BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

DECISION NO. 2019-EMA-002(a)

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

BETWEEN:	Sumas Environmental Services Inc.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on April 11, 2019	
APPEARING:	For the Appellant:	Setareh Javadi, Counsel
	For the Respondent:	Jeff Van Hinte, Counsel

PRELIMINARY ISSUE OF JURISDICTION

[1] On January 18, 2019, Sumas Environmental Services Inc. ("Sumas") appealed a letter dated January 7, 2019 (the "January Letter") from Brady Nelless, Director of Compliance (the "Director"), Regional Operations Branch, Environmental Protection Division, Ministry of Environment and Climate Change Strategy (the "Ministry").

[2] After the appeal was filed, the Director raised a preliminary issue of jurisdiction. The Director submits that the January Letter does not contain an appealable "decision" as defined in section 99 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"), and therefore, the Board has no jurisdiction over Sumas' appeal of the January Letter.

[3] This decision addresses that preliminary issue.

BACKGROUND

[4] Sumas operates a waste management facility (the "Facility") in Burnaby, BC. In 1998, Sumas received a permit for the Facility under the former *Waste Management Act*, R.S.B.C. 1996, c. 482. Section 8 of that Act prohibited the storage of prescribed amounts of special waste except in accordance with a permit, approval, order, or waste management plan. Section 10 of the *Waste Management Act* provided a manager with the authority to issue a permit to store, treat or recycle special waste:

> **10** (1) A manager may issue a permit to introduce waste into the environment, to store special waste or to treat or recycle special waste subject to requirements for the protection of the environment that the manager considers advisable and, without limiting that power, may in the permit do one or more of the following: …
>
> [underlining added]

[5] On July 8, 2004, the *Waste Management Act* was repealed and replaced with the *Act*. In that process, some transitional provisions were enacted, as discussed later in this decision.

[6] The *Act* no longer uses the phrase "special waste" to refer to certain types of waste that were prescribed in regulations. The *Act* uses the phrase "hazardous waste", which is defined in the *Hazardous Waste Regulation*, B.C. Reg. 63/88 (the "*Regulation*"). Essentially, "special waste" was, and "hazardous waste" is, waste that is deemed to warrant special regulation and management regarding its handling, storage, recycling, treatment, and/or disposal.

[7] Section 8 of the *Act* states:

> **8** A person must not construct, establish, alter, enlarge, extend, use or operate a facility for the treatment, recycling, storage, disposal or destruction of a hazardous waste except in accordance with the regulations.
>
> [underlining added]

[8] Section 43 of the *Regulation* requires the submission of a registration form when certain quantities of hazardous waste are stored, treated, recycled or disposed of at a site:

> **Registration of hazardous waste**
>
> **43** (1) A person who,
>
> (a) within a 30 day period, produces, or
>
> (b) at any time, stores at an on site facility
>
> a quantity of a category of hazardous waste greater than the quantity set out in Column II of Schedule 6 opposite that category must register the hazardous waste and apply for a generator registration number by completing Form 1 of Schedule 5 and submitting it to the director.
>
> (2) A person who,
>
> (a) at any time, stores at a site a quantity of a category of hazardous waste greater than the quantity set out in Column II of Schedule 6 opposite that category that was generated at a different site, or
>
> (b) in any one day period, treats, recycles or disposes of a quantity of a category of hazardous waste greater than the quantity set out in Column II of Schedule 6 opposite that category
>
> must register the hazardous waste and apply for a registered site number by completing Form 1 of Schedule 5 and submitting it to the director.

> (3) A person must comply with subsection (1) or (2) within 30 days of the date the applicable subsection first applies to the person.
>
> …
>
> [underlining added]

[9] Section 14 of the *Act* authorizes a director to issue permits "for the introduction of waste into the environment". However, unlike section 10 of the former *Waste Management Act*, section 14 of the *Act* does not also authorize the issuance of permits to store, treat or recycle "hazardous" (or formerly "special") waste.

[10] According to the Ministry's documents, in August 2015, Sumas submitted an application to the Ministry to register the Facility under the *Regulation*, but the application was returned to Sumas because it did not include a completed Form 1 of Schedule 5 in the *Regulation*. That form states that it is a "registration report made under section 43(1), (2) or (4)" of the *Regulation*.

[11] On December 4, 2018, an Environmental Protection Officer with the Ministry conducted an office review inspection of the Facility to verify compliance with the *Regulation* and the *Act*. On that same date, the Environmental Protection Officer issued a warning letter to Sumas. An inspection report was attached to the warning letter. The warning letter/inspection report stated that Sumas had not submitted a complete application to register the Facility under the *Regulation*, despite the fact that Sumas receives and stores hazardous waste at the Facility in quantities greater than that set out in Schedule 6 of the *Regulation*, as reported in Sumas' weekly manifest discrepancy reports to the Ministry. On that basis, the Environmental Protection Officer concluded that Sumas was not in compliance with section 43(2) of the *Regulation* or section 8 of the *Act*. The warning letter/inspection report also stated that Sumas was issued a warning letter on January 4, 2012, and an investigation referral on July 17, 2017, associated with inspection reports on those same dates.

