BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NOS. 2002-HEA-030, 031, 032

In the matter of an appeal under section 8(4) of the *Health Act*, R.S.B.C. 1996, c. 179.

BETWEEN:	Christine and Dan Webb Waco and Kim Wallace Alex and Clover Quesnel Gordon and Carol Webb Kevin King	**APPELLANTS**
AND:	Environmental Health Officer	**RESPONDENT**
AND:	No. 3 V.C. Ventures Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair Fred Henton, Member David Ormerod, Member	
DATE OF HEARING:	January 23, 2003, concluded in writing on January 30, 2003	
PLACE OF HEARING:	Victoria, B.C.	

APPEARING:	For the Appellants:	Christine and Dan Webb Kim Wallace
	For the Respondent:	Gary Gibson
	For the Third Party:	Craig Beveridge, Counsel

APPEALS

Christine and Dan Webb, Waco and Kim Wallace, Alex and Clover Quesnel, Gordon and Carol Webb, and Kevin King (the "Appellants") filed a joint appeal against the September 23, 2002 decision of Erwin Dyck, Environmental Health Officer ("EHO") with the Vancouver Island Health Authority, to issue 3 sewage disposal permits for 3 lots on Gillie Road in Saanich, owned by No. 3 V.C. Ventures Ltd. (the "Permit Holder").

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act*, R.S.B.C. 1996, c. 118, and section 8(4) of

the *Health Act* (the "*Act*"). The Board, or a panel of it, after hearing all the evidence, may decide to confirm, vary, or rescind the decision of the Respondent.

The Appellants seek an order rescinding the permits, and an order that the Vancouver Island Health Authority cease approving sewage disposal systems on lands in the area that do not meet certain policy guidelines and certain requirements of the *Sewage Disposal Regulation*, B.C. Reg. 411/85 (the "*Regulation*").

BACKGROUND

The subject properties have municipal addresses of 4156, 4158, and 4160 Gillie Road, and are legally described, respectively, as Lots 1, 2, and 3, Block 5, Section 1, Lake District, Plan 1719 (the "Lots"). The Lots are all rectangular in shape. They are approximately 15.24 metres wide, and increase in depth from approximately 34 metres (north side of Lot 3) to approximately 42 metres (south side of Lot 1). All of the Lots front onto Gillie Road to the east. Lot 3 is the northernmost of the three, and is bounded on the south by Lot 2. The south side of Lot 2 is bounded by Lot 1, and the south side of Lot 1 is bounded by Herbert Street. The west sides of Lots 1, 2, and 3 are bounded by Lots 18, 17 and 16, respectively.

The Appellants all live within one or two blocks of the Lots.

The Lots are located near an area known as "Hastings Flats" which is subject to periodic flooding by Durrell Creek. In 1984, the municipality of Saanich passed a Fill Control Bylaw that generally prohibits building and filling below the 12.71 metre elevation in the Hastings Flats area. Building and filling is permitted above the 12.71 metre elevation, but any proposal to build or add fill below that elevation requires the proponent to seek a variance from Saanich. The 12.71 metre elevation was set as the so-called "Fill Prohibition Boundary" by taking the elevation of the water measured during a flood in 1974, and adding a safety margin of 1.5 metres.

On two occasions prior to the issuance of the permits that are the subject of these appeals, Sierra Financial Corp., a previous owner of the Lots, obtained permits to construct sewage disposal systems on the Lots. However, the owner did not install the proposed systems before those permits expired.

The first permits were issued for the Lots in 1999. On September 10, 1999, Ron Parker, a professional engineer with Eagle Engineering Ltd., submitted permit applications on behalf of Sierra Financial Corp. The proposed systems included a shared absorption field with a sand mound infiltration bed on Lot 3, essentially identical to the absorption field that is an issue in the present appeals, and an Orenco "OSI" package treatment plant that would serve a home on each Lot. On September 21, 1999, the EHO approved those permit applications.

On August 1, 2001, James Gait submitted permit applications on behalf of Sierra Financial Corp. The proposed systems again included a shared absorption field with a sand mound infiltration bed on Lot 3, and a package treatment plant (no make or

model was specified) that would serve a home on each Lot. On August 2, 2001, the EHO approved those permit applications.

On July 31, 2002, Alan Pitts submitted permit applications on behalf of the current owner, No. 3 V.C. Ventures. An "Enviroserver" package treatment plant will serve a 3-bedroom house to be built on each Lot. Effluent from each house will be treated in its individual treatment plant, and then piped to a shared absorption field on Lot 3 where the effluent will be pressure distributed through pipes into a sand mound infiltration bed consisting of 18 inches of C33 sand, overlying the soil. A portion of Lot 2 is designated as a "standby area" to which C33 sand is added. The portions of Lots 2 and 3 on which the absorption field, standby area, and piping connecting the treatment plants to the absorption field are located are subject to easements in favour of the Province of British Columbia, as represented by the Ministry of Health. The easements are set out in a covenant that has been registered under section 219 of the *Land Title Act*.

The EHO considered the permit applications on the basis that the sewage disposal systems are "alternate" package treatment plant systems, which are evaluated based on requirements that apply under sections 3 and 7(1)(b), and Schedules 1 and 3, of the *Regulation*. Under sections 3 and 7(1)(b), EHO's are granted discretion in considering certain aspects of applications to install alternate systems, and policies have been developed to assist EHO's in evaluating applications to install alternate systems. The policies discussed in this decision are: the Ministry of Health's *Policy –On-site Sewage Disposal* (the "*Policy*"), which provides provincial guidelines for alternate systems and the Ministry of Health's *Submerged Media Fixed Film Treatment Plant Protocol* dated November 20, 2001 (the "*Protocol*"), which provides guidelines for considering "protocol" package treatment plants such as the "Enviroserver", which provide "level 3" sewage treatment.

On September 23, 2002, the EHO approved the permit applications. The following conditions were attached to all 3 permits:

- ALTERNATE METHOD – TREATMENT PLANT OSI - SAND FILTER OR ENVIROSERVER.
- FILTER CLOTH REQUIRED.
- 18 INCHES OF C33 SAND OR EQUIVALENT REQUIRED IN SAND MOUND.
- SAND MOUND INFILTRATION BED 240SQ FEET (7.0 FT WIDE X 35 FT LONG).
- INSTALLATION ONLY DURING DRY WEATHER AND UNSATURATED SOIL CONDITIONS.
- PUMP OR SIPHON CHAMBER REQUIRED.
- PRESSURE DISTRIBUTION.
- FINAL SYSTEM PLAN REQUIRED.
- THE SAND MOUNDS TO BE INSTALLED BY A CERTIFIED INSTALLER.

