Province of British Columbia

Environmental Appeal Board

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DECISION NO. 2005-EMA-007(a)

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

BETWEEN:	Rolf Bettner on behalf of Haida Gwaii Marine Resources Group Association	**APPELLANT**
AND:	Director, Environmental Management Act	**RESPONDENT**
AND:	Husby Forest Products Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on February 7, 2006	
APPEARING:	For the Appellant: Tony Geluch For the Respondent: Dennis Doyle, Counsel	

APPEAL

Rolf Bettner, on behalf of Haida Gwaii Marine Resource Group Association, appeals the issuance of Permit PA-17845 (the "Permit") to Husby Forest Products Ltd. ("Husby"). The Permit was issued on July 12, 2005, by Mark Love, Section Head, Environmental Protection Division, Skeena Region, Ministry of Environment (the "Ministry"), acting in the capacity of director, *Environmental Management Act* (the "Director"). The Permit authorizes Husby to discharge air contaminants to the air and refuse to land from the controlled open burning of log sort debris and landfilling of certain materials at a dry land log sort located at Rennell Sound, Graham Island, Queen Charlotte Islands (also known as Haida Gwaii), British Columbia.

The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 100(1) of the *Environmental Management Act* (the "*Act*"), which provides that a person aggrieved by a decision of a director or a district director may appeal the decision to the Board. Section 103 of the *Act* gives the Board the power to confirm, reverse or vary the decision being appealed, send the matter back to the person who made the decision, or make any decision the person whose decision is appealed could have made and that the Board considers appropriate in the circumstances.

The Appellant asks the Board to reverse the decision to issue the Permit. Alternatively, the Appellant asks the Board to send the matter back to the Director with certain directions.

BACKGROUND

Husby conducts logging operations on Graham Island. As part of those operations, it operates a dry land log sort near the shore of Rennell Sound, on the west side of Graham Island, approximately 35 km by road from Queen Charlotte City. Logs are brought to the log sort after being harvested using a method known as "heli-logging," which involves cutting, topping, and limbing trees *in situ*, and then transporting them by helicopter to the log sort. Topped and limbed materials are left at the harvesting site in order to reduce the weight carried by the helicopter. However, some unusable wood material such as bark, trimmed ends, and limbs, accumulates at the log sort. Approximately 0.5 percent of the wood volume harvested by heli-logging becomes wood waste at the log sort.

In early April 2005, Husby applied for a permit to discharge waste under section 14 of the *Act*. Specifically, Husby sought a permit authorizing it to open burn combustible wood waste in a burn pile at the log sort, and dispose of ash, soil, and noncombustible waste from the log sort in a former rock quarry, located a short distance inland from the log sort. Husby's application states that Rennell Sound is uninhabited, but the open burning may affect forest industry personnel and recreational users passing by the area. The application also indicates that Husby's operating window at the log sort is April 15, 2005 to November 30, 2008, but operations in 2005 should only take 10 to 12 weeks, and operations in 2006 to 2008 depend upon obtaining approvals.

Norm Fallows, Emergency Response Officer, Environmental Protection Division, of the Ministry's Skeena Region, completed a "Ministry Assessment" report dated July 7, 2005 (the "Ministry Assessment") regarding Husby's application. The Ministry Assessment contains a description of referrals made and comments received regarding Husby's application, as well as a brief technical analysis and general assessment of the application. Under the description of referrals made and comments received, the Ministry Assessment indicates that:

- Husby's application was referred to the Skeena Queen Charlotte Regional District, the Village of Queen Charlotte City, and the Ministry of Forests and Range office in Queen Charlotte City for comment in April 2005;
- the Ministry of Forests and Range and the Skeena Queen Charlotte Regional District advised the Ministry that they had no objection to Husby's application;
- Husby's application was published in the *British Columbia Gazette* and the *Queen Charlotte Observer* newspaper on April 28, 2005;
- Mr. Bettner sent letters to Husby and the Ministry objecting to the proposed open burning on the basis that, among other things, it would

release toxins and particulates into the watershed and release CO_2 contributing to global warming;

- in May and June 2005, representatives from Husby and the Ministry sent letters to Mr. Bettner, and/or contacted him by telephone or in person, in response to the his concerns; and
- on June 11, 2005, Mr. Fallows inspected and photographed the log sort and the burn pile.

The Ministry Assessment discusses Mr. Bettner's concerns, but states that the overall environmental risk of the proposed activity is "low", based on the Electronic Risk Document ("EDOC") risk ranking sheets completed by Ministry staff. The Ministry Assessment states that the "only known potential impacts to human health would be to users of two forestry recreation sites" located 2.5 km southeast and 6 km northwest of the log sort. It also states that the "Nuisance Risk" is rated "low/moderate," and would be associated with possible smoke visibility and recreational enjoyment of the forestry recreation sites. The Ministry Assessment states that the wood waste could be "piled and burned when conditions are optimal to produce a hot clean burn resulting in minimal amount of particulate matter and ash," and that Husby suggested that large pieces of wood waste can be used as firewood at nearby recreation sites.

At the conclusion of the Ministry Assessment, Mr. Fallows recommends that the Director issue the Permit.

The Permit was issued to Husby on July 12, 2005. It authorizes the burning of a maximum of 400 m^3/year of wood residue, and the land filling of a maximum of 1000 m^3/year of ash and noncombustible yard scrapings in the rock quarry. The Permit contains a number of requirements pertaining to both the open burning and the land filling operations. The requirements specific to open burning include the following:

1.1.2 Characteristics of the Discharge

The characteristics of the discharge shall be typical of emissions originating from controlled open burning of wood residue in the form of logsort debris. For the purposes of this Permit, logsort debris includes trim ends, branches, bark and log ends.