[12] In addition, the December 4, 2018 warning letter/inspection report states:

> … By managing hazardous waste under the Hazardous Waste Regulation without a valid authorization Sumas Environmental [Services] Inc. commits an offence under the Environmental Management Act. Section 120(3) of EMA states…
>
> It should be noted that, as an alternative to prosecution of the offence referenced above, the Ministry may initiate action to impose an administrative penalty against Sumas Environmental [Services] Inc. …
>
> I request that Sumas Environmental [Services] Inc. immediately implement the necessary changes or modifications to correct the non-compliance(s) listed above with the Environmental Management Act. Further, I request that Sumas Environmental [Services] Inc. notify this office in writing, by email or letter within 30 days of this letter, advising what corrective measures have been taken, and what else is being done, to prevent similar non-compliance in the future.

> …
>
> Finally, if you fail to take the necessary actions to restore compliance, you may be subject to escalating enforcement action. This Warning Letter and the alleged violations and circumstances to which it refers, will form part of the compliance history of Sumas Environmental [Services] Inc. and will be taken into account in the event of future violations.

[13] On December 13, 2018, representatives of Sumas, including Sumas' legal counsel, sent a letter via email to the Ministry in response to the December 4, 2018 warning letter/inspection report. Among other things, Sumas' letter submitted that Sumas' permit issued under the *Waste Management Act* is deemed to be a valid authorization under the *Act* based on section 140(2) of the *Act*, which provides that "A decision of a manager under the *Waste Management Act* is deemed to be a decision of a director under this Act."

[14] On December 20, 2018, an Operations Manager with the Ministry's Compliance Section (the "Compliance Manager") sent a letter to Sumas via email, in response to Sumas' December 13, 2018 letter. The Compliance Manager's December 20, 2018 letter states, in part:

> … To be clear, the ministry does not agree with this position as it pertains to special waste storage permits. With respect, section 140(2) of EMA, which you quote in support of your position, has no application to this matter. Section 10 of the WMA, which was the authority for issuing special waste storage permits, was repealed in 2003, and was not replaced under EMA.
>
> The intent at the time was to transition holders of special waste storage permits to new regulatory requirements under the Hazardous Waste Regulation (HWR). A transition period was put in place under the legislation to facilitate this transition. I draw your attention to section 141 of EMA and section 54 of HWR. In particular, section 54(a) of the HWR provided the director with the authority to order that a special waste storage permit under section 10 of the WMA remains valid and in force, despite the repeal of section 10. If special waste storage permits continued in force despite the repeal, as you assert, then there would be no need to include an authority for the director to order that such permits remain in force during the transition. I trust that this assists in explaining the ministry's position on this matter.

[15] Section 54(a) of the *Regulation* contains the following transitional provisions regarding hazardous waste storage permits:

> **54** During the period that this provision is in force in accordance with section 141 (3) of the Act, despite the repeal of section 10 of the *Waste Management Act*, a director may
>
> (a) order that a specific permit issued under that section of the *Waste Management Act* authorizing the storage, treatment, disposal or recycling of hazardous waste remains valid and in force,
>
> [underlining added]

[16] Later on December 20, 2018, Sumas' legal counsel responded via email to the Compliance Manager, stating in part:

> … Briefly, [the Compliance Manager] alleges that Sumas is in breach of the *Environmental Management Act* ("EMA") as it is allegedly operating its facility without the requisite authorization issued under the EMA. As [the Compliance Manager's] decision was communicated to Sumas via email, we are unable to appeal the decision to the Environmental Appeal Board (EAB").
>
> We are providing you, the Deputy Directors of the Regional Operations Branches, the attached letter, requesting clarification on the matters noted and requesting a formal decision from a Director, or his or her delegate, as to the alleged non-compliance decided by [the Compliance Manager]. Sumas requests the formal written decision so we may have recourse to appeal to the EAB.

[17] The January Letter was issued in reply to Sumas' December 20, 2018 letter.

The January Letter and the Appeal

[18] The Director's January Letter states as follows:

> This acknowledges your letter of December 20, 2018 directed to [the Deputy Directors of the Regional Operations Branches] in response to the December 20, 2018 email [of the Compliance Manager] outlining the [Ministry's] position respecting Sumas Environmental Services Inc.'s requirement to obtain a valid authorization under the Hazardous Waste Regulation in order to operate the [Facility]. [The Deputy Directors of the Regional Operations Branches] requested that I respond on [their] behalf.
>
> The Ministry respectfully disagrees with the position outlined in your [December 20, 2018] response. In particular, the case law cited is not relevant to special waste storage permits. I reiterate that the operation of the subject facility without a valid registration under the Hazardous Waste Regulation is contrary to the *Environmental Management Act* and may be subject to enforcement action.
>
> I would like to take this opportunity to invite Sumas Environmental Services Inc. to share with me any Ministry correspondence that would support the position that no new authorization was determined to be necessary by the Ministry officials referred to in your response.
>
> As indicated in [the Compliance Manager's] email below, you are reminded that the next compliance assessment of the Sumas Environmental Services Inc. facility … is scheduled to occur no later than February 28, 2019. In the event that this assessment leads to a statutory decision of a director, Sumas Environmental Services Inc. will be provided with written notice of such decision. In the interim, I strongly suggest that Sumas Environmental Services Inc. comply with [the Compliance Manager's] preceding advice and register the [Facility] under the Hazardous Waste Regulation.

