Environmental Appeal Board

APPEAL NO. 98-HEA-09

In the matter of an appeal under section 8 of the *Health Act,* R.S.B.C. 1996, c. 179.

BETWEEN:	Utility Waterworks District	**APPELLANT #1**
AND:	Dana Hummel	**APPELLANT #2**
AND:	Environmental Health Officer	**RESPONDENT**
AND:	Bev Kendall	**PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Carol Quin, Chair	
DATE OF HEARING:	June 8, 1998	
PLACE OF HEARING:	Duncan, B. C.	
APPEARING:	For Appellant #1:	No one appeared
	For Appellant #2:	Dana Hummel
	For the Respondent:	Glen Smith
	For the Permit Holder:	David Conway

APPEAL

This was an appeal against the March 25, 1998 decision of the Environmental Health Officer ("EHO") to issue a permit for a sewage disposal system for Lot 34, Block 7, Plan 4935, Cowichan Lake District (the "Property").

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 8 of the *Health Act.* The Board, or a Panel of it, may, after hearing all evidence presented, decide to vary, rescind or uphold the decision of the EHO.

The Appellants are seeking an order that the permit issued by the EHO for repair of an existing system be rescinded on the grounds that the lot site plan is inaccurate, the new disposal field is too close to existing supply and domestic waterlines, and that the disposal field is too close to a potential breakout point.

BACKGROUND

The Property is located in the village of Youbou, near Duncan, B.C. On the 15 metre x 96 metre sloped Property there is a relatively small dwelling, constructed

sometime before 1985, which in recent years has been used as a rental house. Domestic water to the Property is provided by a community water line provided by the local Youbou Utility Waterworks District ("Waterworks District").

Over time alterations were made to the house and to the old sewage disposal system, without a permit. (The system was most likely installed before 1985.) In 1996, the Permit Holder and present owner of the Property, Bev Kendall, noticed effluent surfacing on the ground in front of the house below a new deck. Ms. Kendall had the failing sewage disposal system repaired, again without a sewage disposal permit.

Sometime after that a complaint was submitted to the local Health Unit, and after investigation by the EHO, Ron Cook, further repairs to the system were ordered. The Property is considered too small to accommodate a conventional sewage disposal field.

The EHO informed the Permit Holder that a permit would be required as well as an engineer- designed plan for a system. The consulting engineering firm hired by the Permit Holder, Wright Parry Consulting Engineers, discussed the site with the EHO, suggesting that a package treatment plant be installed rather than simply extending the existing small field. A design was submitted in October of 1997 and additional revisions in March 1998. The final proposal called for leaving the existing 3400 litre septic tank and adding a "Multi-flo" package treatment plant plus adding another line to the original field, thus enlarging the field to 22 m in total length. The proposed system would provide aerobic treatment. Hydraulic loading and dye tests were carried out by Wright Parry Consulting Engineers showing no breakout along the newly constructed driveway and staircase.

The final application for "repair" of the older sewage disposal system was submitted by Wright Parry Consulting Engineers on March 18, 1998. An upgrading of the older system was proposed for a two bedroom single family dwelling with an estimated daily flow of 1136 litres.

A permit for the system as proposed was issued by the EHO on March 25, 1998. Conditions attached to the Permit called for:

1. Wright Parry drawing 9889 C-1 and D. Conway letter dated March 19, 1998 shall form part of this permit,

2. Package treatment plant distributor to provide written confirmation that the plant installation conforms to manufacturer's specifications,

3. Restrictive Covenant to be registered prior to final inspection. (limiting the dwelling to two bedrooms)

Shortly after the permit was issued the adjacent neighbour and the Waterworks District appealed the permit on the grounds that the plan submitted had omitted to show domestic utility waterlines, correct setbacks, construction of a new driveway and stairs and potential breakout points.

One of the Appellants, Dana Hummel, is the owner of the adjacent residence which shares a water line with the house on the Property in question. The joint water line runs from the Waterworks District's supply line along Arbutus Road in front of the

two lots, outside the property lines, and then along the common property line, splitting to the two dwellings. Mr. Hummel expressed concern for his drinking water quality.

In its initial appeal notice, the Waterworks District also expressed concern that the location of the proposed disposal field for the Property could affect their waterlines because the application showed inaccurate measurements of setbacks from the waterlines and from potential breakout points. The Waterworks District provided no written submissions, however, and no spokesperson appeared at the hearing.