The permits for Lots 1 and 2 also state as follows:

- AN EASEMENT IS REQUIRED OVER LOT 3, PLAN 1719, BLOCK 5.

In addition, the permit for Lot 2 states:

- ADD C33 SAND TO THE STANDBY AREA ON LOT 2.

Installation of the systems began within one day after the permits were issued, and was completed by approximately the end of October 2002. On November 14, 2002, the EHO authorized backfilling and use of the systems, subject to permanent power connections being installed. The Panel was advised that no building permits have been issued for the Lots.

On October 16, 2002, the Board received the Appellants' joint Notice of Appeal against the issuance of the permits. In general, the Appellants appeal on the basis that the systems will create a public health and environmental hazard, and do not comply with certain provisions of the *Act*, the *Regulation*, the *Policy*, and the *Protocol*. The Appellants raised five specific grounds for appeal:

- The owner did not give notice that the permits had been issued, contrary to section 3.3 of the *Regulation*.

- The treatment plants will not be located more than 15 metres (50 feet) from the high water mark of the surrounding flood plain as required by the *Regulation*, and will, therefore, impair the quality of the surface water and ground water in the area, creating a health risk.

- Inadequate percolation tests and wet weather assessments were performed before the issuance of the permits. None of the Lots meet the minimum requirement of 12 inches of native, unsaturated percable soil to screen the effluent of viruses and other effluent by-products before entry into ground water sources.

- The septic field will not be located more than 30 metres (100 feet) from a source of domestic water (well) as required by the *Regulation*, and will, therefore, impair the quality of the ground water in the area, creating a health risk.

- The setback from the system and potential downslope breakout points is considerably less than 15.25 metres (50 feet), contrary to chapter 4.4 of the *Policy*.

The Appellants seek an order rescinding the permits, and an order that that the Health Authority cease approving sewage disposal systems on lands in the area that do not meet certain policy guidelines and certain requirements of the *Regulation*.

The EHO and the Permit Holder request that the Board uphold the decision to issue the permits, and dismiss the appeals. The EHO submits that the systems comply with the *Act* and the *Regulation*, and will protect the public health.

On January 27, 2003, after the oral hearing concluded, the Appellants submitted additional comments on the issue of whether the standby area contains suitable soil, and whether adequate site investigations, percolation testing, and wet weather assessments were conducted in the standby area. The Board offered the other parties an opportunity to respond to these comments by January 30, 2003. The EHO and Permit Holder responded to the Appellants' additional comments. The Panel has accepted and considered the new submissions in its decision.

ISSUES

The issues before the Panel are:

1. Whether the proposed system complies with the standards in the *Regulation* and will protect the public health, and

2. Whether notices of permits were posted on each of the Lots in accordance with section 3.3 of the *Regulation*.

RELEVANT LEGISLATION

The relevant section in the *Act* is:

Sewage Disposal

25 A common sewer or system of sewerage must not be established or continued unless there is maintained with it a system of sewage purification and disposal that removes any menace to public health, and the minister may call for, and any municipal council, person or corporation must, when requested, provide as soon as possible, the information and data in relation to the matters under their control as the minister may consider necessary.

The relevant sections in the *Regulation* are as follows:

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 issued under this section or section 3.01.

...

(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, and

Notification Requirements

3.2 A person who is issued a permit under section 3 or 3.01 to construct, install, alter or repair a sewage disposal system

(a) must post a notice in accordance with section 3.3, and

Posted Notice

3.3 (1) The notice required under section 3.2 (a) must be in the form specified in Schedule 5 and must include

(a) a site map showing the location of the sewage disposal system that is to be constructed, installed, altered or repaired, and

(b) the conditions that apply to the permit.

(2) The notice required under section 3.2 (a) must

(a) be posted in a conspicuous place on the parcel for which the permit is issued,

(b) be posted not more than 3 days from the date the permit is issued, and

(c) remain posted for 30 days after the date the permit is issued.

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

...

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

Alternate Methods

7 (1) Where a medical health officer or public health inspector is satisfied that it is impossible for a person to comply with

...

(b) in the case of a conventional package treatment plant system, sections 11, 12 or 18 of Schedule 3,

but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under section 3, containing conditions that he considers appropriate to meet the omitted standards having regard to safeguarding public health.

SCHEDULE 1 – SITE INVESTIGATION

1 The obligations on an owner before applying for a permit to construct or install under section 3 (2) or section 3.01, are as follows:

(a) determination of the subsurface ground conditions in the area of the absorption field by digging or boring a representative number of holes to a minimum depth of 1.2 m [4 ft.], report the conditions found, leave the excavated material for inspection and cover the test holes;

(b) determination of the suitability of the soil to absorb effluent by conducting percolation tests as follows:

(i) percolation test holes must be made at points and elevations selected as typical in the area of the proposed absorption field;

(ii) test holes must be dug at each end of the area of the absorption field. Further holes maybe required, depending upon the nature of the soil, the results of the first tests and the size of the proposed absorption field;

(iii) test holes must be 30 cm [12 in.] square and excavated to the proposed depth of the absorption field;

...

3 (1) The applicant for a permit shall report the results of all determinations made under the schedule in a manner and form satisfactory to the Ministry of Health.

(2) If the results reported under subsection (1) are unable to satisfy the medical health officer or public health inspector that the quality of the surface and ground water will not be impaired, the medial health officer or public health inspector may require that alternative or additional tests be carried out by or on behalf of the applicant for a permit, so as to ensure that proper surface and ground water quality will be maintained.

SCHEDULE 3 – CONVENTIONAL PACKAGE TREATMENT PLANT SYSTEMS

...

11 A conventional absorption field shall not be located in an area where an impervious layer of soil or bedrock, or the ground water table, are less than 1.2 m [4 ft.] below the ground before it has been artificially disturbed by placement of fill, excavation or otherwise.

12 A conventional absorption field shall not be allowed where the percolation rate of the soil exceeds 30 minutes per 2.5 cm [1 in.] or the slope of the absorption field area is greater than 30%.

...

14 An absorption field shall be located not less than

…

(c) 3m [10 ft.] from an interceptor drain,

(d) 30 m [100 ft.] from a source of domestic water,

(e) 30 m [100 ft.] from the high water mark, and

…

Section 1 of the *Regulation* defines "high water mark" as:

"high water mark" means a point on the shoreline which corresponds

(a) for a controlled lake, to the highest water level within the normal operating range for that lake, and

(b) for any other body of nontidal water, to the average highest water level calculated from measurements taken over a sufficient number of years to enable a fair and reasonable estimate.