Discharge smoke opacity shall not exceed 30% at any time during burning operations except during the first half hour of starting up during which time smoke opacity shall not exceed 60%. For the purposes of this Permit, opacity is defined as follows:

"Opacity is the degree to which an emission obscures the view of an observer expressed numerically from 0 percent (transparent) to 100 percent (opaque)"…

For compliance assessment purposes, opacity will be determined as an average of 24 consecutive observations recorded by a certified opacity reader at 15-second intervals…

…

2.1.1 Pursue Alternatives to Burning of Wood Residue

The Permittee shall ensure that every reasonable effort is made to reduce, reuse or recycle wood residue. Specifically, the material removed from the logging site shall be minimized to the greatest extent possible. For the purposes of this permit, recyclable materials include wood residue pieces exceeding 15 cm in diameter.

…

2.1.3 Favourable Weather for Smoke Dispersion

The burn shall not proceed unless a test burn, lasting no longer than 60 minutes from start to finish, of material similar to that planned for the controlled open burn event is completed. Results from the test burn must show that local weather conditions are adequate to provide good smoke dispersion and prevent impacts on individuals using near by camp sites.

Open burning of wood residue must not be initiated or continued if the following occurs:

a) local air flow will cause smoke to negatively impact on a nearby population or cause pollution…

2.1.4 Cessation of Burning

The Director may require any burn to be extinguished at any time based on its impacts on the receiving environment and/or public health and safety.

…

2.1.7 Burn Pile

The Permittee shall ensure that materials [are] charged to the burn pile in a manner to promote best combustion and smoke emissions are minimized. Burning shall only take place when conditions promote rapid combustion and dispersion of combustion products…

2.1.8 Attendant

The Permittee shall have an attendant on duty during the entire burn period…

…

2.4 Environmental Impact

> Inspections of the discharge will be carried out by Environmental Protection staff as a part of routine permit administration. Based on these inspections, monitoring data, or any other relevant information, the Director may require the Permittee to submit an Environmental Protection Plan…

3.1 Monitoring

> The Permittee shall maintain a monthly record of refuse volumes generated, landfilled and open burned as well as dates of open burning for inspection…

The Appellant filed an appeal with the Board on August 11, 2005. Its grounds for appeal focus on the open burning, as opposed to the landfilling. They are that the Ministry:

- failed to properly consider or give sufficient weight to current scientific understanding regarding biomass burning;
- failed to consider the daily fluctuations of local hypermaritime environment;
- failed to consider ever more public opinion opposed to burning; and
- failed to take into consideration federal legislation in regards to air quality and *Canadian Environmental Protection Act* legislation regarding the "continuous improvement of operations" and "keeping clean areas clean".

In addition, the Appellant submits that Husby failed to seek viable alternatives to the burning of the wood biomass, and failed to take into account the detrimental environmental impacts of the burn plume. The Appellant submits that biomass should be recycled in an environmentally safe and appropriate manner, and that it considers burning to be not only wasteful but deleterious to human and watershed health. Finally, it argues that such burning activities are contrary to Canada's commitments under the Kyoto Protocol to reduce greenhouse gases.

In its appeal submissions, the Appellant also requests that the Board "rule on the nature of the obligation on [the] Third Party… [Husby], to facilitate the hearing process by complying with reasonable requests for document disclosure made by other Parties to an appeal."

By a letter to the Board dated August 29, 2005, David Goldie, a Husby employee, advised that Husby accepted Third Party status in the appeal. The letter also stated that Husby did not intend to participate in the appeal, but would "supply requested information if available." Husby provided no submissions on the appeal.

The Director opposes the appeal and requests that the Board confirm the decision to issue the Permit.

ISSUES

1. Whether Third Parties in an appeal have an obligation to comply with reasonable requests for document disclosure made by other parties to the appeal.

2. Whether the Director relied on inadequate or deficient information, or failed to consider relevant factual information, in exercising his discretion to issue the Permit.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to this appeal. Other relevant legislation is reproduced in the body of this decision, as needed.

Permits

14 (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

…

(c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

(d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

(f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy potential from wastes.

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93 (11) The appeal board, a panel and each member have all the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

DISCUSSION AND ANALYSIS

1. Whether Third Parties in an appeal have an obligation to comply with reasonable requests for document disclosure made by other parties to the appeal.

The Appellant requested that the Board rule on this issue due to Husby's failure to provide the Appellant with documents that it had requested from Husby to assist in preparing its appeal submissions.

The parties made no submissions regarding the law on this issue, and the Director made no submissions at all on this issue.

The Appellant described the circumstances of its attempts to obtain information from Husby before the written appeal hearing concluded. The Appellant submits that, by a letter to Husby dated November 4, 2005, its representative asked whether Husby had provided technical data or had other communications with the Ministry, beyond that which are set out in its permit application, regarding monitoring or adverse effects. A copy of that letter was provided to the Board. The Appellant's representative received no reply to that letter, so the representative contacted Husby by telephone with a view to securing the information. According to the Appellant, Dave Goldie, an employee of Husby, informed the Appellant's representative that the Director's counsel had advised that Husby, as a Third Party, had no obligation to disclose documents to the Appellant.

The Appellant advised the Board that it was particularly concerned that a burn summary report prepared by Husby for the Ministry and dated September 12, 2005, was not provided to it by Husby. This document was subsequently disclosed to the Appellant as part of the appeal process (the exchange of Statements of Points and documents), by the Ministry, on January 31, 2006. This was after the Appellant had made its initial written submissions to the Board.

The Appellant submits that the appeal should be decided on the basis of the documents that were made available to the Appellant before it made its submissions. The Appellant argues that it would frustrate and undermine the spirit, if not the letter, of the Board's jurisdiction over pre-hearing disclosure if the Board considered evidence or documentation that was the subject of the Appellant's unsuccessful requests for disclosure.

