifically referenced herein.

[96] For the reasons provided above, the Panel orders:

- GFL to disclose documents to the District Director as directed in the Panel's reasons above by May 24, 2019; and
- the District Director to disclose documents to GFL as directed in the Panel's reasons above by May 24, 2019.

[97] The District Director's application for document disclosure is granted, in part.

[98] GFL's application for document disclosure is granted, in part.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 16, 2019