DISCUSSION

1. Whether the proposed system complies with the standards in the *Regulation* and will protect the public health.

To determine whether the proposed system complies with the standards in the *Regulation* and will protect the public health, the Panel considered each of the following sub-issues:

a) Compliance with the requirement under section 14(e), Schedule 3, of the *Regulation* for a minimum 100-foot setback between an absorption field and a high water mark;

b) Inadequate site investigation and soil conditions on Lots 2 and 3;

c) Compliance with the requirement under section 14(d), Schedule 3, of the *Regulation* for a minimum 100-foot setback between an absorption field and a source of domestic water;

d) Potential for harm to public health or the environment arising from a breakout of effluent at a point downslope of the absorption field; namely, the perimeter drains for the proposed dwellings on Lots 2 and 3; and

e) Potential health risk arising from inadequate system maintenance.

a) Compliance with the 100-foot setback requirement in section 14(e), Schedule 3

The Appellants argue that the treatment plants will be less than 50 feet from the high water mark of the surrounding floodplain, and, therefore, the systems do not comply with the *Regulation*. The Appellants submit that, although the EHO

approved the permits based on his determination that the bank of Durrell Creek is the high water mark for the purpose of measuring setback distances, the Lots are located in a low-lying area that it is part of the natural floodplain of Durrell Creek. The Appellants submit that, in order to protect public health, the high water mark should be defined as the 20-year average flood level. The Appellants maintain that the municipality of Saanich could have provided the EHO with flood data to determine that level. The Appellants submit the EHO was not duly diligent in exercising his discretion to determine the appropriate high water mark.

In support of those submissions, the Appellants provided a number of documents, including:

- photos of flooded wetlands in the Hastings Flats area, which were taken in approximately January 1998.
- a copy of a letter dated December 11, 2002, from John Rowse, Project Manager, Land Use, Ministry of Health Planning. With respect to floodplains, Mr. Rowse states that "The provincial guideline suggests using 20 year floodplain."
- copies of portions of the *Durrell Creek Integrated Watershed Management Plan* (the "Durrell Creek IWMP") prepared by Saanich in May 2000. At page 22, the Durrell Creek IWMP states:

  > A frequency analysis was performed on the set of annual maximum water levels. Estimated water levels for 2-, 10-, 25-, 50-, 100-, and 200-year returns were predicted. Selected peak flow estimates are as follows:
  >
  > - 10-year - 11.3 m
  > - 25-year - 11.5 m
  > - 200-year - 12.1 m

  At page 115, the Durrell Creek IWMP further states:

  > There is potential to reduce flooding of the Courtland - Hastings flats for agricultural purposes. There is still a small risk of flooding and about half of the Gillie Road lots still lie below the 1:200 year flood level. Due to constraints outlined in section 5.2.5 [which refers to high water tables and the potential for flooding of lots on Gillie Road], these lots are not suitable for residential development.

In addition, Christine Webb, Dan Webb, and Kim Wallace testified as witnesses on behalf of the Appellants. Ms. Webb stated that she is concerned that the close proximity of the systems to surface water could lead to system malfunctions or effluent breakouts. Ms. Wallace stated that she has lived on Gillie Road across from the Lots since 1997. She testified that the bank of Durrell Creek is often below 2 to 3 feet of water in the winter and, at those times, the distance from the reserve or standby area on Lot 2 to the edge of the water is less than 100 feet. Mr. Webb stated that the 11.3 metre elevation referred to in the Durrell Creek IWMP could be

a 20-year average high water mark and is within approximately 100 feet of the system.

The EHO submits that the high water mark should be determined based on the average water level measured at the obvious shoreline of Durrell Creek, and the systems are well over 100 feet from that high water mark. The EHO notes that the 100-foot setback in section 14(e), Schedule 3, of the *Regulation* applies to the absorption field, and not a treatment plant as suggested by the Appellants.

In particular, the EHO notes that "high water mark" is defined in section 1(1) of the *Regulation* as "a point on the shoreline" for a controlled lake or any other body of nontidal water. He submits that the high water mark should, therefore, not be based on water levels that may occur on a floodplain for a few days at a time as a result of storm-related floods. The EHO further submits that the "floodplain" of Durrell Creek, as referred to by the Appellants, is not recognized by provincial government agencies as a floodplain. The EHO submits that the absorption field and standby area for these systems are more than 100 feet from the channel of Durrell Creek and, therefore, comply with section 14(e), Schedule 3, of the *Regulation*.

The EHO testified that, before and after approving the permits, he and Alex Johnson, a Drain Design Technician with the municipality of Saanich, discussed the Fill Control Bylaw and flooding levels in the Gillie Road area. The EHO stated that Mr. Johnson advised that Saanich does not measure the flood elevation every year; rather, it does so only when residents complain or a particularly heavy rain occurs. The EHO stated that the last measurement was taken in November 1995, when the water level reached 11.15 metres where Hastings Road crosses the Flats. The EHO also stated that Saanich considers the 12.71 metre elevation to be an approximate 200-year flood level, and has never actually recorded water at that level.

The EHO referred to a contour map for the Hastings Flats area, and noted that 15-metre contour line runs across the northeast corner of Lot 3 through the absorption field. He noted that the slope descends from the absorption field at one-metre elevations, towards the front of Lot 3 and towards adjacent Lot 2. The 12.71-metre elevation runs approximately across the front quarter of Lot 3, then runs diagonally across the southwest corner of Lot 2, and then diagonally through the middle portion of Lot 1. He stated that the defined channel of Durrell Creek is at approximately 10-metres elevation, making it 5 metres lower in elevation than the absorption field. He stated that even if floodwaters reached the 11.15 metre elevation recorded in November 1995, there would still be adequate vertical separation between the water level and the absorption field. He also stated that the horizontal distance from the absorption field to the Creek channel is over 400 feet, which far exceeds the 100-foot setback requirement.

In cross-examination by the Appellants, the EHO agreed that the package treatment plants are buried below the ground surface, and are, therefore, below the 12.71 metre elevation, but stated that the tank portion of the plants are made of solid concrete and are leak proof.

The Permit Holder submits that the EHO was duly diligent and the systems comply with the *Regulation*.

The Panel's findings regarding compliance with section 14(e), Schedule 3

The *Regulation* requires that an absorption field must be set back at least 100 feet from the "high water mark" of a nontidal body of water. The Panel notes that the minimum setback to a nontidal body of water cannot be altered at the discretion of an environmental health officer, and is measured as a horizontal distance from the absorption field. Consequently, information about the vertical separation between the treatment plants and the high water mark is not relevant to the question of whether the systems comply with section 14(e), Schedule 3, but may be relevant to the question of whether the systems protect public health.