In deciding this issue, the Panel has reviewed the relevant statutory provisions, as well as the Board's policies regarding document disclosure. Section 93(11) of the *Act* gives the Board "all the powers, protection and privileges of a commissioner under sections… 15… of the *Inquiry Act*." Section 15 of the *Inquiry Act*, R.S.B.C. 1996, c. 224, states as follows:

Power to summon witnesses

15 (1) The commissioners acting under a commission issued under this Part, by summons, may require a person

…

> (b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry.
>
> (2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.
>
> [underlining added]

Thus, pursuant to section 93(11) of the *Act* and section 15 of the *Inquiry Act*, the Board has the power to compel a person named in a summons to "produce before [the Board] all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry."

The Board's *Procedure Manual* addresses a party's failure or refusal to disclose documents to another party. It states at pages 24 and 26 to 27:

> ***Failure or refusal to produce documents before a hearing***
>
> If a party refuses to produce a document(s), an application may be made to the Board to require the production of documents at the hearing or at some other place and time as directed by the Board (see "Obtaining a summons", below).
>
> ...
>
> ***Obtaining a summons***
>
> Arranging for the attendance of witnesses, production of documents and other evidence at a hearing must be performed by the parties. It is up to the parties to ask people to voluntarily attend a hearing, give evidence, and/or provide certain documents.
>
> If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to issue a summons. Also, if a party refuses to produce particular relevant documents in its possession, a party may ask the Board to issue a summons.
>
> ...
>
> In deciding whether to issue a summons, the Board will consider whether the party has requested voluntary attendance/compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, whether that person is reasonably likely to be able to supply the information, and any other factors that the Board considers relevant.

In this appeal, Husby chose to accept party status but decided against making submissions.

When Husby refused to disclose the requested documents, the Appellant could have requested that the Board issue a summons requiring Husby to produce the documents. The Appellant did not do so. However, the Director has submitted no additional documentation regarding the basis for his decision beyond that which the Director disclosed to the Appellant prior to, or during, the appeal hearing. Further, the Director disclosed the September 12, 2005 burn report that was prepared by Husby to the Appellant during the course of the appeal process and the Appellant was given an opportunity to review that report and reply to it before the close of the Appellant's submissions to the Board. Thus, there is no indication that Husby's failure to disclose information prejudiced the Appellant's ability to argue its case or respond to the Director's case. If Husby has further information, it has not been provided to the Board and, therefore, has not been considered by the Board

Husby was under no legal obligation to comply with the Appellant's request for document disclosure in the absence of a summons. However, the Board does encourage all parties to disclose all relevant documents to the Board and the other parties as soon as possible in the appeal process, to ensure that the matter proceeds in an informed and expeditious manner. Failure to do so may result in the Board issuing a summons requiring the party to produce documents.

2. Whether the Director relied on inadequate or deficient information, or failed to consider relevant factual and legal considerations, in exercising his discretion to issue the Permit.

The Appellant submits that the Director has grossly underestimated the potential adverse effects that the Permit will have on human health and the environment. The Appellant maintains that this is largely due to the Director's failure to require Husby to submit a technical report or monitoring proposal to support its application; the Director's failure to consult the Ministry's Environmental Quality Section or require Ministry staff to prepare a technical report evaluating Husby's application; and, the Director's reliance on an inadequate EDOC risk assessment. The Appellant argues that the Director failed to consider a number of relevant factual and legal considerations in exercising his discretion. The Appellant also maintains that the Ministry has no policy guidance regarding when an applicant should prepare a technical report, nor when the Ministry should consult its Environmental Quality Section or prepare an internal technical report. The Appellant submits that there is little reliable information regarding the potential effects of the Permit.

The parties organized their submissions on this issue under three sub-headings:

- Whether the Director failed to secure adequate data to provide a factual foundation for his decision to issue the Permit;
- Whether the Director failed to turn his mind to factual and legal considerations that were relevant to his decision; and

- Whether the EDOC risk assessment was substantially flawed and formed the foundation for the Director's decision.

For convenience, the parties' submissions and evidence are summarized below under those sub-headings. The Panel's discussion and analysis of the issue follows all of the parties' submissions and evidence.

Whether the Director failed to secure adequate data to provide a factual foundation for his decision to issue the Permit.

The Appellant submits that the Director relied almost exclusively on data provided in Husby's application. The Appellant argues that such data was not provided by a "qualified professional" nor was it based on independent research. Thus, the Appellant submits that the Director failed to ensure that he had reliable data regarding the potential effects of the proposed activities. The Appellant argues that the Permit should be cancelled based on this ground alone.

The Appellant further submits that the Director has provided virtually no evidence to support his assertions that he relied on relevant personal knowledge held by himself and other Ministry staff, nor his assertions regarding the impacts of the permitted open burning and the alternatives to open burning. For example, the Appellant notes that Mr. Fallows prepared the Ministry Assessment, yet there is no evidence regarding his qualifications, experience, or training. The Appellant submits that the Board needs to know the qualifications and expertise of Mr. Fallows and the Director, and the basis for the "combined regional knowledge" of Ministry staff that the Director claims to have relied on, in order to make an informed decision regarding the merits of the Permit.

The Director submits that section 2(1) of the *Public Notification Regulation*, B.C. Reg. 202/94, specifies the information that must be submitted in support of a permit application. The Director maintains that Husby supplied all of the required information, and that the factual foundation for his exercise of discretion to issue the Permit was satisfied.