ISSUES AND RELEVANT POLICY AND LEGISLATION

The *Health Act* (the "*Act*") and *Sewage Disposal Regulation* (the "*Regulation*") govern the approval of residential sewage disposal systems. The primary issue in this appeal is whether the *Act* and the *Regulation* permits the EHO to approve the proposed sewage disposal system for the Property to repair the existing failing system, e.g.:

1. Can the approval be considered as a "repair" under section 7(2) of the Regulation?

2. If so, what setbacks apply: e.g. to waterlines or to potential breakout points?

3. Will the proposed system, if installed and used as approved, create a potential threat to public health?

The relevant legislation from the *Regulation* is:

Sewage from Buildings

2 (2) Except as relieved by an authorization issued under section 4(1) or by terms of a permit issued under B.C. Reg. 577/75, it is the duty of the owner or occupier of every building to ensure that domestic sewage emanating from the building does not reach the surface of land or discharge into a surface body of fresh water.

Permits to construct systems

3 (1) No person shall construct, install, alter or repair a sewage disposal system or cause it to be constructed, installed altered or repaired unless he holds a permit…

…

(3) No permit shall be issued under this section

(a) in the case of construction or installation, until site investigation tests, set out in or required by Schedule 1 have been carried out to the satisfaction of the medical health officer or public health inspector, and either of them is satisfied that, having regard to the provisions of that schedule, the construction, installation, and ultimate use of the system will not contravene the Act or this regulation

Standards for systems

6 Subject to section 7, no sewage disposal system constructed after the date of this regulation which involves the use of a septic tank or a package treatment plant is permitted unless the system conforms with the standards of construction, capacity, design, installation, location, absorption, operation, and use set out:

(a) for conventional septic tank systems, in Schedule 2,

(b) for conventional package treatment plant systems, in Schedule 3.

Alternate methods

7 (2) Where a sewage disposal system, constructed or installed prior to December 20, 1985 is in need of repair or alteration and the appropriate work cannot reasonably be effected in accordance with this regulation, the medical health officer or public health inspector may issue a permit to repair or alter under section 3 if the sewage disposal system, when repaired or altered in accordance with the conditions contained in the permit, *will not constitute a health hazard.* [emphasis added]

MOH Policy

The "Policy On-site Sewage Disposal," section 4.4 "Breakout Point Setback" states:

> The Environmental Health Officer may consider reducing [the] 50 foot minimum setback distance upon receipt of a report from a professional engineer who has specialized training in soils or hydrology, indicating that the sewage will be attenuated before it leaves the Property. This report will assist the [EHO] in the exercise of his discretion given under section 3(3)(a).

EVIDENCE AND DISCUSSION

1. Can the proposed system be approved as a "repair" of an existing failing system?

Dana Hummel (hereafter the "Appellant"), the owner of the adjacent property and the only one of the Appellants to make a presentation at the appeal hearing, explained that over time he had noticed alterations being made to the building and to the old septic system on the subject Property. These "alterations," he said, caused "septic," or black sewage, to ooze out in front of the house, below a new deck. The Appellant stated that the owner, upon discovering the effluent, had quickly built a new disposal field.

The Appellant argued that, in his view, the new field is "not legal" as it was not built under permit. He therefore questioned how a permit could be issued for a "repair" of an existing system if it had been recently rebuilt, without a permit, by the present owner, who wanted to sell the Property. The Appellant argued that the system is therefore not a "repair" but rather a *new system* and should not be "grand-fathered." He expressed both his and his wife's concerns for the health of

their family should their water become contaminated by effluent breaking out too close to the domestic water line.

Glen Smith, the Deputy Chief Environmental Health Officer for the Central Vancouver Island Health Region, stated that the small dwelling and some form of disposal system had been constructed well before 1985, which is a condition of the *Regulation* if repairs are required but a system cannot comply with the Schedules. He explained that because the system was found to be failing in 1996, a permit for an improved system could be issued for repair or alteration of the failing system. He added that, upon initial inspection of the Property following the complaint, the repairs which had been made by the owner without a permit were not satisfactory and that a professional engineer would be required to propose and carry out "design enhancements" for the system. The system now proposed and approved, he affirmed, "…complies with all relevant requirements of the *Regulation*."