As noted above, section 1 of the *Regulation* defines "high water mark" as:

> …a point on the shoreline which corresponds
>
> a) for a controlled lake, to the highest water level within the normal operating range for that lake, and
>
> b) for any other body of nontidal water, to the average highest water level calculated from measurements taken over a sufficient number of years to enable a fair and reasonable estimate…

In this case, subsection (b) of the definition above applies, since there is no evidence that Durrell Creek or its floodplain is a controlled lake. According to subsection (b), the high water mark is to be calculated from *"a point on the shoreline* which corresponds…to the *average* highest water level calculated from measurements taken over a sufficient number of years to enable a fair and reasonable estimate…." [emphasis added].

The Panel notes that the Board recently considered the meaning of "shoreline" in *Paul Scrimger et al.* v. *Environmental Health Officer* (Appeal Nos. 2002-HEA-022 and 023, January 21, 2003) (unreported). In that case, the Board stated that:

> Two definitions from the *Oxford English Dictionary* are of assistance in this case:
>
> **"shore:"** the land that adjoins the sea or a large body of water, land between ordinary high and low water marks; and
>
> **"shoreline:"** the line along which a stretch of water, esp. a sea or lake, meets the shore.
>
> The dictionary definition of "shore" and the definition of high water mark in the *Regulation* are noteworthy in that they both reference the "ordinary" or "average" high water mark – not the highest recorded water mark. In this case, the Panel finds that the average high water mark must necessarily be at or close to the active beach front as shown in photos and registered on legal surveys. This is essentially the grassline along the beach.

Adopting this approach to the present appeals, the Panel finds that the 100-foot setback distance from the "high water mark" of the "shoreline" should be measured from the defined bank of Durrell Creek, and not from the level of periodic episodes of high water that have been measured during floods.

Further, while the Panel accepts the Appellants' evidence that water sometimes rises above the bank of Durrell Creek during winter flood events, the Panel agrees with the following statements in *Maerkl* v. *Environmental Health Officer* (Appeal No. 2001-HEA-012(b), October 16, 2001) (unreported). In that case, the Board determined that the "gully" at issue in that appeal was not a body of nontidal water for the purposes of the *Regulation*. The Board found that:

> …the mere existence of water from time to time is not sufficient to create all the characteristics that must exist to create a nontidal body of water…[for] that purpose there must be a 'high water mark'. In this case, there is some evidence of puddles appearing in the gully during times of high precipitation. But, there is no evidence of a high water mark as indicated by the edge of a stream or watercourse… There is no evidence of erosion along the inner walls or the floor of the gully to show that water regularly passes through the gully….

The Panel has heard that water levels during flood events have risen as high as 11.15 metres. However, the Appellants presented no evidence to support a finding that there are characteristics of a "shoreline" in the areas subject to periodic flooding. It must be remembered that the high water mark for the purposes of sewage disposal systems is defined in the *Regulation* – it is not the seasonal or episodic flood level. Applying that definition, the Panel finds that the floodplain areas that are subject to flooding do not contain a high water mark as defined in the *Regulation* and, therefore, do not attract the 100-foot setback requirement set out in section 14(e) of Schedule 3. Rather, the evidence indicates that the bank of Durrell Creek is the "shoreline" from which to measure the 100-foot setback. The evidence further indicates that the distance from the edge of the absorption field to the bank of Durrell Creek is approximately 400 feet.

For these reasons, the Panel finds that the EHO correctly determined that the systems meet the setback requirement found in section 14(e), Schedule 3 of the *Regulation.* Accordingly, this ground of appeal fails.

b) Inadequate site investigation and soil conditions on Lots 2 and 3

Site investigation in the absorption field and reserve area

The Appellants submit that inadequate percolation tests and wet weather assessments were performed prior to the issuance of the permits. The Appellants maintain that under Schedule 1 of the *Regulation*, the obligations of an owner applying for a permit to construct or install a sewage disposal system under section 3(2) of the *Regulation* are as follows:

- determination of the subsurface soil conditions in the area of the absorption field by digging or excavating at least 2 observation holes to a minimum depth of 4

feet each, flag the holes, leave the excavated material for inspection, cover the holes temporarily for safety and report the conditions found; and

- determination of the suitability of the soil to absorb effluent by conducting percolation tests in a minimum of 4 test sites in each corner of the proposed field site (which must be 12 in. square and excavated to a minimum depth of 12 in.).

The Appellants submit that the Permit Holder did not comply with these requirements, and the EHO should not have issued the permits. The Appellants submit that 4-foot observation holes were never dug on Lot 3, and that only 4 perc test holes were dug, namely, 2 for each of the absorption field and reserve area. They also submit that the perc test holes on Lot 3 were only 8 inches in diameter and depth, which would make observation of the water table or limiting layer impossible.

In addition, the Appellants submit that the EHO failed to conduct site assessments of the reserve area on Lot 2, in order to determine whether the area contains sufficient suitable soil to serve as a replacement field in the event of a failure of the existing absorption field. In this regard, Ms. Wallace testified that she has never seen 4-foot test holes, or evidence of such holes being filled, on Lots 2 or 3.

In addition, the Appellants submit that the EHO did not conduct wet weather assessments of Lots 2 and 3. The Appellants maintain that wet weather assessments are necessary in this case because the soils in the area have a high clay content, and, therefore, percolation rates can vary widely between the wet and dry seasons.

Further, the Appellants submit that although a site assessment was conducted on Lot 3 in August 1999, in conjunction with a previous permit application, the soils on Lots 2 and 3 were disturbed after that site assessment occurred, and therefore the soils should have been re-assessed prior to the 2002 permit applications. The Appellants submit that the soil on Lots 2 and 3 was excavated and fill was added in early 2000. The Appellants submit that Lots 2 and 3 contained a concrete foundation surrounded by rock and driftwood retaining walls, which were excavated and buried in the absorption field and reserve areas after the 1999 site assessment.

In support of those submissions, Ms. Wallace testified that in early 2000, she observed an excavator on Lots 2 and 3 demolishing the foundation and walls, and tilling debris into the soil. The Appellants also provided air photos of Lots 2 and 3 showing the location of the foundation and walls.

In addition, the Appellant Gordon Webb testified that he has resided in the neighbourhood since 1988, and in about 1989, he observed a 3,000-gallon tank being installed in a 10-foot deep hole on Lot 3. He stated that he believes that the tank was excavated from the area of the absorption field, although he did not actually see the tank being removed.

The EHO submits that under section 3(3) of the *Regulation*, site investigations must be conducted to the satisfaction of an environmental health officer. The EHO

maintains that the site investigation on Lot 3 was conducted to his satisfaction. He further submits that there is no legal requirement for a site investigation of a reserve or standby area, and in any event, the standby area on Lot 2 is not intended to serve as a back-up area for the absorption field.