In addition, the Director submits that section 14 of the *Act* assumes that a director and other Ministry staff who process permit applications are trained and experienced environmental managers who use their expertise and knowledge when assessing applications. The Director argues that this is recognized by the subjective and discretionary nature of the power created under section 14, which states that a director "may issue a permit… subject to requirements for protecting the environment that the director considers advisable". The Director maintains that this provision requires a director to use personal judgment in deciding whether to issue a permit, and in deciding on the requirements that are to be included in a permit.

The Director submits that the Ministry receives numerous applications for the disposal of wood residue every year in the Skeena Region and throughout the Province. The Director argues that the effects of open burning and land filling wood waste are well known, based on information gained over the past 30 years. He argues that historical assessments along with the collective experience of Ministry

staff indicate that open burning can be done cleanly and efficiently, producing minimal smoke and particulate matter, especially in coastal areas that tend to experience frequent wind which disperses smoke, such as Husby's burn site.

Moreover, the Director submits that section 2 of the *Open Burning Smoke Control Regulation*, B.C. Reg. 145/93, exempts persons from sections 6(2), (3), and (4) of the *Act* if certain criteria are met, and in this case, all of those criteria are met except one; namely, that the debris is not being burned on the parcel of land from which it originated (i.e. the harvesting site). The Director submits that it can be inferred from the *Open Burning Smoke Control Regulation* that any environmental effects that may be attributed to burning under the Permit are authorized by the legislature. It is only the relocation of the debris to the log sort and its placement in the controlled conditions of the burn site that necessitate a permit.

The Director further submits that the Permit requirements enhance the requirements in the *Open Burning Smoke Control Regulation* in many respects, including the following:

- the Permit limits the maximum authorized rate of discharge per year and sets out the characteristics of the discharge, including opacity, which limits particulate emissions;
- the Permit requires material to be managed in a manner to promote the best possible combustion and minimize smoke;
- the Permit requires Husby to conduct a test burn to ensure that local weather conditions will provide good smoke dispersion;
- the Permit requires an attendant to be on duty during the entire burn period, and requires the maintenance of optimum burn conditions.

The Director submits that the remote location of the burn site renders it impractical to use recovery, recycling or other forms of disposal. The Director argues that similar conditions were recognized by the Board in *Paddy Goggins v. Assistant Regional Waste Manager* (Appeal No. 2001-WAS-013(b), December 10, 2001)(unreported)(hereinafter *Goggins*). The Director also notes that a letter from Husby to the Ministry, dated September 12, 2005, regarding activities under the Permit, indicates that over 10 percent of the burn volume was reused as firewood.

Finally, the Director notes that Ministry staff inspected the burn site on June 11, 2005, to verify the suitability of the site. In support, the Director provided copies of photographs taken by Ministry staff of the burn site and the debris pile.

Whether the Director failed to turn his mind to factual and legal considerations that were relevant to his decision.

The Appellant submits that the documentation on which the Director relied must address all factors that are relevant to the permit application and the potential impacts of the proposed activity. The Appellant submits that the information on

which the Director relied fails to adequately address health and environmental impacts, as well as the following relevant considerations:

- the precautionary principle set out in *114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 (hereinafter *Spraytech*), and applied in *Wier v. British Columbia (Environmental Appeal Board)*, [2003] B.C.J. No. 2221 (hereinafter *Wier*);
- the Ministry's policies on reducing open burning;
- the need for an effective monitoring regime, including specifying how Husby should collect and retain data that would allow the Ministry to monitor compliance;
- Canada's commitments under the Kyoto Accord, and the Province's plan to reduce greenhouse gas emissions;
- the release of furans and dioxins during burning, and their possible effect on rare, endangered, and protected species in the area; and
- reasonable alternatives to the disposal of wood waste.

The Appellant submits that the Permit would have been denied if the Director had properly turned his mind to all of the relevant considerations.

Specifically, the Appellant submits that, at paragraph 30 of the *Spraytech* decision, the Supreme Court of Canada embraced the precautionary principle as a means of informing "the contextual approach to statutory interpretation and judicial review." Further, at paragraph 38 of *Wier*, the B.C. Supreme Court held that the "application of the precautionary principle would favour an interpretation that permitted the Board to consider evidence of toxicity beyond that limited to site specific and application specific concerns."

The Appellant further submits that the Ministry has acknowledged the potential harm associated with open burning, and has a policy of reducing open burning. The Appellant maintains that the record pertaining to the Director's decision discloses neither an acknowledgement of that policy nor an analysis of whether the Permit complies with the policy.

The Appellant also submits that the Permit fails to impose monitoring requirements that would allow the Ministry to ensure Husby's compliance with other Permit requirements. The Appellant submits that, by imposing performance based standards without imposing obligations to collect compliance-related data, the Director failed to ensure that the Ministry is able to oversee compliance.

Additionally, the Appellant argues that the Permit and the Ministry's documents show no indication that the Director considered Canada's commitment under the Kyoto Accord to reduce greenhouse gas emissions. The Appellant notes that the Ministry Report states at page 4 that "because BC is not a signatory to the Kyoto Protocol, and has no direct responsibilities flowing from the Protocol, concerns

brought forward relating to the Protocol by Mr. Bettner will not be addressed in this assessment." The Appellant submits that this statement conflicts with a statement in a letter dated November 10, 2005, from counsel for the Director, in which he states that it is not the Ministry's policy that the Kyoto Protocol is irrelevant to the issuance of permits.