The Permit Holder, represented by Wright Parry Consulting Engineers, stated that because the old system had failed, it is now being repaired (upgraded) with a much more effective disposal system, which will improve public health protection. An historic background was provided indicating that a disposal system had been installed prior to 1985.

After reviewing the relevant legislation, the Panel finds that the EHO's consideration and approval of the proposed system as a repair of an existing but failing system is valid and consistent with the *Regulation*. Section 7(2) requires only that the original system was installed prior to 1985 and that it is "in need of repair or alteration." It further states that an EHO may issue a permit to correct the problem, through repair or alteration, in *accordance with the conditions contained in the permit* provided that it "…will not constitute a health hazard."

2. Does the proposal meet the setback requirements as set out in the *Regulation*?

The Appellant argued that the waterlines should have been shown on the sketch accompanying the application and that various setback distances, such as the distances to potential breakout points, had been misrepresented or omitted by the applicant. He stated that he believed that there was insufficient setback distance between the disposal field and the shared domestic water line located on the property line between the two properties. This is especially so, he maintained, because the lines are old and any effluent breaking out from the field could possibly find its way into the old pipes and thus contaminate his family's drinking water.

He maintained that a new location for the disposal system should have been explored first, because of the space constraints in front of the house, and that a new area could have been located in the back of the house rather than in front.

The Appellant expressed further concerns about potential "breakouts" from the field near the cut made by the owner for the new access to the house, but admitted that he had not seen any seepage along the exposed bank during the hydraulic testing. He stated that the house was empty during the testing and that the field was not being used. He repeated his concern that the plot plan was inaccurate especially with regard to the location of the new access to the residence on the Property.

Mr. Hummel noted that he believed that there existed a possibility of contamination of his drinking water should the new sewage disposal system on the adjacent property cause effluent to flow in the vicinity of their common waterline. He explained that when the Permit Holder was building a new separate access to the dwelling the common water line between the two properties had been broken and was subsequently repaired, in his view, in a substandard manner.

The Appellant spoke of previous disputes between himself and the Permit Holder. The arguments involved driveway access and an old stairway located on their common property line which, if removed could interfere with the new field or create new breakout points. He argued that removal of the old common stairway would, in his view, disturb the "biomat" and possibly allow effluent to travel to his waterline.

The Appellant stated that the Waterworks District did not have sufficient funds (he estimated $5-$10,000) to upgrade its old lines or to replace the one into his residence. The Appellant also stated that he believed that the waterline junction box at the foot of his property line should have been shown on the plot plan and that there is no "retaining wall" along the Permit Holder's new stairs as is shown on the plan. In reality, there are banks along the new driveway access which create potential break-out points.

The Respondent's statement of points note that "The setback to the Waterworks District line exceeds 3 metres. A set-back of less than 3 metres could, however, be considered for repairs to [an] existing sewage disposal system." He added, "The responsibility for correcting deficiencies with the integrity of the water distribution system and/or lack of bacteriological treatment of the water supply clearly lies with the water supply [purveyor]" under the *Safe Drinking Water Regulation*.

Mr. Smith explained that he was aware that the waterline along the street was not shown on the plan, but advised that the *Regulation* does not require it. He stated further that a decision had been made not to disturb the line by searching for it and that in any case, the setback distance was greater than the required 3 metres.

David Conway, of Wright Parry Consulting Engineers, stated that the Waterworks District's water supply main in front of the Property had been located and was measured to be 8.5 metres from the nearest disposal field pipe. He noted also that the 30 metre [100 ft.] setback distances required by *Regulation* is to a water "source," but that only 3 metre setback is required from a domestic water "line." He stated further that there is more than 5 metres to the nearest waterline. In answer to the Appellant's concern that the waterlines had not been shown on the site plan, Mr. Conway stated that it is his understanding with a "repair" application that all utilities, such as water lines, do not have to be located on the site plan.