The EHO testified that he has visited the Lots 10 to 12 times in the past 2½ years, and has visited the Gillie/Holland Road area at least 62 times during that period. He stated that he visited Lot 3 in summer 1999, and referred to a site investigation report for Lot 3 submitted by Eagle Engineering Ltd., which indicates that the site investigation was performed on August 10, 1999. He stated that he was satisfied with the results of that report. Specifically, he testified that he observed two 4-foot inspection holes and 4 percolation test holes at that time. He stated that he observed the same perc test holes when he visited Lot 3 on subsequent occasions, and noticed that the holes were still visible when the permits were issued in 2002. He testified that there was no disturbance of the soils in the absorption field between 1999 and 2002, and that excavation debris was deposited where the house will be built on Lots 2 and 3, and not where the absorption field and standby area are located. The EHO testified that he received a phone call from the excavation contractor immediately after the foundation and walls were excavated and the fill was deposited, and he visited the site to confirm that there had been no disturbance of the absorption field area or the perc test holes.

The EHO further stated that he conducted wet weather assessments on 2 adjacent lots (lots 4 and 17), and not on Lot 3, but that he was satisfied by the results of those wet weather assessments due to the similarity in the soils of these lots.

Overall, the EHO submits that the application file contained sufficient evidence about the soil conditions to satisfy him that the soil conditions will not create a risk to public health.

The Panel notes that section 3(3) of the *Regulation* provides that no permit shall be issued until site investigations required by Schedule 1 have been carried out *to the satisfaction of the EHO*. Further, having regard to that Schedule, the EHO must be satisfied that the construction, installation, and ultimate use of the system will not contravene the *Act* or *Regulation*.

The Panel finds that the site investigation procedures for the area of the absorption field on Lot 3 were performed to the satisfaction of the EHO. Although the results were compiled from multiple site assessments, rather than a single, recent site investigation, nothing in Schedule 1 stipulates a time period in which the site assessment must be conducted. Further, the Panel is satisfied by the evidence of the EHO that the soil conditions on Lot 3 have not changed since the site investigation in August 1999, and that the excavation of the foundation and walls did not disturb the absorption field area. The Panel notes that the EHO had previous experience with the Lots due to the previous permit applications, and the Panel is satisfied that the EHO had a complete picture of the conditions on Lot 3 in order to ascertain whether the conditions will be sufficient to support the system and protect public health.

Soil conditions in the absorption field and reserve area

The Appellants submit that none of the Lots meet the minimum requirement of 12 inches of native, unsaturated percable soil needed to remove viruses and other effluent by-products before entry into ground water sources. With respect to the policy guidelines concerning suitable soils for alternate systems, the Appellants refer to Chapter 6.1 of the *Policy*:

> To meet the requirements of a proposed alternate system, the natural soil on the site must be acceptable and to a depth considered adequate to attenuate the effluent and thus prevent ground/perched water contamination and/or result in the creation of a health hazard.

The Appellants submit that the minimum depth of native soil required for "sand filters" is 12 inches. In support of that submission, the Appellants refer to the Board's decision in *Cox* v. *Environmental Health Officer* (Appeal No. 2002-HEA-003), [2002] B.C.E.A. No. 35 (Q.L.).

Specifically, the Appellants submit that the soils in the absorption field and standby areas are not "natural soils" due to disturbances that have occurred, and there is less than the minimum 12 inches of natural soil available for treating effluent discharged to the ground. In support, the Appellants submitted photos of Lots 2 and 3 taken when the system was being installed. The Appellants maintain that those photos indicate that the soil does not consist of 14 to 16 inches deep dark brown silt loam, contrary to the site investigation report dated August 10, 1999.

The Appellants further submit that the soil on Lot 2 contains rubble that was tilled into the ground when the foundation and walls were excavated. The Appellants submit, therefore, that the standby area is unsuitable as a replacement of the existing absorption field. In support, the Appellants provided photos of soil containing rubble, which, they submit, is the soil in the standby area. The Appellants stated that the photos were taken when the area was excavated prior to installation of the sand mound.

With respect to the standby area, the Appellants note that clause 1) g) of the *Protocol* states:

> A reserve area, suitable for replacement of system field area, should be required for Submerged Media Fixed Film installations under this section. The reserve area may be installed at the time of the original installation or a covenanted area may be registered on land title.

The Appellants also refer to clause "H" of the registered covenant, which states that the "Sewage Disposal System and the Reserve Area shall be constructed in accordance and to the standards and specifications as approved by the Ministry of Health."

In further support of their submissions, the Appellants provided reports prepared by Mike Kelly, a professional agrologist and soil scientist, and Derek Smith, B.Sc., R.E.H.O., neither of whom testified at the hearing. Mr. Kelly's report was prepared

by reviewing soil maps of the Hastings Flats area and the Appellants' photos of Lots 2 and 3.

The Panel has reviewed the reports by Mr. Kelly and Mr. Smith. However, the Panel has accorded them little weight in assessing this issue. Neither of the authors appeared at the hearing to attest to the contents of their reports, nor did the authors visit the sites in question prior to preparing their reports. Mr. Smith's report is a general discussion of hydraulic loading rates for different types of sewage effluent and does not address the Lots specifically, while Mr. Kelly's report largely refers to standards and guidelines used in jurisdictions outside British Columbia. Consequently, those reports are of little assistance in resolving the issues in these appeals.

The EHO submits that the systems meet the recommended minimum of 12 inches of natural soil. In addition, the EHO submits that there is no legal requirement for a reserve field for these systems. Although the *Protocol* recommends a reserve field, the EHO states that this is simply a guideline.

The EHO testified that he observed 14 to 16 inches of suitable soil in the test holes in the absorption field area, as stated in the 1999 site investigation report, and that this area was not disturbed when the foundation and walls were excavated. He also stated that he did not intend the standby area on Lot 2 to serve as a reserve field; rather, he intended it to act as a buffer area to provide added protection against the risk of an effluent breakout downslope of the absorption field. The EHO stated that he added this requirement to the permit for Lot 2 in order to satisfy his concerns about the potential for downslope breakout. With respect to the need to use the standby area as an absorption field if the existing field failed, the EHO testified that the existing field area could be re-used because the C33 sand mound could be removed and replaced, and the soil below would not be affected because it does not provide attenuation of the effluent.

The EHO also stated that, with the high level of treatment provided by the Enviroserver plant along with the addition of 18 inches of C33 sand over the existing soil, the effluent will be fully attenuated by the time it reaches the natural soil. He states that the purpose of the 12 inches of natural soil is not to provide further attenuation of the effluent, but rather, to provide a buffer between the C33 sand, where final attenuation occurs, and the confining layer. In this regard, the EHO testified that the Enviroserver produces effluent containing no more than 10 parts per million (ppm) for total suspended solids and less than 10 ppm BOD (biological oxygen demand). The EHO also noted that test results showing less than 2 CFU/100 mL fecal coliform have been obtained from Enviroserver systems that use a chlorinator to treat the effluent.