[19] On January 18, 2019, Sumas filed an appeal against the January Letter. In its Notice of Appeal, Sumas provided the following reasons for its appeal:

> On January 7, 2019, … [the Director] informed Sumas that it was the Ministry's position that Sumas' Permit [issued under the *Waste Management Act*] is not valid given the repeal of the WMA and that Sumas' activity at its facility is not authorized. [The Director] advised Sumas that Sumas must apply for *de novo* authorization for its activity at its facility and provided Sumas until February 29, 2019 to be in compliance with that decision.
>
> **Reason Ministry's Decision is incorrect:**
>
> Sumas is not required to apply for and obtain new authorization for its waste management facility … pursuant to the *Environmental Management Act* ("EMA") because it obtained the operational authorization pursuant to the *Waste Management Act* ("WMA").
>
> …
>
> It is Sumas' position that section 140(2) [of the *Act*] means that Sumas' operational permit … under the WMA is deemed to be authorization for the operation of the facility, pursuant to the EMA and its related regulations, including the *Hazardous Waste Regulation*.
>
> …
>
> It is Sumas' position that the Ministry's explanation of the legislation is not consistent with decisions rendered by the Environmental Appeal Board, the British Columbia Supreme Court and the British Columbia Court of Appeal.
>
> …

[20] In its Notice of Appeal, Sumas requested: a stay "of any enforcement proceedings by the Ministry pending a decision from the EAB in this matter"; a decision that Sumas' permit issued under the *Waste Management Act* is valid; and, a decision that Sumas is not required to apply for new authorization pursuant to the *Act*.

[21] In a letter dated January 21, 2019, the Board acknowledged receipt of the Notice of Appeal, and provided a copy to the Director. The Board requested that the Director advise whether he would consent to a voluntary stay of the January Letter until the appeal could be decided.

The Director's application

[22] In a letter dated January 23, 2019, the Director stated that he was unable to advise on the possibility of a voluntary stay, because in his view, no appealable decision was rendered in the January Letter. Rather, the January Letter involves a compliance and enforcement matter that is in the preliminary stages. The Director requested that the Board conduct a preliminary hearing on whether the January Letter constitutes an appealable "decision" within the meaning of section 99 of the *Act*.

[23] The Director requested that the Board summarily dismiss the appeal pursuant to section 31(1)(a) of the *Administrative Tribunals Act*, because the Board lacks jurisdiction to hear the appeal.

ISSUE

[24] This decision addresses the following preliminary issue:

Whether the January Letter contains an appealable "decision" under section 99 of the *Act*.

RELEVANT LEGISLATION

[25] Under section 100(1) of the *Act*, the Board may hear an appeal from a person aggrieved by a "decision" of a director. Section 100(1) states:

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

[26] Section 99 of the *Act* defines "decision" for the purposes of appeals to the Board:

99 For the purpose of this Division [appeals to the Board], "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) [administrative penalties] have not been performed.

[27] Section 31(1)(a) of the *Administrative Tribunals Act* provides as follows:

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

[28] Section 1 of the *Administrative Tribunals Act* defines "application" as follows:

"application" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

[29] Thus, for the Board's purposes, the word "application" in section 31 of the *Administrative Tribunals Act* means "appeal".

DISCUSSION AND ANALYSIS

1. Whether the January Letter contains an appealable "decision" under section 99 of the *Act*.

The Director's submissions

[30] The Director submits that the January Letter does not contain a "decision" under section 99 of the *Act*. Rather, the January Letter:

- contains an acknowledgement of previous correspondence exchanged between Sumas and Ministry representatives;
- expresses that the Ministry disagrees with Sumas' position regarding the continued validity of special waste storage permits;
- reiterates that the operation of the Facility without a valid registration under the *Regulation* is contrary to the *Act* and may be subject to enforcement action;
- invites Sumas to share with the Ministry any previous relevant correspondence in the matter;
- reminds Sumas that the next compliance assessment of the Facility is scheduled to occur no later than February 28, 2918; and
- suggests to Sumas that they comply with previous advice to register the Facility under the *Regulation*.

[31] The Director submits that none of the above communications, considered separately or as a whole, represent an appealable decision based on the principles set out in *Revolution Organics, Limited Partnership v. Director, Environmental Management Act* (Decision No. 2017-EMA-012(a), September 27, 2017) [*Revolution #2*], which considered the BC Court of Appeal's decision in *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300 [*Unifor*]. The Director refers to paras. 38 and 39 of *Revolution #2*, which state as follows:

> In its Jurisdictional Decision, the Board considered how to evaluate the contents of a letter in order to determine whether any or all of the contents are appealable as a "decision" under section 99 of the *Act*. This Panel agrees with and adopts the following findings of the Board in the Jurisdictional Decision:
>
> 1) To be an appealable "decision", there must be some exercise of authority under the legislation that relates to a subsection of section 99.
>
> 2) "While a letter may, indeed, communicate a decision that is appealable under the *Act*, it may also convey information or decisions that are not appealable. Thus, as noted by the Director, it is the contents of a letter that must be examined to determine if there are any decisions that have been made and are, therefore, appealable" (paragraph 70).

3) The Board should consider the nature of the decision and the legislation at issue, and not decline its jurisdiction on a "purely formal or technical basis" (paragraph 68).

Further, the Board is mindful of Justice Groberman's finding in *Unifor* that section 99 is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the *Act*.

[32] The Director submits that nothing on the face of the January Letter would indicate the exercise of an authority under the *Act*. He argues that the January Letter is properly characterized as conveying information to Sumas, and at most, contains the expression of an opinion. Furthermore, the Director maintains that the January Letter states that no statutory decision had been made, but a decision may eventually be made.

