Province of British Columbia

Environmental Appeal Board

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DECISION NO. 2005-EMA-010(a)

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

BETWEEN:	Donald Steven (Steve) Graham	**APPELLANT**
AND:	Director of Waste Management	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on December 5, 2005	
APPEARING:	For the Appellant: Steve Graham For the Respondent: Dennis Doyle, Counsel	

PRELIMINARY ISSUES OF JURISDICTION

On October 19, 2005, Steve Graham appealed the determination of Charles Porter, Director of Waste Management (the "Director"), Ministry of Environment, refusing to process Mr. Graham's application to write the October 2005 Roster examinations to establish his qualification to be appointed to the Roster of Professional Experts under section 42 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*").

By letter dated November 1, 2005 the Environmental Appeal Board requested that the parties provide submissions on whether the Director's decision letter is a "decision" as defined under section 99 of the *Act*.

The Board reviewed the Notice of Appeal and the submissions from counsel on behalf of the Director on the preliminary issue of jurisdiction. The Appellant, Steve Graham, did not provide any submissions beyond those in his Notice of Appeal. In his submissions on jurisdiction, the Director raised a second jurisdictional issue of whether the appeal was filed within the applicable limitation period under the *Act*.

BACKGROUND

Under Part 4 of the *Act*, the Director oversees the identification, management and remediation of contaminated sites. Section 42 of the *Act* authorizes the Director to designate classes of persons who are qualified to perform duties that may or are required to be performed by a qualified professional, and to establish a roster of

qualified professionals to assist him in the fulfillment of his statutory responsibilities.

To assist in establishing and maintaining a roster of qualified professionals, the Director has approved a procedural guideline called "Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation" (the "Procedure"). Section 3.1 of the Procedure sets out the qualifications criteria for appointment to the Roster as follows:

> **3.1 Qualifications**
>
> a) Only qualified individuals may be appointed to the roster of professional experts. The following minimum qualification requirements must be met. The individual must be a member or licensee in good standing with either:
>
> i. the Association, or
>
> ii. the Institute,
>
> b) possess a minimum of eight (8) years of documented experience, post registration with either the Association or the Institute, in the areas of contaminated site assessment, management and remediation, or possess a minimum of ten (10) years of documented post graduation experience in the areas of contaminated site assessment, management and remediation of which eight (8) years must be at a professional level,
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> c) have successfully written and passed, in the year of appointment, the contaminated sites professional expert examination (members appointed by the Director to serve on the Roster Steering Committee are exempt from the contaminated sites professional expert examination requirement during their term of appointment),
>
> d) have been recommended for inclusion on the Roster by the Roster Steering Committee, and
>
> e) have obtained the required liability insurance as specified by the Director.

Section 3.2 deals with the administration of the Procedure and provides that the Association of Professional Engineers and Geoscientists of the Province of BC will provide administrative and secretariat support for the Roster Steering Committee (the "RSC"). The RSC is a committee established to administer the Procedure on behalf of the Director and consists of members appointed by the Director under this section.

Section 3.3 of the Procedure deals with appointment to the Roster and provides that appointments to, and removal from, the Roster of Professional Experts is at the sole discretion of the Director.

Mr. Graham is a registered professional engineer and registered professional geologist in British Columbia. He has a Ph.D. in environmental engineering and has completed the requirements for a second Ph.D. in hydraulic engineering. He has

worked as a consultant in engineering and geology, full and part time, since 1971 in Canada and the United States.

Mr. Graham submits that there is an economic advantage to being on the Roster and there is professional prestige to membership in the contaminated sites field. Since February 2004, Mr. Graham has made a number of applications for appointment to the Roster and received a number of responses from the RSC indicating that he did not yet meet the minimum experience requirements to write the Contaminated Sites Professional Experts Examination.

In March of 2005, the RSC referred the matter to the Director, as the committee was unable to satisfy Mr. Graham's concerns related to his qualifications. The Director personally undertook a review of Mr. Graham's qualifications and work history to determine whether he met the criteria for classes of persons designated under section 42 of the *Act*. To ensure that Mr. Graham was not prejudiced by any delay in the assessment and review, the Director directed the RSC to allow Mr. Graham to take the April 2005 Roster examinations with the results to be held in abeyance pending the Director's decision regarding the extent of Mr. Graham's contaminated sites experience. Mr. Graham wrote the exams in April 2005 but has not been advised of the results.