In reviewing the relevant portions of the *Regulation* with regard to the question of whether a proposal to "repair or alter" a failing system must comply with the minimum setbacks as required in the various schedules, the Panel finds that the EHO is not required to insist that these are strictly met if the EHO is satisfied that no threat to the health of the public will result from the relaxation. Mandatory conditions attached to the permit are intended to provide mitigating measures to offset insufficient setback distances. Further, the R*egulation* does not require that all water lines be shown on the site plan, although MOH's permit application form does ask that they *should* appear. The Panel is satisfied that if the water lines are

greater than 5 metres from the disposal field and if a condition were included in the permit that the shared domestic water line running into the two houses shall be replaced, strengthened and protected as proposed by the Permit Holder (see issue 3), then there should be little or no chance of interchange of water between the field and the water supply line.

Accordingly, the Panel finds that the setbacks to the waterline and potential breakouts are sufficient to satisfy the EHO that public health is safeguarded.

3. Does the proposed system, as approved, pose any threat to public health?

The Appellant expressed concern that the very old and poorly repaired waterline could allow for the intrusion of effluent into the drinking water supply for his house. He argued that the field as proposed would be too close to the line and to potential breakout points where the new driveway and stairs had been constructed by the Permit Holder. He stated that he feared potential health problems for his family if the "biomat" were disturbed. He requested that, at the least, a new water line to the houses be installed.

The Appellant concluded by stating that he is concerned that the Permit Holder, who is a real estate agent, merely wants to fix the old system so that she can sell the Property. He added that he doesn't like the system proposed and would prefer a composting toilet instead because, in his view, "…the worst thing you can do with solid waste is put it in water."

The Respondent replied to the Appellant's concern that the approved system would allow sewage to infiltrate the Appellant's drinking water where the old water line passes between the two properties. In its statement of points, the Respondent argued that "It may be reasonable and prudent to consider upgrading the service water line to the dwelling as an additional condition of permit. It is however, our position that the permit was correctly granted in accordance with section 7(2)." He further noted that responsibility lies with the Waterworks District to maintain its lines in good condition.

The Respondent stated that "A package treatment plant has been included in the design to enhance the quality of effluent." He commented, as well, that the driveway construction on the Property had been carried out before the breakout and dye tests were conducted by the engineering firm and that no problems were evident along the bank.

Mr. Smith stated that pursuant to the requirement of section 3 of the *Regulation,* he could see nothing about the system as approved which could constitute a potential health threat. The Respondent explained that both section 7(2) and section 3 provide the EHO with the discretion to approve such systems if no health hazard exists. He added that he is satisfied that the system has been inspected by an engineer, that all the conditions of the permit would be met, and that a final inspection of the package treatment plant will be made before final approval, prior to granting an "authorization to operate."

He explained that consideration had been given to the possibility of relocating the field to the area behind the house and that he had asked to have engineers look at

it. He stated however that they had concluded that that area was too sloped for a field, that the existing house foundation itself would then constitute a potential breakout point, and that the creek behind/beside the Property would be less than 30 metres from that site. That location was therefore not approvable under Schedule 3 of the *Regulation*. He submitted that the present location was the only possible site for the repaired system.

The Respondent concluded that in his opinion the proposed system would cause no health hazard, particularly if the permit were to require that the water line be upgraded in accordance with the Permit Holder's engineer's recommendation. In addition, he stated that in his view the approved system should not cause effluent to breakout or reach a water body.

Mr. Conway, for the Permit Holder, assured the Panel that the procedures of investigation, design and follow-up had been adequate and that he felt certain that the system would function well.

He stated that relocation of the access point of the waterline into the Permit Holder's residence as well as replacement and strengthening of the common line on the property line was a possible solution to the Appellant's concerns.

Mr. Conway stated that the repairs and alterations to the existing system and field would ensure that the effluent would be well treated and would not reach the waterline or any breakout points along the banks which were created when the new driveway and stairs were constructed (prior to the hydraulic and dye testing.) He assured the Panel that the package treatment plant chosen would reduce any "biomat" buildup. In closing, he asked that the permit be upheld with the addition of the requirement that the water line be upgraded.

The Panel, in reviewing the current legislation, understands that for a permit to be issued to alter or repair an older failing system, public health must not be jeopardized. The *Safe Drinking Water Regulation* under the *Act* puts the onus on the water purveyor to deliver safe potable water. However, as an added insurance both for the Permit Holder and for the neighbouring Appellant and to be certain that no public health risk exists or would be created, the Panel concurs that it would be "reasonable and prudent" to ensure that no effluent is deposited within 5 metres of the line and that it is not possible for the water line carrying domestic water to be subject to any effluent intrusion. The Panel agrees with the Permit Holder's proposal to locate, reconstruct, and protect the water line that serves the two dwellings.