The Appellant also submits that burning wood waste laden with salt creates airborne dioxins and furans. The Appellant maintains that the wood waste burned under the Permit must be salt-laden because it consists of debris from trees that grow near the coast and are exposed to salt mist. The Appellant notes that dioxins and furans are considered "toxic," as defined under section 11 of the *Canadian Environmental Protection Act*. The Appellant submits that, once those substances are released, they persist in the environment for several years, and are associated with a wide range of adverse health effects in animals and humans. The Appellant argues that there is no evidence that the Director considered the possible effects of the release of dioxins and furans, despite Mr. Bettner drawing this issue to the Ministry's attention. The Appellant submits that the release of those substances poses a threat to rare, endangered and protected species in the area, and to humans who consume fish, birds, and game from the area. The Appellant submits that numerous rare, endangered and threatened species have habitat or potential habitat in the area to be exposed, as indicated by the list of species in Husby's 2004-2008 Forest Development Plan.

Regarding reasonable alternatives to burning wood waste, the Appellant submits that, although the Permit requires Husby to make every reasonable effort to reduce, reuse or recycle waste, the Permit contains no criteria that ensure compliance with that requirement. The Appellant maintains that the only evidence that alternatives to wood waste disposal have been considered is a letter dated May 24, 2005, from Bob Brash, President of Husby, to Mr. Bettner, stating that large pieces of wood waste "may" be relocated to recreation sites for use as firewood. The Appellant argues that this statement falls short of the Permit requirement.

In support of those submissions, the Appellant refers to several documents, including the following:

- a document on the Ministry's website titled, *Where There's Fire There's Smoke: Reducing Smoke in British Columbia* (February 2002);
- the Board's decision in *Goggins*;
- an article by Mark Z. Jacobson titled, "The Short-Term Cooling but Long-Term Global Warming Due to Biomass Burning," *Journal of Climate,* Vol. 17 (2004), pp. 2909-2926;
- an article by W. Duo and D. Leclerc titled, "Thermodynamic and Kinetic Studies of Dioxin Formation and Emissions from Power Boilers Burning Salt-Laden Wood Waste," *Organohalogen Compounds,* Vol. 66 (2004), pp. 1008-1016; and

- a Government of Canada document titled, "Canadian Environmental Protection Act, Priority Substances List Assessment Report No. 1, Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans," (1990).

The Director submits that, notwithstanding the lack of formal Ministry policy or a requirement for the Director to maintain a record for his decision, Ministry documents provide adequate support for issuance of the Permit. In particular, he submits that the Ministry Assessment summarizes a comprehensive referral process and a technical assessment of issues that were raised in the process.

In reply to the specific points raised by the Appellant, the Director submits that the precautionary principle is inapplicable to the issuance of the Permit, both on the facts of this case and based on legal principles. The Director submits that there is little scientific uncertainty over the effects of the permitted activities, which have been conducted at the site for many years with predictable results and without a threat of serious or irreversible damage to human health or the environment. He further submits that there is no legal basis to engage the precautionary principle in this case, given that the *Act* and its regulations authorize open burning. The Director argues that, at best, the precautionary principle creates a rebuttable presumption that can be displaced by clear statutory provisions, such as the *Open Burning Smoke Control Regulation* which condones wood waste disposal by burning.

Regarding the Ministry's policies to reduce open burning and particulate pollution, the Director submits that this policy is reflected in Permit conditions that require wood waste recycling and require burning to occur under optimal conditions that reduce the amount of particulates released. Moreover, the Director submits that the small amount of wood waste generated at this site, together with its isolated location, leave no viable alternatives to burning and landfilling. The Director also maintains that the Ministry has considered the option of landfilling wood waste without prior burning, but the Ministry has found that this can create a risk of fire due to spontaneous combustion, as air pockets in the waste can lead to high temperature aerobic decomposition. The Director submits that underground fires in landfills can produce significant amounts of particulates and are very difficult to control.

The Director also argues that the Permit requires Husby to monitor conditions both before and during the burn operation, to ensure that smoke emissions are minimized. In addition, Ministry staff will inspect discharges as part of their routine enforcement activities, and Husby is required under the Permit to maintain monthly records of refuse volumes generated, open burned, and land filled, as well as burning dates.

Additionally, the Director maintains that he did consider greenhouse gas emissions and Canada's commitment under the Kyoto Accord, as indicated in the Ministry Assessment where it summarizes Mr. Bettner's concerns. Moreover, the Director submits that burning wood waste is greenhouse gas neutral because wood is a renewable resource that regenerates, and this is recognized by the fact that the

Kyoto Protocol does not require signatories to account for carbon changes in either natural or managed forests as long as the forested land area remains constant.

Regarding dioxins and furans, the Director submits that the Appellant's characterization of risk is grossly overstated. He argues that the Appellant's document on this subject is not relevant to open burning, as it presents analyses of high temperature salt chemistry in pulp mill power boilers fueled by salt-laden wood waste that was stored and/or transported in marine waters. The Director maintains that the wood waste burned under the Permit has not been put in marine waters, and is transported directly from the harvesting site to the log sort. Moreover, the Director submits that there is no evidence that wood waste burned under the Permit is from trees that are salt-laden, or that the burning will have any impact on protected, threatened, rare or endangered species that may be in the area. The Director submits that any potential risk to human health or the environment from the permitted burning has been addressed and likely eliminated through the Permit requirements.

Whether the EDOC risk assessment was substantially flawed and formed the foundation for the Director's decision to issue the Permit.

The Appellant submits that the Ministry's EDOC risk assessment regarding Husby's application is grossly inadequate, and there is a lack of evidence to support the risk ratings of "0" or "1" given to most of the criteria in the assessment. The Appellant notes that the Ministry document titled "Guidance on Risk Ranking Waste Discharges" states that "Where additional information is needed to facilitate the scoring, the staff would contact the Environmental Quality staff or the local health authority for assistance; this may only be necessary where a greater degree of certainty is desired" and "where greater accuracy is desired, the ranking process may benefit by having a more diverse participation in scoring the relevant factors." The Appellant argues that there is no indication that the Ministry's Environmental Quality staff or the local health authority were contacted or that such diversity of participation was sought. The Appellant also notes that the document states that "[i]t is advisable to enter notes in the worksheet indicating key considerations in arriving at a score," yet no notes appear on the document. The Appellant argues, therefore, that there is no way to assess the validity of the risk rankings.