[33] In addition, the Director submits that Sumas has mischaracterized the content of the January Letter. The Director notes that the Sumas' Notice of Appeal characterizes the "decision" in the January Letter as follows:

> Director Nelless advised Sumas that it was required to apply for authorization of its activity in accordance with the *Environmental Management Act* and has provided Sumas until February 28, 2019 to implement the directive.

[34] The Director argues that this is inaccurate, for two reasons:

- The Director did not advise Sumas that it was "required" to apply for an authorization. Rather, he "strongly suggested" to Sumas that it comply with the Compliance Manager's advice and register the Facility under the *Regulation*. The Director submits that a "strong suggestion" is not tantamount to imposing a requirement under the *Act*.
- There is no February 28, 2019 deadline to implement a directive. Rather, that is the date before which the next compliance assessment of the Facility was scheduled to occur. The Director maintains that the date for a compliance assessment is not a deadline to "implement a directive". No requirement and no deadline were imposed.

[35] The Director submits that the present case is similar to that in *Fording Coal Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2001] B.C.E.A. No. 44 [*Fording Coal*], in which the Board rejected an appeal of a letter refusing to reconsider withdrawing a warning letter. The Director submits that the January Letter, like the warning letter in *Fording Coal*, is an administrative measure that is part of the Ministry's enforcement strategy, and was not issued under any statutory authority in the *Act*. Moreover, the Director submits that anticipated future decisions are not appealable under section 99 of the *Act*.

Sumas' submissions

[36] Sumas maintains that the January Letter contains a "decision" under section 99 of the *Act*. Sumas submits that:

> The key decision that Sumas seeks to appeal is the determination by the Ministry, confirmed by the Director in his email of January 7, 2019, that

> Sumas' Permit issued under the WMA is no longer valid given the repeal of the WMA.

[37] Sumas argues that the Director has not addressed how his conclusion about the status of Sumas' permit is not a decision under section 99 of the *Act*. Furthermore, Sumas submits that the Ministry's requirement that Sumas obtain a *de novo* authorization is premised on, and secondary to, the decision that Sumas' permit is no longer valid, as is the decision that Sumas is not in compliance with the *Act*.

[38] In support of its submissions, Sumas relies on the Board's decision in *BCR Properties v. Manager, Risk Assessment and Remediation* (Decision No. 2011-EMA-004(a), November 10, 2011)[*BCR Properties*]. In that case, the Board found that a letter contained an appealable decision, and did not simply provide an interpretation of statutory provisions. Sumas refers to paras. 40 and 41 of *BCR Properties*:

> In the present case, the Panel finds that the Manager's August 23, 2011 letter does not simply offer an interpretation of TG6. Although the letter comments on the intended purpose of TG6 and the type of guidance TG6 offers, the letter goes much further than that. The letter expressly rejects BCR's application. The Manager clearly rejects BCR's application on the basis that the rationale provided in the application, by Piteau Associates, is insufficient to justify an exemption from the drinking water use standards. The letter clearly makes a finding or determination that the drinking water use standards apply to the Site, based on the information that was provided in the application and available to the Ministry. In that regard, the letter states:
>
> > The ministry has reviewed the application... dated May 30, 2011. The document was prepared by Piteau Associates and describes investigations regarding the applicability of drinking water standards at [the Site].
> >
> > ... The presented rationale... is not sufficient arguments to obtain a DW use exemption. Based on the presented rationale DW standards apply to the site.
>
> There is no indication in the letter that the Manager's findings are not final, or are preliminary in nature.
>
> [underlining in original]

[39] Sumas submits that, similar to the letter in *BCR Properties*, the January Letter expressly rejects Sumas' explanation as to the validity of its permit, and confirms the finding that the permit is not valid. The January Letter provides legislative interpretation to justify the decision that Sumas' permit is no longer valid, in the same manner that the letter in *BCR Properties* did to deny the appellant's application. Furthermore, Sumas submits that similar to the letter in *BCR Properties*, there is no indication in the January Letter that the decision that Sumas' permit is not valid is preliminary; rather, it is clearly final and has legal consequences for Sumas in terms of possible enforcement proceedings.

[40] In addition, Sumas relies on the Board's decision in *West Fraser Mills et al v. Regional Director, Environmental Management Act* (Decision No. 2016-EMA-001(a)

et al, September 13, 2016)[*West Fraser*]. In that case, the Board concluded that a change in the reporting procedure for non-compliance with a permit was an appealable decision, because it imposed a requirement that resulted in a permit amendment pursuant to section 16(4)(j) of the *Act*. Sumas submits that the January Letter similarly imposes a requirement on Sumas' permit, and amends or cancels its permit pursuant to sections 16(4)(j) or 18(3)(f) of the *Act*, respectively.

[41] Sumas also refers to the Board's findings in *Revolution 2* at paras. 38 and 39 (provided above), and relies on the Court of Appeal's finding in para. 32 of *Unifor* that section 99 of the *Act* should be interpreted in light of section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

[42] Sumas addressed how, in its submission, the content of the January Letter and the preceding correspondence from the Ministry, individually and collectively, amount to decisions pursuant to subsections 99(a) through (e) of the *Act*; namely: making an order; imposing a requirement; exercising a power except a power of delegation; amending or cancelling a permit; and, including a requirement or condition in a permit.