The Permit Holder submits that the systems comply with the *Regulation* and the *Act*. With regard to the standby area, counsel for the Permit Holder states that a reserve area is not required by statute or regulation, and the Permit Holder agreed to this requirement to provide additional protective measures designed to an already acceptable system, and to provide additional assurances to prospective purchasers of the Lots.

The Panel notes that section 7(1)(b) allows the EHO to exercise discretion to alter certain requirements in the *Regulation* and impose other conditions. For example, section 11 of Schedule 3 (the depth of soil requirement) may be relaxed as long as the EHO is confident that the soil conditions will adequately protect the public health. In addition, the Panel notes that there is no requirement in the *Regulation* or the *Act* for a reserve field; rather, the *Protocol* suggests that a reserve field "should" be required. However, this policy and the other policies cited by the Appellants are intended as guidelines that may assist environmental health officers in exercising their discretion. These policies are not binding on environmental health officers. Therefore, the issue is whether there is adequate soil in the absorption field to protect the public health, and not whether Lots 2 and 3 comply with all of the policies referred to by the Appellants.

Based on the evidence of the EHO and the 1999 site investigation report, the Panel is satisfied, on a balance of probabilities, that the absorption field has been constructed in an area where the soil consists of 14 to 16 inches of undisturbed, suitable native soil. The Panel is also satisfied on a balance of probabilities that demolition rubble was not deposited in the area of the absorption field on Lot 3, but rather, was deposited in the area where the house will be built. The Panel also accepts the EHO's evidence that the Enviroserver plant provides a very high level of sewage treatment before the effluent is discharged, and that most if not all of the further attenuation will occur in the 18 inches of C33 sand that has been added above the soil. Given the sand mound and the high level of treatment provided by the Enviroserver, the Panel is satisfied that the soil in the absorption field will provide sufficient additional attenuation, in the event that the effluent needs further attenuation by the time it reaches the soil.

In addition, the Panel notes that the *Cox* decision cited by the Appellants can be distinguished on its facts. The Panel notes that the proposed system in *Cox* included an intermittent sand filter as a substitute for a package treatment plant, and did not include an Enviroserver package treatment plant. Furthermore, the proposed absorption field site in *Cox* was subject to a high water table, with as little as 3 inches of natural soil above the water table recorded in some observation holes during the wet season, which is not the case with the Lots. Furthermore, the property owners in *Cox* has installed perimeter drains that drained water from their property onto an adjacent property, but had not secured a covenant from the adjacent property owner to ensure their continued access to his property. Therefore, the Board's findings in *Cox* are not directly applicable to the present appeals.

With regard to the standby area, the Appellants have drawn the Panel's attention to the fact that clause "H" of the covenant requires the system and "reserve area" to be constructed "in accordance and to the standards and specifications *as approved by the Ministry of Health*" [emphasis added]. The Panel interprets this clause as requiring that the "reserve area" or "standby area" (which is the term that is found in the actual permit) (both phrases refer to the same part of Lot 2) must comply with the standards and specifications set out in the *Regulation*. Where the *Regulation* grants the EHO discretion to determine appropriate standards and specifications for sewage disposal systems, clause "H" also means that the systems

and the standby area must comply with the permits approved by the EHO. The *Regulation* does not set out standards or specifications for reserve areas, and the Appellants have presented no evidence that the standby area does not comply with the conditions set out in the permit for Lot 2.

Nevertheless, the Panel has considered that the *Protocol* recommends that a reserve field, suitable for replacement of the absorption field, "should" be installed for submerged media fixed film systems. The Panel accepts the EHO's evidence that in this case, the existing soil in the absorption field area could be re-used in the event of a failure in the sand mound, because the attenuation occurs in the sand mound and the C33 sand could be removed and replaced. The Panel also accepts the EHO's evidence that he intended the standby area to act as a buffer area, to provide added protection against a downslope effluent breakout, and not as a reserve absorption field. Therefore, the Panel finds that the question of whether there is sufficient suitable soil in the standby area to serve as an absorption field is not a relevant consideration in determining whether these systems will protect the public health. The existence of the standby area is more relevant to the issue of whether an effluent breakout could occur downslope of the absorption field and create a public health risk. The issue of potential effluent breakout is considered below under sub-issue (d).

Summary of findings

In summary, the Panel has found that the site investigation procedures for the absorption field were performed to the satisfaction of the EHO, and the EHO had sufficient information about the site to determine whether the installation and use of the systems would comply with the *Regulation* and protect public health, as required under section 3(3)(a) of the *Regulation*. The Panel further finds that under section 7(1)(b) of the *Regulation*, the depth of native, permeable soil required by section 11 of Schedule 3 can be reduced provided that the system will safeguard the public health. The *Protocol* recommends that where chamber distribution is used with submerged media fixed film treatment plants such as the Enviroserver, as is the case with the systems installed on the Lots, there should be a minimum of 12 inches of suitable native soil above the impervious layer. In this case, the evidence indicates that the absorption field area contains 14 to 16 inches of suitable native soil, which meets the guideline in the *Protocol*. As an extra safeguard, the EHO made it a condition of the permits that there be a minimum of 18 inches of C33 sand. In these circumstances, the Panel agrees with the EHO that the soil conditions on Lot 3 will not create a potential health hazard.

Therefore, this ground of appeal fails.

c) Compliance with the 100-foot setback requirement in section 14(d), Schedule 3

The Appellants submit that the absorption field is not located at least 100 feet from a source of domestic water, as required by section 14(d), Schedule 3, of the *Regulation*. The Appellants maintain, therefore, that the system creates a risk of ground water contamination, which poses a public health risk since all of the Appellants rely on the aquifer for their domestic water. In particular, the Appellants

submit that a decommissioned well is located within the standby area on Lot 2, and is less than 100 feet from the absorption field. The Appellants acknowledge that the aquifer in the area is "confined" by a layer of bedrock, but submit that effluent could seep into the aquifer via cracks in the well casing or in the bedrock where the well was drilled. The Appellants submit that although the former well was filled with clay and capped with concrete, there is no way to know for certain that such cracks may not exist.

In support of these submissions, Ms. Webb and Ms. Wallace testified that they, and the other Appellants, rely on wells drilled into the aquifer for their domestic water. Ms. Webb acknowledged that her home could connect to the municipal water supply, but advised that none of the other Appellants have the option of connecting to the municipal water supply.