Additionally, the Appellant maintains that there is no indication that any other technical assessment or report was done regarding Husby's application.

The Director submits that the Appellant has overstated the Director's reliance on the EDOC risk assessment. The Director maintains that the EDOC risk assessment is an internal screening tool for risk-ranking comparative discharges. It is not the primary tool in the exercise of the Director's discretion. The Director emphasizes that he relied on past experiences and practices when assessing Husby's application, and he placed particular significance on the fact that similar burns have taken place at the same location for over 25 years with no record of complaints or concerns.

Panel's findings

The decision to issue the Permit involved an exercise of discretion. Discretion must be exercised in a manner that is consistent with the purposes and objectives of the legislation that empowers the decision-maker, and must be based on information that is relevant to the power being exercised and the circumstances of the case. The Panel has considered the nature of the Director's discretion under section 14 of the *Act*, based on the language in that section as well as the purposes of the legislative scheme created by the *Act* and relevant regulations. In that statutory context, the Panel has considered whether the Director erred as alleged by the Appellant. The Panel has also considered the merits of the Permit based on the parties' submissions and evidence.

Before examining the *Act* and its regulations, it is important to comment on the relevance of the Kyoto Protocol in this analysis. As stated at page 2923 of the article titled, "The Short-Term Cooling but Long-Term Global Warming Due to Biomass Burning," which was cited above by the Appellant, "The Kyoto Protocol of 1997 did not consider controlling biomass burning as a strategy for slowing global warming… By far, the greatest long-term benefit in reducing biomass burning would result from the reduction in permanent deforestation." In the present appeal, the wood waste at the log sort originates from harvesting operations that use the forest as a renewable resource. The licensee is required under forestry legislation to ensure regeneration within a specific time period. The harvesting is not for the purpose of permanently converting forest land into settlements or other non-forest uses. As such, the Panel finds that the Appellant's submissions regarding the Kyoto Protocol are of little assistance.

It is helpful to examine the role of section 14 of the *Act* within the context of the regulatory scheme created by the *Act* and relevant regulations. Sections 6(2), (3) and (4) of the *Act* generally prohibit the introduction of waste into the environment. "Waste" is defined in the *Act* as follows:

> **"waste"** includes
>
> (a) air contaminants,

However, the *Act* also contemplates a number of circumstances whereby a person may lawfully introduce waste into the environment. In particular, the prohibitions in sections 6(2), (3) and (4) of the *Act* are all subject to section 6(5) of the *Act*, which states as follows:

> **6** (5) Nothing in this section or in a regulation made under subsection (2) or (3) prohibits any of the following:
>
> (a) the disposition of waste in compliance with this Act and with all of the following that are required or apply in respect of the disposition:
>
> (i) a valid and subsisting permit;
>
> …

(iv) a regulation;

...

(e) the burning of leaves, foliage, weeds, crops or stubble for domestic or agricultural purposes or in compliance with the *Weed Control Act*;

...

(g) fires set or controlled by a person

...

(ii) carrying out fire control under section 9 of the Wildfire Act, or

(iii) if the fires are resource management open fires under the Wildfire Act and are lit, fuelled or used in accordance with that Act and the regulations under that Act;

...

(k) emission of an air contaminant from combustion of wood or fossil fuels used solely for the purpose of comfort heating of domestic, institutional or commercial buildings;

Thus, sections 6(5)(e), (g) and (k) of the *Act* expressly authorize the discharge of waste, including air contaminants, through the combustion of wood and other biomass, without the need for a permit. Additionally, section 6(5)(a) contemplates regulations that authorize the introduction of waste, including air contaminants, into the environment, as well as the issuance of permits authorizing waste discharges.

Although the present appeal involves a permit, it is instructive to note that both the *Open Burning Smoke Control Regulation* and the *Wood Residue Burner and Incinerator Regulation*, B.C. Reg. 519/95, authorize wood waste burning under certain conditions, without a permit. The former regulation is the most relevant to this appeal.

Section 2 of the *Open Burning Smoke Control Regulation* exempts a person from the prohibition against waste discharges, without the need for a permit, as long as certain requirements are met, including the following:

2 A person who carries out open burning of debris on a parcel of land is exempt from section 6 (2), (3) and (4) of the *Environmental Management Act* if

(a) the debris is open burned on the parcel of land from which it originated,

(b) substances which normally emit dense smoke or noxious odours, and those prohibited materials set out in Schedule A, are not included with debris that is open burned,

> (c) every reasonable alternative for reducing, reusing or recycling debris has been pursued to minimize the amount of debris to be open burned,
>
> …
>
> (g) the open burning is conducted in accordance with the conditions set out in section 3,
>
> (h) the open burning is conducted in accordance with the Open Burning Smoke Control Code of Practice in Schedule B, and…

On a review of section 6(5) of the *Act* and the regulations noted above, it is evident that the legislative scheme allows wood waste burning, without a permit, in many circumstances, as long as certain conditions are met. As such, the legislature's approach to regulating wood waste burning may be characterized as one of managing and minimizing the potential risks, rather than broadly prohibiting the activity. This suggests that the legislature views wood waste burning as an activity that poses relatively low risks to human health and the environment, as long as the activity is properly managed.