[43] Regarding the Director's reference to *Fording Coal*, Sumas submits that *Unifor* makes it clear that reliance on a particular statutory provision is not necessary for a "decision" to have been made. Moreover, Sumas submits that it is not appealing the December 4, 2018 inspection report/warning letter. It is appealing the Director's determination, initially stated in the inspection report/warning letter, that Sumas' permit is not valid given the repeal of the *Waste Management Act*, making the Facility noncompliant with the *Act*. Sumas submits that this determination is final and impacts Sumas' legal status and the rights it acquired under the permit.

The Director's reply submissions

[44] The Director submits that there is no statutory authority under the *Act* or the *Regulation* for the alleged determinations that Sumas identified in the January Letter; namely:

- Sumas' permit is no longer valid;
- Sumas is out of compliance with the *Act* and the *Regulation*; and
- a registration is required to be in compliance with the *Act*.

[45] The Director notes that the December 4, 2018 inspection report/warning letter stated that Sumas was out of compliance with section 43(2) of the *Regulation* and section 8 of the *Act*. The Director maintains that nothing in those provisions could be construed as authorizing a decision of a director.

[46] The Director also notes that the December 20, 2018 letter from the Compliance Manager referred to section 54 of the *Regulation* and section 141 of the *Act* in the context of explaining the Ministry's position regarding the validity of Sumas' permit. The Director submits that none of the alleged determinations in the January Letter could have been made under section 54 of the *Regulation*, because that provision is no longer in force in accordance with section 141(3) of the *Act*.

The Director further submits that section 141 of the *Act* contains regulation-making powers which are incapable of providing the basis for a decision of a director.

[47] Moreover, the Director argues that *Unifor* states at para. 31 that section 99 of the *Act* applies to "substantive decisions that are made under the" *Act*. Thus, there would need to be statutory authority for the Director to "determine the validity of a permit", "determine non-compliance", or something similar, but no such authority exists in the *Act*.

[48] The Director distinguishes *BCR Properties* from the present case, on the basis that the decision under appeal in *BCR Properties* was grounded in section 12(4) of the *Contaminated Sites Regulation* which provided that "A director may specify the applicable water uses…" for a contaminated site. That regulation expressly provided authority for a director to specify the water uses that apply, whereas the Director was acting under no statutory or regulatory provision in relation to the communications in the January Letter. The Director maintains that the January Letter is reiterating a position on the validity of Sumas' special waste storage permit, which is administrative in nature.

[49] The Director also distinguishes *West Fraser* from the present case, on the basis that the decision under appeal in *West Fraser* was grounded in a director's power to amend a permit pursuant to section 16(4)(j) of the *Act*. Therefore, the decision in *West Fraser* was made pursuant to a statutory authority in the *Act*.

[50] In reply to Sumas' allegation that the January Letter contains an "order" for the purposes of section 99(a) of the *Act*, the Director submits that section 1 of the *Act* defines "order" to mean "an order made or given under this Act" [underlining added]. The Director submits, therefore, that there is no power to issue an order 'at large' for the purposes of an appeal.

[51] In reply to Sumas' allegation that the January Letter is "imposing a requirement" for the purposes of section 99(b) of the *Act*, the Director submits that any requirement that is being imposed is being imposed by the *Act* and the *Regulation*, and not the Director. In this case, the Director is communicating a requirement in the legislation (which is not appealable under section 99(b)), as opposed to exercising a statutory power to impose a requirement.

[52] Similarly, in regard to section 99(c) of the *Act*, the Director submits that there is no statutory provision under which the Director was "exercising a power" in relation to the communications in the January Letter.

[53] In reply to Sumas' allegation that the January Letter is "amending… [or] cancelling… a permit" or "including a requirement in a permit" under sections 99(d) and (e) of the *Act*, respectively, the Director submits that Sumas' permit was not a permit to introduce waste into the environment issued under section 14 of the *Act* or its predecessor provision in the *Waste Management Act*, and therefore, the Director could not have been amending Sumas' permit under section 16 of the *Act*. In any event, the Director submits that he could not have been amending, cancelling, or including a requirement in a permit that is no longer valid.

[54] Finally, the Director submits that Sumas will have an opportunity to file an appeal if, and when, a statutory decision is made by the Director.

Sumas' reply submissions

[55] Sumas argues that no specific statutory authority is required for there to be an appealable "decision" according to *Unifor*, particularly at paras. 16 and 30. In *Unifor*, the Court held that the Board must take a liberal and substantive approach to interpreting section 99 of the *Act*. Sumas submits that it is consistent with that approach to find that the January Letter contains an appealable decision. The Board should not refuse to hear the appeal for lack of jurisdiction unless it is clear that the contents of the January Letter are not a decision under section 99: *Revolution Organics, Limited Partnership v. Director, Environmental Management Act* (Decision No. 2017-EMA-004(a), April 13, 2017)[*Revolution #1*], at para. 82.

[56] Sumas submits that, in the January Letter, the Director confirmed the Ministry's position that:

- Sumas' permit was cancelled with the repeal of the *Waste Management Act*;
- since the permit is no longer valid, Sumas' operation of the Facility is illegal under the *Act*;
- Sumas must obtain new valid registration under the *Regulation* to bring the Facility into compliance with the *Act*; and
- Sumas may be subject to enforcement proceedings if it does not obtain new authorization pursuant to the *Regulation*.