In addition, the Appellants referred to section 42 of the *Sanitary Regulations*, B.C. Reg. 142/59, which states that "Every well hereafter sunk or dug shall be at least 100 feet from any probable source of contamination."

The EHO submits that the former well has been properly sealed and there is no risk of effluent entering the aquifer via the former well. The EHO further submits that the former well is no longer a "source of domestic water", and therefore, the 100-foot setback requirement in section 14(d), Schedule 3 of the *Regulation* does not apply.

The EHO provided a copy of an invoice dated October 11, 2002, from Drillwell Enterprises (1982) Ltd., indicating that a well on Lot 2 was sealed using 14 50-pound bags of bentonite clay and 1 bag of concrete pre-mix. In addition, the EHO provided a letter dated January 9, 2003 from the General Manager of Drillwell Enterprises (1982) Ltd., stating that a B.C. Certified Journeyman Well driller measured the depth of the well and then filled the well with bentonite chips from the bottom up through the bedrock contact, and placed a concrete cap near the surface. The letter further states that 45 feet of the 50-foot deep well were sealed using bentonite, and that the procedure conforms to the Ministry of Water, Land and Air Protection's guidelines for well abandonment, as stated in Appendix 8 of the "Guidelines for Minimum Standards In Water Well Construction, Province of British Columbia." The EHO stated that the bentonite clay is applied in a dry form and expands as it absorbs water, thereby filling spaces and cracks in the well and the well casing to prevent the vertical movement of water within the bore hole. The EHO also testified that even if effluent did reach the surface of the former well, there is low potential for it to reach the aquifer due to the depth at which the well contacts the aquifer.

Based on the evidence of the EHO, the Panel finds that, on a balance of probabilities, the former well on Lot 2 has been sealed such that there is no risk of effluent from the systems entering the aquifer via the former well. The Panel is satisfied that the well was sealed using a method that effectively seals spaces and cracks in the well, the surrounding casing and in the confining layers, and conforms to standard procedures set out in Ministry of Water, Land and Air Protection

guidelines for well abandonment. The Panel is further satisfied that the depth at which the well contacts the aquifer further reduces any residual risk of contaminants entering the aquifer via the sealed and capped well. Finally, the Panel finds that the former well is no longer a "source of domestic water," and therefore, the systems comply with the 100-foot setback requirement in section 14(d), Schedule 3 of the *Regulation*.

Therefore, this ground of appeal fails.

d) Potential for harm to public health or the environment arising from a breakout

The Appellants submit that the setback from the absorption field to potential downslope breakout points is considerably less than 50 feet, contrary to Chapter 4.4 of the *Policy*. The Appellants submit that the natural slope of Lot 3 is towards the building sites on Lots 2 and 3, and therefore, effluent in the absorption field will follow the slope of the impervious layer to the perimeter drains of the proposed houses. The Appellants submit that, according to the diagram submitted with the permit applications, the distance from the distribution pipes in the absorption field to the proposed dwelling foundation is 10 feet. The Appellants further submit that if the setback is measured from the toe of the mound, as recommended in Chapter 6 of the *Policy*, then there will be approximately 5 feet between the mound and the perimeter drains.

Additionally, the Appellants submit that the absorption field has been constructed so that a retaining wall encompasses at least 50 percent of the perimeter of the absorption field and standby area. The Appellants argue that the C33 sand and topsoil fill extends to the proposed foundations of the homes on Lots 2 and 3, and therefore, the foundations should be considered a part of the retaining wall. On that basis, the Appellants argue that perimeter drains should not be located along the foundations because this will create a potential breakout point for effluent. The Appellants maintain that the setbacks between the distribution pipes in the absorption field and the retaining wall near the proposed dwelling on Lot 3 will only be 2 feet, and will not conform to the 10-foot setback recommended in Chapter 5.1 of the *Policy*. The Appellants submit that given the minimal separation distance to the retaining wall, the soil conditions, and the hydraulic loading on the field, the soil along the wall will become saturated and effluent will migrate laterally into the perimeter drains of the dwellings on Lots 2 and 3.

The EHO submits that the main purpose of the retaining wall is to protect the absorption field and standby area from construction traffic. He submits that the absorption field slopes mainly towards the standby area on Lot 2, and only slightly towards the building site on Lot 3. The EHO also submits that the required setback distance between an absorption field and an interceptor drain is 10 feet under section 14(c) of Schedule 3, and is measured from the nearest drainage pipe in the field. He maintains that the *Policy* recommendation to measure the setback from the toe of the mound is not legally binding. In any event, he submits that there are no buildings on Lots 2 or 3 at this time, and the future location of the perimeter

drains is uncertain. He further submits that the drainage pipes in the absorption field are 10 feet away from the retaining wall.

The Panel finds that the Appellants have not provided sufficient evidence to establish, on a balance of probabilities, that the systems pose a potential risk to public health or the environment arising from a breakout at the proposed location of the perimeter drains. The Panel is satisfied, based on the approved design drawings accompanying the permits, that the hydraulic loading on the absorption field is acceptable, and there is sufficient room on Lots 2 and 3 to allow for at least 10 feet between the pipes in the absorption field an the perimeter drains for the proposed homes. The Panel is further satisfied, based on the EHO's evidence with respect to the high level of effluent treatment provided by the Enviroserver and the sand mound, that the effluent would be fully attenuated before leaving the sand mound. Consequently, the Panel is satisfied in this case that a 10-foot setback between the absorption field and any potential downslope breakout points will be sufficient to protect public health and the environment.

e) Potential health risk arising from inadequate system maintenance

The Appellants were concerned that the systems require regular maintenance in order to function properly, and there is no guarantee that the ultimate owners of the Lots will ensure that the systems are regularly inspected and monitored after the expiry of the 2-year period in which maintenance is provided by the installer at no extra cost to the owner. They submit that after that time, maintenance is done at a cost to the owner, and there is no way to require owners to continue proper maintenance of their systems.

The EHO submits that there is currently no law compelling owners to maintain Enviroserver systems after the 2-year warranty period expires. He stated that Saanich may adopt a bylaw proposal that would require owners to undertake regular inspections and maintenance of on-site sewage disposal systems, but it is uncertain when that bylaw may come into force.

Upon questioning from the Panel, the EHO acknowledged that a covenant put on the property title may be used to require the landowners to conduct regular system maintenance.

The Panel finds that the service and maintenance of all sewage disposal systems is left to the responsibility of owners, and there is no requirement in the *Regulation* regarding service and maintenance of systems. In this case, many of the Panel's findings with regard to whether various aspects of the systems will adequately protect public health and the environment rest, in part, on the conclusion that the Enviroserver plant provides a high level of sewage treatment before effluent is discharged to the ground. In these circumstances, the Panel finds that it is critical to the long-term protection of public health and the environment to ensure that the systems are properly maintained over time.