Although the Appellant has cited Ministry policies that discuss the potential health effects of open burning and encourage the recycling and reuse of wood waste, the Panel notes that policies are not legally binding, nor are they a primary tool for statutory interpretation. To determine whether the Director properly exercised his discretion, the starting point in the enquiry is to determine the objectives of the empowering statutory provisions, and whether his exercise of discretion was consistent with those objectives, and not solely whether he followed Ministry policies. Similarly, while the Appellant has pointed to a lack of Ministry policies regarding the nature and extent of consultation and analysis that the Director should have undertaken, the Panel finds that policies are not a prerequisite for a decision-maker to properly exercise a statutory power. Although policies may be helpful to decision-makers, an absence of relevant policies in this case has no bearing on whether the Director properly exercised his discretion.

The Panel has carefully considered the plain language in section 14 of the *Act*, in the context of the statutory scheme discussed above. Section 14 states that a director "<u>may</u> issue a permit authorizing the introduction of waste into the environment subject to requirements for protecting the environment <u>that the director considers advisable</u>…" [underlining added]. That language gives directors broad discretion in deciding whether to issue a permit, and to include requirements for the protection of the environment. The language indicates that the inclusion of requirements in a permit involves a subjective assessment. Thus, a director may issue a permit subject to the requirements for protecting the environment that he or she concludes, based on all of the relevant information as well as his or her professional knowledge and experience, are advisable. Consequently, the Panel finds that a director may utilize personal knowledge and expertise in assessing a permit application and in deciding on requirements that he or she considers advisable.

In the present appeal, the Panel was provided with little information regarding the Director's personal knowledge and expertise, or that of other Ministry staff that may be relevant to the decision to issue the Permit. However, the Panel acknowledges that a director exercising discretion under section 14 of the *Act* is presumed to do so in good faith and for the purposes that are contemplated in the legislation.

Having reviewed the relevant statutory language, the Panel finds that there is no legal basis to engage the precautionary principle in this case. The *Act* and its regulations authorize wood waste burning under certain conditions, and there is no indication in the statutory language that a precautionary approach should be taken when considering permits for open burning of wood waste. Moreover, the Panel notes that the Court's decision in *Wier* involved the application of a legal test that was based on statutory language in the former *Pesticide Control Act*, and not the language in the *Act* or its predecessor, the *Waste Management Act*. Therefore, *Wier* has limited application to the present appeal.

The parties do not dispute that a director exercising discretion under section 14 of the *Act* must assess the potential risk of harm to human health and the environment associated with the proposed discharge of waste, and weigh those risks against the potential benefits of the activity and other societal interests. The information needed to properly assess a given permit application will depend on the circumstances of each case. At a minimum, a director assessing a permit application should conduct a risk assessment based on the information that the applicant provides under section 2(1) of the *Public Notification Regulation*, which must include:

- a clear description of the source and location of the waste…;
- the legal description of the place where the waste is or will be discharged or emitted or the storage is or will be located;
- a description of the waste in general terms based on the origin or nature of the operation that produced it;
- the characteristics of the waste in specific terms including the content of potential pollution causing substances expressed in metric scientific units; and
- the volume of material to be discharged, emitted or stored during a specific time period.

In the present appeal, the Appellant does not allege that that Husby failed to provide that information, or that the Director failed to consider it. Rather, the Appellant submits that the Director should have required Husby to submit more technical analyses to support its application, and the Director should have conducted more consultation both within the Ministry and with other agencies regarding the potential effects of the burning.

It is logical that activities that pose relatively high potential risks of harm to human health or the environment, or that involve a high degree of uncertainty regarding

potential risks, will require a greater degree of technical analysis and caution when assessing a permit application. It is also logical that activities that pose relatively low risks of harm to human health or the environment, and that involve a high degree of certainty regarding potential risks, will require a less rigorous analysis and a lower degree of caution when assessing applications.

The Panel has already concluded that the legislature allows wood waste burning, without a permit, in many circumstances, as long as certain conditions are met, and that it may be inferred that the legislature views wood waste burning in those situations as an activity that poses relatively low risks of harm to human health and the environment. In addition, based on the facts, the Panel finds that the open burning proposed in Husby's permit application is at the low end of the spectrum in terms of potential risks to human health or the environment. In particular, the volume of wood waste to be burned is relatively small. As a comparison, an email dated September 22, 2005, from Mr. Fallows to Mr. Bettner indicates that, as of that date, three other operations were authorized to burn wood waste in the Queen Charlotte Islands, including a Weyerhaeuser operation approved to burn 4,440 m^3 of wood waste, which is almost 10 times the volume that may be burned under Husby's Permit. In addition, Husby's burn site is located in a remote coastal area that has no permanent human settlements and is separated from the nearest settlements by a mountain range.

Moreover, the Panel notes that the Director did seek input from other public agencies and the general public. The permit application was published in the local newspaper, and the Director referred the application to the local municipality and the regional district. He also sought information beyond that which was in Husby's application. The evidence before the Panel indicates that the Director relied on the following documents: the information submitted by Husby in its application; the Ministry Assessment, which summarizes the history of open burning at the site, the results of consultation with local public agencies and members of the public, the source of discharge and the nature of the receiving environment, and a brief technical analysis of potential risks associated with the proposed burning; the EDOC risk assessment; and, photographs of the burn site taken by Ministry staff in June 2005. The Panel finds that, contrary to the Appellant's submissions, the EDOC risk assessment was not the primary basis for the Director's decision. Rather, it was one tool that the Director relied on in assessing the application.

The Panel finds that those documents provided sufficient information for the Director to properly assess the potential risks associated with the proposed activity, including: the nature, volume, and rate of discharge; the characteristics of the receiving environment; and the degree and nature of possible exposure from the discharge to humans and other receptors. In these circumstances, the Panel finds that the Director relied on adequate information when assessing the permit application, with the possible exception of the risks associated with emissions of dioxins and furans. Those substances are not specifically mentioned in any of the documents that were considered by the Director. Therefore, the Panel has considered the potential risks associated with those substances below.