[57] Sumas submits that these determinations appear to be final in nature, impact Sumas' legal rights and obligations, and create a requirement for Sumas. The Director exercised power over Sumas, and in doing so, he made a "decision" within the meaning of section 99 of the *Act*.

[58] In addition, Sumas submits that if the Director is correct that the repeal of the *Waste Management Act* cancelled Sumas' permit, then the repeal of that Act was a "decision" within the meaning of section 99 of the *Act*. Sumas acknowledges that the Board has no jurisdiction over the repeal of legislation, but Sumas submits that the Board has jurisdiction over the Ministry's interpretation and application of the legislation to regulated parties. Sumas maintains that the Board has "inherent jurisdiction" over an appeal involving an exercise of power by the Director that impacts the legal rights and obligations of a regulated party.

[59] Moreover, Sumas argues that it is irrelevant whether the Director had actual statutory authority to make a determination about the status of Sumas' permit, as it is apparent from the January Letter that the Director believed he had such authority.

[60] Finally, Sumas submits that it is clear that the parties have a different understanding of the legal status of Sumas' permit and its operation of the Facility, and this can only be resolved by an appeal to the Board.

The Director's sur-reply submissions

[61] The Director maintains that Sumas' basic premise is that no specific statutory authority is required for an alleged decision of a director to be considered an appealable decision for the purposes of section 99 of the *Act*. The Director argues

that, on the contrary, a decision must be made pursuant to the *Act*, or made under an authority derived from the *Act*, in order to be an appealable decision under the *Act*: *Unifor*, at para. 31; *Revolution #1*, at para. 68; *Revolution #2*, at para. 38; *West Fraser*, at para. 23; *Gibsons Alliance of Business and Community Society et al v. Director, Environmental Management Act* (Decision No. 2017-EMA-010(a), October 24, 2017 [*Gibsons*], at para. 72. For example, the Director notes that the appealed decision in *Revolution #1* was made pursuant to a regulation under the *Act*, and the appealed decision in *Gibsons* was made pursuant to a director's protocol and supporting statutory provisions.

[62] In contrast, the Director submits that the January Letter contains no communications that are an exercise of an authority under either the *Act* or an authority deriving from the *Act*. The Director maintains that the January Letter conveys information, expresses the Ministry's position, and suggests that Sumas register the Facility under the *Regulation*. The Director argues that Sumas has not raised any possible sources of authority under, or derived from, the *Act* as a basis for the communications in the January Letter; rather, Sumas submits that no such authority is required.

[63] In addition, the Director submits that the communications in the January Letter are not final in nature. The Director notes that the January Letter invited Sumas to share with the Ministry any previous relevant correspondence on the matter that would support Sumas' position, and stated that written notice would be provided to Sumas "In the event that this assessment [i.e., the compliance assessment schedule for no later than February 28, 2019] leads to a statutory decision of a director". The Director maintains that the positions taken in the January Letter may eventually lead to an appealable decision, but the communication in the January Letter is not such a decision. The interpretation of a statute may inform the Ministry's position, but it is not an appealable decision in itself. The January Letter did not cancel Sumas' permit.

The Panel's findings

[64] The Panel is mindful of the Court's findings in paras. 31 and 32 of *Unifor*, that section 99 of the *Act* "is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the statute", and should be interpreted in light of section 8 of the *Interpretation Act*, which states:

> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[65] The Panel notes that the Board decided *Revolution #1* before the Court of Appeal rendered its decision in *Unifor*, but after the BC Supreme Court issued its decision in *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592, which preceded *Unifor*. Therefore, the Board had the benefit of the BC Supreme Court's decision, but not the Court of Appeal's decision, when the Board decided *Revolution #1*. This is relevant because Court of Appeal's decision in *Unifor* provided some clarification regarding the findings of the BC Supreme Court.

[66] The BC Supreme Court held that the director's decision that had been appealed to the Board (i.e., a director's decision to require a monitoring plan as a condition of a permit amendment) was the second stage of a staged decision-making process involving a permit amendment (paras. 25 - 31). The Court of Appeal agreed with that findings, but clarified that the director's decision was a "deferred exercise of a power under ss. 14(1)(e) and 16(4)(j) of the" *Act* [underlining added](at para. 21). In other words, the Court of Appeal explained that the director's decision was part of, or derived from, a permit amendment under sections 14 and 16 the *Act*, which was appealable because it was "exercising a power" within the meaning of subsection 99(c) of the *Act*.

[67] The Court of Appeal also stated as follows at para. 34 of *Unifor*:

> … In granting and amending permits, the director under the Environmental Management Act has only those powers given to him by statute. Any authority that the director has in the permit, therefore, is a power deriving from the statute.
>
> [underlining added]

[68] Based on those findings in *Unifor*, the Panel rejects Sumas' argument that no statutory authority is required for there to be an appealable "decision" under section 99 of the *Act*. Although the Court of Appeal held that the Board must take a liberal approach to interpreting section 99 of the *Act*, the Court also confirmed that, for there to be an appealable "decision", there must be some exercise of authority under, or derived from, the *Act* that relates to section 99 of the *Act*. These principles are reflected in the Board's findings at paras. 38 and 39 of *Revolution #2*:

1) To be an appealable "decision", there must be some exercise of authority under the legislation that relates to a subsection of section 99.
2) "While a letter may, indeed, communicate a decision that is appealable under the *Act*, it may also convey information or decisions that are not appealable. Thus, as noted by the Director, it is the contents of a letter that must be examined to determine if there are any decisions that have been made and are, therefore, appealable" (paragraph 70).
3) The Board should consider the nature of the decision and the legislation at issue, and not decline its jurisdiction on a "purely formal or technical basis" (paragraph 68).