Consequently, the Panel orders that the EHO amend the permits to require the Permit Holder to register a covenant on each of the Lots, which will make owners of

the Lots responsible for regular system inspections, and for maintaining the systems in accordance with directions or standards provided by the manufacturer and/or the EHO.

2. Whether notices of the permits were posted on each of the Lots in accordance with section 3.3 of the *Regulation*.

The Appellants submit that the notice of permit was not posted in accordance with sections 3.2 and 3.3 of the *Regulation*. They argue that notice was never posted on the Lots, and they only became aware that the permits had been issued because the EHO notified Kristine Webb by email. Ms. Webb testified that she had requested that the EHO notify her of the issuance of the permits because there had been several past occasions where permit holders had failed to provide notice of the issuance of permits to install sewage disposal systems in the area. In this regard, the Appellants noted that they had filed appeals of permits issued in the area on two previous occasions, but the Board rejected their appeals because their Notices of Appeal were received after the 30-day period for filing an appeal had expired.

Counsel for the Permit Holder concedes that notices of the permits were not posted on the Lots, contrary to section 3.3 of the *Regulation*. When questioned by the Panel about the reason for this, counsel stated that he was not aware of any reason for the failure to post the notices. However, counsel submits that the Appellants received effective notice of the permits by the EHO, and their rights were not prejudiced by the failure to post notices.

The EHO confirmed that he notified Ms. Webb of the permits via email, and that he was aware of past incidents where permit holders had failed to post notice of permits to install sewage disposal systems.

The Panel finds that the Permit Holder failed to post notice of the permits on the Lots, contrary to section 3.3 of the *Regulation*. The Panel further finds that, but for the notice provided by the EHO, the Appellants' rights to appeal the permits within 30 days of issuance may have been prejudiced, as they were in the previous cases noted by the Appellants. The Panel also notes that it is the owner of the Lots, and not the EHO, who is responsible for posting notice that the permits were issued. Although the Appellants were not prejudiced by the failure to post the notices in this case, and the failure to provide notice does not affect the Panel's determination that the systems will protect the public health, the Panel is satisfied, on a balance of probabilities, that there has been a breach of section 3.3 of the *Regulation*.

Further, even though this failure to comply with the *Regulation* may not have prejudiced the Appellants, it may well have prejudiced other affected persons. There may be other neighbours who would have appealed the permits had they known about its existence. Had that been so, new information could have been brought forward that may have influenced the Panel's decision in respect of the effectiveness of the systems to protect public health. However, without the permits having been posted, the Panel can only speculate on what might have been.

The Panel also notes that the requirement to post is clearly outlined in the permits. The Permit Holder has completed all other responsibilities under the permits and

appears to be a sophisticated developer. The failure to post cannot be attributed to being an accidental oversight. Rather, it appears to have been an intentional attempt to avoid the appeal process. The appeal process exists to protect the rights of applicants for permits and other affected persons. The Permit Holder in this case is willing to accept all of the benefits of the permits and has endeavoured to avoid its responsibilities by denying its neighbours their statutory right of appeal. The Panel finds this to be unacceptable.

For these reasons, the Panel finds that this ground of appeal succeeds.

However, the Panel is faced with a difficult situation in determining an appropriate remedy in this case. While section 3(6) of the *Regulation* provides that "A violation of a condition of a permit issued under this section operates to confer a right upon the grantor to cancel it," the Panel has been advised that the EHO is of the view that he has no authority to cancel a permit for failure to post notice under section 3.3. The Panel does not agree. The EHO should have exercised his authority under section 3(6) immediately when he became aware of the failure to post notices. Instead, he chose to advise Ms. Webb, whom he knew was concerned about the issuance of permits for the Lots, that the permits had been issued. Although the EHO's efforts to provide notice are commendable, they are not an adequate substitute for posting notices on the Lots as required by the *Regulation*. It is not the EHO's responsibility to give notice when permits are issued, and where proper notice is not given he should have rescinded the permits.

In addition, the Panel notes that the systems have been installed and the EHO has issued approvals for use in this case. The Panel has determined that cancelling the permits at this time would result in substantial cost and inconvenience to the Permit Holder. Further, and more importantly, the Panel is satisfied that the systems as designed will protect the public health. Cancellation of the permits so that they can be re-issued, posted, and then appealed would serve no good purpose under the circumstances. However, the Panel is very concerned with the Permit Holder's flagrant disregard for the posting requirement in this case. Therefore, the Panel considers that this is an appropriate case for awarding costs against No. 3 V.C. Ventures, as the owner of the Lots, and in favour of the Appellants.

Section 11(14.2) of the *Environment Management Act*, R.S.B.C. 1996, c. 118, authorizes the Board to require a party to pay all or part of the costs of another party in connection with the appeal:

> **11** (14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:
>
> (a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

The Board's policy on costs is stated in the *Environmental Appeal Board Procedure Manual*, starting at page 44. It states:

> …A party seeking costs under this section may make a submission to the panel hearing the appeal with respect to an award of costs at the conclusion of the hearing.
>
> The panel will not make an order for costs unless a party requests that it be awarded costs. However, the panel may, on its own initiative, ask a party whether it seeks costs.
>
> …
>
> The panel will not order a party to pay costs unless it has first given that party an opportunity to make submissions on this issue. If the panel orders that all or part of a parties costs be paid, the panel may ask for submissions with respect to the amount of costs incurred.

The Panel notes that the parties did not make submissions on the issue of costs at the appeal hearing. Consequently, in accordance with the principles of natural justice and the Board's policies outlined above, the Panel requests that the Appellants advise the Board whether they seek an award of costs, and if so, what those costs should be. The Panel will then hear from the Permit Holder in respect of that submission.

DECISION

In making its decision, the Panel has carefully considered the submissions of the parties, whether or not they have been specifically reiterated here.

For the reasons provided above, the Panel finds that the systems comply with the requirements in the *Regulation* and will protect the public health and the environment, subject to the above noted amendment with respect to a covenant to ensure ongoing inspection and maintenance of the systems. In addition, the Panel finds that the owner of the Lots failed to post the permits as required under section 3.3 of the *Regulation*.

Accordingly, the decisions to issue the permits are confirmed, subject to the amendment of the permits. The appeals are allowed, in part.

The Panel requests that the Appellants provide submissions on whether they seek their costs associated with these appeals, and if so, what those costs should be. The Panel will then provide the Permit Holder with an opportunity to make submissions on the issue of costs.

Alan Andison, Panel Chair
Environmental Appeal Board

February 12, 2003