In assessing the merits of the decision to issue the Permit, the Panel has carefully reviewed all of the documents that were before the Director, as well as documents that were provided during the appeal process. The latter includes Husby's letter dated September 12, 2005, regarding activities conducted under the Permit in July 2005, and the documents that were provided by the Appellant regarding potential risks associated with the burning.

The Panel has already noted that the low volume of waste to be burned and the remote location of the burn site, make the activity low risk regarding potential harm to human health. The Panel also notes that the Ministry Assessment states that the "only known potential impacts to human health would be to users of two forestry recreation sites" located 2.5 km southeast and 6 km northwest of the log sort. It further states that the "Nuisance Risk," which is rated "low/moderate," would be associated with possible smoke visibility and recreational enjoyment of the forestry recreation sites. Moreover, none of the public agencies to which Husby's application was referred expressed objections to the proposed burning. Finally, the Panel notes that there is evidence that burning and land filling of wood waste has been occurring at this site for numerous years, and no adverse effects have been observed or reported.

Regarding harm to wildlife, the Panel finds that there is no evidence confirming the presence of threatened, endangered or rare species in close enough proximity to the burn site that they may be exposed to harmful concentrations of smoke. While Husby's Forest Development Plan states that a number of endangered or threatened species are known to inhabit the area covered by the Plan, the Panel notes that the Plan covers large portions of Graham Island, including not only Husby's Forest Licence area but also three other license areas. The Forest Development Plan does not indicate exactly where those species have been observed, or where their habitat is located, within the area covered by the Plan.

Regarding the potential harm associated with airborne emissions of dioxins and furans, the Panel finds that the Appellant has provided no evidence regarding whether the wood waste being burned is actually laden with salt. The only document that the Appellant provided to support its assertions on this subject is a study of dioxin and furan levels in emissions from pulp mill boilers that burn hog fuel. Hog fuel contains wood that has been transported and/or stored in salt water. In contrast, the wood waste burned under the Permit is transported directly from the harvesting site to the dry land log sort via helicopter, and spends no time immersed in salt water. Moreover, pulp mill boilers burn wood waste at much higher temperatures than open burning, therefore, the emissions are not directly comparable. Accordingly, the Panel finds that there is no evidence that the burning of wood waste under the Permit will result in the emission of airborne dioxins or furans. Further, there is no evidence that any fish, wildlife or humans exposed to smoke from the burning would be exposed to dioxin or furan concentrations above the ambient concentrations in the local air, water and soil, or in the foods they normally consume.

Although the risks associated with the proposed burning are relatively low even without considering the content of the Permit, the Panel has considered that the

Permit includes requirements that further minimize those risks. In particular, section 1.1.2 of the Permit specifies that "Discharge smoke opacity shall not exceed 30% at any time during burning operations except during the first half hour of starting up during which time smoke opacity shall not exceed 60%." The Permit defines "opacity" in detail, and explains how opacity is determined for the purposes of assessing compliance. Consequently, Ministry staff should be able to ascertain, for compliance purposes, whether Husby is complying with this performance-based requirement. The Panel also notes that, in the event of non-compliance, the Director may under section 2.1.4 of the Permit require a burn to be extinguished "based on its impacts on the receiving environment and/or public health and safety."

The Permit also includes proactive measures to ensure that burning occurs at optimal efficiency and in appropriate conditions. Section 2.1.3 of the Permit requires Husby to conduct a test burn before starting the full burn pile, to ensure that "local weather conditions will provide good smoke dispersion and prevent impacts on individuals using near by camp sites." The open burning must not be continued if "local air flow will cause smoke to negatively impact on a nearby population or cause pollution…." Sections 2.1.7 and 2.1.8 require Husby to "ensure that materials [are] charged to the burn pile in a manner to promote best combustion and smoke emissions are minimized" and to have an attendant on duty "during the entire burn period…." To facilitate combustion, section 2.1.9 indicates that a blower system "shall be used if necessary to supply underfire to the wood residue pile during burning."

Regarding monitoring, under section 3.1, Husby must maintain a monthly record of refuse volumes generated, landfilled and open burned as well as dates of open burning for inspection. Husby's letter dated September 12, 2005, to the Ministry, fulfills that requirement, and indicates that, in 2005, approximately 350 m^3 of wood waste was burned during 3 days in July, which is less than the maximum volume authorized under the Permit.

The Appellant's concerns regarding whether Husby is complying with the requirement in section 2.1.1 of the Permit to make "every reasonable effort" to reduce, reuse or recycle wood residue, is a matter of compliance and enforcement for the Ministry, and is not a matter for the Board in this appeal. However, the Panel notes that Husby's September 12, 2005 letter indicates that, in 2005, approximately 50 m^3 of wood waste was diverted to recreation sites for use as firewood. The Panel also notes that the parties provided no submissions regarding other potential alternative uses for the wood waste, which is relatively small in volume and is in a remote location.

In summary, the Panel finds that the Director relied on adequate information and considered all of the relevant considerations, with the possible exception of the potential risks associated with the emission of dioxins and furans. However, the Panel has considered the Appellant's submissions on dioxins and furans and finds no evidence to support its allegations of potential harm on the facts of this case.

Based on all of the evidence, the Panel finds that the discharge of waste authorized under the Permit will not result in harm to human health or the environment.

DECISION

In making this decision, the Panel has considered all of the evidence and submissions before it, whether or not specifically reiterated herein.

For all the reasons set out above, the Panel confirms the decision to issue the Permit.

Accordingly, the appeal is dismissed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

March 20, 2006