Further, the Board is mindful of Justice Groberman's finding in *Unifor* that section 99 is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the *Act*.

[69] The Panel agrees with and adopts the Board's findings in paras. 38 and 39 of *Revolution 2*. Given that section 1 of the *Act* defines "order" to mean "an order made or given under this Act", the Panel finds that "making an order" for the purposes of section 99(a) of the *Act* means making an order under the *Act* or an authority derived from the *Act*, such as a regulation. Also, given the findings in *Unifor*, the Panel finds that "imposing a requirement" for the purposes of section 99(b) of the *Act* refers to a requirement that is imposed under an authority that is

provided in, or derived from, the *Act*. Similarly, "exercising a power" for the purposes of section 99(c) of the *Act* means a power that is exercised pursuant to the *Act* or an authority derived from the *Act*.

[70] Regarding "amending… [or] cancelling… a permit" or "including a requirement in a permit" for the purposes of sections 99(d) and (e) of the *Act*, respectively, the Panel finds that section 1 the *Act* defines "permit" to mean "a permit issued under section 14 or under the regulations". Section 14 of the *Act* provides a director with the discretion to issue permits that authorize the introduction of waste (including hazardous waste, if specified in accordance with section 14(2)) into the environment. Section 14 of the *Act* does not contemplate the issuance of permits that authorize the storage, treatment, disposal or recycling of waste. In contrast, section 10 of the *Waste Management Act* authorized a manager to "issue a permit to introduce waste into the environment, to store special waste or to treat or recycle special waste" [underlining added]. Thus, section 10 of the *Waste Management Act* authorized the issuance of permits to store, treat or recycle certain types of waste, whereas section 14 of the *Act* does not.

[71] Consistent with the approach described in paras. 21 and 34 of *Unifor* and paras. 38 and 39 of *Revolution #2*, the Panel also finds that the appealed decisions in *BCR Properties*, *West Fraser*, *Revolution #1*, and *Gibsons* involved an exercise of authority under, or derived from, the *Act* or a regulation or protocol created pursuant to the *Act*, that related to section 99 of the *Act*.

[72] Specifically, the decision under appeal in *BCR Properties* "imposed a requirement" within the meaning of section 99(b) of the *Act*, and was grounded in section 12(4) of the *Contaminated Sites Regulation* which provided that "A director may specify the applicable water uses…" for a contaminated site. In that case, BCR Properties had applied for a water use determination in relation to groundwater at a contaminated site, and sought a determination that the drinking water standards did not apply to the site. In the appealed letter, the director determined that the drinking water standards did apply, and the director expressly rejected BCR's rationale for requesting a determination to the contrary. It was the director's determination pursuant to section 12(4) of the *Contaminated Sites Regulation* that constituted an appealable decision.

[73] Similarly, the appealed decision in *West Fraser* imposed a requirement within the meaning of section 99(b) of the *Act*. In that case, although the director initiated the permit amendment, rather than granting the permit amendment in response to an application from a permit holder, section 16(1)(a) of the *Act* expressly provides that a director may amend a permit "on the director's own initiative". The Board found that the director acted under section 16(4)(j) of the *Act* by imposing requirements on permits "to report information specified by the director in the manner specified by the director."

[74] The appealed decision in *Revolution #1* addressed notice requirements in relation to a permit application. The Board found that a director's letter contained a "decision" that imposed requirements within the meaning of section 99(b) of the *Act*, because it imposed timelines and specified the form and content of a public

notice that the applicant was required to publish, pursuant to regulations under the *Act*.

[75] The appealed decision in *Gibsons* involved a letter in which a director stated that the Ministry was "supportive of" a specific remediation plan and schedule for the investigation and remediation of a contaminated site, and the director referred to the remediation plan and schedule as the "accepted remedial plan and schedule". The Board found that the director's statements were made in response to a developer's formal application for a review of the remediation plan and schedule, and constituted a substantive decision that stemmed from the director's powers under section 54(4) and 64(4) of the *Act*. The Board held that this constituted "exercising a power" within the meaning of section 99(c) of the *Act*.

[76] With these principles in mind, the Panel has considered whether the statements in the January Letter constitute an appealable "decision" within the meaning of subsection 99 of the *Act*.

[77] The Panel finds that, in the January Letter, the Director:

- acknowledges receipt of Sumas' December 20, 2018 letter;
- reiterates the Ministry's position that Sumas' permit ceased to be valid when the *Waste Management Act* was repealed, and Sumas' operation of the Facility without a valid registration under the *Regulatio*n is contrary to the *Act*;
- Sumas' operation of the Facility without a valid registration may lead to enforcement action;
- invites Sumas to share any correspondence that may support Sumas' position that no new authorization is necessary;
- reminds Sumas that the Facility's next compliance assessment is scheduled to occur no later than February 28, 2019;
- advises that written notice of a decision will be provided to Sumas if the compliance assessment leads to a statutory decision of a director;
- "strongly suggests" "in the interim" that Sumas comply with the Compliance Manager's advice and register the Facility under the *Regulation*.