The Panel finds, in addition, that with the improvements proposed to the system, designed in consultation with an engineering firm, and with hydraulic and dye testing having been successfully carried out the system should safeguard public health and not endanger the safety of the Appellant's family.

4. Should costs be awarded?

The Board has authority under section 11(14.2) of the *Environment Management Act*, "requiring a party to pay all or part of the cost of another party in connection with the appeal, as determined by the appeal board."

At the end of the hearing, the Permit Holder applied for an order for costs. Specifically she requested that the costs incurred in responding to the appeal initiated by the Appellants be awarded to her.

The Board's Policy Manual gives the Board some guidance in the consideration of costs applications. The policy manual provides as follows:

The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs". The Board's policy is to award costs in special circumstances. Those circumstances include:

(a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

(b) where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;

(c) where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing";

(d) where a party unreasonably delays the proceeding;

(e) where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and

(f) where a party has continued to deal with issues which the Board has advised are irrelevant.

A panel of the Board is not bound to order costs when one of the above-mentioned examples occurs, nor does the panel have to find that one of the examples must have occurred to order costs.

In this case the Permit Holder has not provided any grounds to support her application for costs. Additionally, the Board is satisfied that the appeal filed by the Appellant, Dana Hummel, was for the legitimate concern that the proposed septic system would impact the quality of his drinking water. The appeal is neither frivolous nor vexatious and has been brought in a timely manner. Similarly, there is no evidence that the appeal filed by the Water District was commenced for improper reasons.

It is noted that the Water District failed to attend the hearing into this matter. However, the Panel is not convinced that this resulted in any prejudice to the Permit Holder as a full hearing into the merits was conducted in any event. Accordingly the application for costs is denied.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has considered all the relevant documented evidence and all comments made during the hearing, whether or not they have been specifically reiterated here.

The Panel concludes that the Appellant did not successfully demonstrate that the EHO erred in issuing a permit for a repair and alteration of the sewage disposal system for the subject Property. The Regulation allows the EHO the discretion

under section 7(2) to issue a permit to upgrade a failing system to avoid any health hazard the leaking effluent might have caused. The Panel is satisfied that the system as proposed will not create a threat to public health, and agrees that the shared domestic water line serving the two houses should be replaced and protected. In addition, the site plan attached to the Permit should be updated to show the water lines as they are now known as well as the actual setback distances (disposal field to property line, breakout points, etc.)

The Panel has therefore decided that some amendments should be made to the three conditions attached to the March 25, 1998 Permit and that some additional conditions should be added as well. The Permit conditions will therefore to read as follows [additions and amendments in Italics]:

1. The Wright Parry drawing 9889 C-*1 as presented as Exhibit # 6 at hearing on June 8, 1998 [red date stamped January 7, 1998]* and D. Conway letter dated March 19, 1998 shall form part of this permit,

2. *The drawing shall be updated to show domestic water lines and the distances from them to the nearest point of the new disposal field or to any potential breakout point,*

3. *The existing shared domestic water service line shall be upgraded and the design be revised to include relaying the domestic water connection from the wall of the house to a minimum of 5 metres beyond the disposal field, or to the previous break in the line, whichever is further, to the following standards (as proposed in the Permit Holder's May 28, 1998, Wright Parry Statement of Points, specifically Item 1.3 paragraph 5):*

    - *19 mm diameter polyethylene tubing inside a 32 mm polyethylene sleeve with Trenton Tec tape wrap at ends*
    - *No joints within 3 m of disposal field*
    - *Backfill with clay soil*

4. Package treatment plant distributor to provide written confirmation that the plant installation conforms to manufacturer's specifications, and

5. Restrictive Covenant to be registered prior to final inspection, *limiting the dwelling to two bedrooms,*

6. *Minimum field length shall be 22 m.*

With the foregoing amendments and additions to the conditions attached to the Permit issued by the EHO on March 25, 1998, the Panel dismisses the appeal. The

Permit should become effective as of decision issuance date to compensate for lost 6 months due to appeal process.

Carol Quin, Panel Chair
Environmental Appeal Board

October 7, 1998