[78] Sumas asserts that it is appealing a substantive and final decision in the January Letter that Sumas' permit is not valid given the repeal of the *Waste Management Act*, making the Facility noncompliant with the *Act* and requiring Sumas to obtain registration under the *Regulation* or else be subject to enforcement action. Sumas characterizes this as a decision in which the Director is imposing requirements on Sumas and/or exercising powers over Sumas.

[79] However, Sumas has not identified any statutory authority under the *Act*, its regulations, or any statutory authority derived from the *Act*, for the alleged decision in the January Letter. For example, Sumas identifies no statutory authority for a director to "determine the validity of a permit", "interpret legislation", "require a person to register a facility under the *Regulation*", or "issue warnings" about possible enforcement action.

[80] Overall, the Panel finds that, even when viewed liberally, the January Letter does not contain a final or substantive decision that was made under, or derived from, the *Act*. Rather, the Director confirmed the Ministry's interpretation of the legislation, and explained the steps the Sumas may take to bring the Facility into compliance with the *Act* and avoid the risk of enforcement action that the Ministry may take in the future. The January Letter expressly states that "in the event that" the compliance assessment scheduled for February 28, 2019 "leads to a statutory decision by a director", Sumas "will be provided with written notice of such decision". The Director's choice of language implies that the January Letter is not substantive insofar as no "statutory decision of a director" has been made yet, and is not final insofar as, depending on future events, such a decision may be made.

[81] In the January Letter, the Director confirmed the Ministry's interpretation of the legislation, and continued the Ministry's disagreement with Sumas over the applicability of the transitional provision in section 140(2) of the *Act*. Even if the Ministry is wrong and section 140(2) of the *Act* applies to Sumas' permit, there must be an appealable "decision" under section 99 of the *Act* for the Board to have jurisdiction over the matter. Although the Board regularly interprets legislation in the course of deciding appeals under the *Act*, a dispute over the proper interpretation of legislation is not appealable to the Board without first there being an appealable "decision" over which the Board has jurisdiction. For example, the BC Supreme Court and the BC Court of Appeal have the jurisdiction under section 1 of the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68, to hear "any matter" referred to them by the Lieutenant Governor in Council (i.e., Cabinet) including cases that involve the interpretation of legislation, but the Board's jurisdiction under the *Act* does not extend to "any matter".

[82] Alternatively, if Sumas is wrong and section 140(2) of the *Act* does not apply to its permit, the Panel finds that section 8 of the *Act* and section 43 of the *Regulation* directly impose requirements on Sumas with regard to registering the Facility, without a director taking any action or exercising any decision-making power. Neither of those sections requires, authorizes or empowers a director to make a decision with respect to registration of a facility that stores, treats or recycles hazardous waste. The transitional provision in section 54 of the *Regulation* provides that a director "may order" that a permit issued under the *Waste Management Act* authorizing the storage, treatment, recycling or disposal of hazardous waste "remains valid and in force", but Sumas has provided no evidence that such an order has been issued.

[83] For these reasons, the Panel finds that the January Letter, viewed either on its own or together with the previous correspondence from the Ministry, does not contain an "order" within the meaning of section 99(a) of the *Act*, nor does it constitute "imposing a requirement" or "exercising a power" within the meaning of section 99(b) and (c) of the *Act*, respectively.

[84] In addition, even if the Panel assumes, for present purposes, that Sumas' permit is a "permit" for the purposes of the *Act* (which the Panel has not determined), the Panel finds that the January Letter does not contain a decision by the Director to amend, cancel, or include a requirement or condition in Sumas' permit within the meaning of sections 99(d) or (e) of the *Act*. As explained above,

if Sumas' permit is no longer valid, or a condition was included in the permit that affects its validity, this was caused by the repeal of the former *Waste Management Act* and the operation of the replacement legislation, and not due to any action or decision of a director (in the absence of any evidence that a director made an order under section 54 of the *Regulation*). Sumas acknowledges that the Board has no jurisdiction over the repeal of legislation.

[85] The Panel notes that the Director has the authority to make a determination to levy an administrative penalty under section 115 of the *Act*, if he concludes that Sumas has contravened a prescribed provision of the *Act* (such as section 8) or the regulations. Section 115(2) requires that such a determination be in a prescribed form and contain prescribed information. The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014, sets out a process that a director must follow before levying an administrative penalty, including requirements that a director provide specific written notices and an opportunity to be heard, before a determination of contravention is made. If such a determination is eventually made, it would be appealable to the Board under section 99(f) of the *Act*.

[86] In conclusion, the Panel finds that the parties clearly have a different interpretation of the legislation, which has led them to differing positions on the legal status of Sumas' permit and whether the operation of the Facility complies with the *Act*. However, the Panel finds that even on a liberal interpretation of section 99 of the *Act*, the January Letter contains no decision made under the *Act*, or an authority derived from the *Act*, that would constitute a "decision" within the meaning of section 99 of the *Act*. Although the Panel has found that the Board has no jurisdiction over the parties' disagreement at this point in time, the Panel finds that Sumas may eventually have recourse to an appeal to the Board if an appealable decision is made in the future.

DECISION

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

[88] For the reasons provided above, the Director's application to dismiss the appeal is granted. The appeal is dismissed for lack of jurisdiction pursuant to section 31(1)(a) of the *Administrative Tribunals Act*.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

April 26, 2019