On August 24, 2005, the Director issued a letter setting out the results of his review of Mr. Graham's qualifying experience. The Director concluded that Mr. Graham had "a total of 5 years and 10 months of contaminated site relevant experience to January 27, 2005." The Director's letter also stated:

> Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation specify a minimum of 7 years to sit the roster examinations and a minimum of 8 years for appointment to the Roster. In light of the lack of the requisite contaminated sites experience as of January 27, 2005, the results of your roster examinations, written April 6 and 7, 2005 will not be released to you, but rather will be destroyed.
>
> Assuming a minimum of 75% of your work is spent on contaminated sites issues after January 27, 2005, you would obtain the requisite 7 years of experience to be eligible to write the roster examinations no sooner than March 31, 2006. Please note that, under the Procedure for the Roster of Professional Experts under the Contaminated Sites Regulation, if you were to write and successfully pass the roster examinations in March 2006, you would require one additional year of contaminated sites experience (from March 31, 2006 to March 31, 2007) before you would be eligible for appointment to the Roster.
>
> Also please note that as you lack the requisite experience to sit the October 2005 roster examinations, your application to write the October 2005 Roster examinations will not be processed…

Mr. Graham seeks to appeal the following decisions of the Director:

1) The decision to deny processing of his application of May 5, 2005 to write the Contaminated Sites Roster exam in October 2005.

2) The decision that he had five years and ten months experience relevant to Roster registration as of January 27, 2005.

3) The decision to make an experience determination of 5 years and 10 months as of January 27, 2005 for his application of May 5, 2005 to write the Contaminated Sites Roster exam in October 2005.

Mr. Graham asks the Board to

- reverse the decision of the Director,
- direct that the Director consider previous determinations and calculations used by the RSC in making his experience determination, and
- if the eligible experience determined on that basis is reasonably close to the required 7 years as of January 27, 2005, the Director be ordered to recommend approval for the examination within one week.

Mr. Graham further asks the Board to order that, if he is approved, his April examination be marked, and if he passes, that he be appointed to the Roster within two weeks of the exam notification. If it is determined that he does not have sufficient experience, Mr. Graham asks the Board to order an experience review interview, within one week, that he may record and attend with counsel.

Mr. Graham's Notice of Appeal is dated October 18, 2005. It was sent by registered mail post-marked October 19, 2005, and was received by the Board on October 20, 2005. In his Notice of Appeal, Mr. Graham acknowledged receipt of a copy of the Director's August 24th determination letter on September 19, 2005, by regular mail.

On November 1, 2005, the Board wrote to Mr. Graham acknowledging receipt of his Notice of Appeal. The Board also advised that the Director would be provided with a copy of the Notice of Appeal. Based on the information contained in the Notice of Appeal, the Board accepted that Mr. Graham was within the 30 day time period for filing an appeal. However, the Board asked Mr. Graham and the Director to make submissions on whether the Director's letter contained a "decision" as defined in section 99 of the *Act*. The Board requested submissions from both parties by December 5, 2005.

On November 18, 2005, the Board received submissions on behalf of the Director. The Director submits that Mr. Graham had actual and constructive notice of the Director's determination letter no later than August 25, 2005. The Director submits that his determination was faxed to Mr. Graham on August 24, 2005, and was subsequently sent by courier to the address for delivery provided by Mr. Graham. Accordingly, the Director submits that the limitation period in the *Act* for filing an appeal expired on September 26, 2005.

In addition, the Director submits that his determination on Roster-qualifying experience relates to the application of policies and procedures that he has developed to assist him in the determination of classes of persons from which Roster appointments can be made; it does not involve a "decision" as defined by section 99 of the *Act*. Accordingly, the Director submits that the appeal should be

rejected on the basis that it is out of time and relates to matters beyond the jurisdiction of the Board under the *Act*.

The Appellant did not provide any submissions to the Board in response to the Director's submissions on jurisdiction.

ISSUES

The preliminary issue to be determined is whether the Board has jurisdiction to hear the appeal. This issue has been broken down into two sub issues as follows:

1. Was the appeal filed within the statutory time limit?
2. If so, do any or all of the determinations made by the Director, as set out in his letter of August 24, 2005, constitute a "decision" which may be appealed to the Board under the *Act*?

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to the preliminary jurisdictional issue:

Approved professionals

42 (1) A director may designate classes of persons who are qualified to perform activities that under the regulations or a protocol may be or are required to be performed by a qualified professional.

(2) The director may establish a roster of persons who are in a class designated under subsection (1).

(3) A director may

(a) make changes to the roster that are necessitated by the removal of a designation, and

(b) add and remove names from the roster.

(4) If a qualified professional has performed activities in a manner that a director has reasonable grounds to believe does not satisfy the applicable protocol established under section 64 [*director's protocols*], the director may suspend the qualified professional from the roster on terms and conditions.

Definition of "decision"

99 For the purpose of this Division, **"decision"** means

(a) making an order,

(b) imposing a requirement,

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

(d) issuing, amending, renewing, suspending, refusing or canceling a permit, approval or operational certificate,

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

(f) determining to impose an administrative penalty, and

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

Appeals to Environmental Appeal Board

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

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Service of notice

133 (1) Anything that under this Act must be served on a person, may be served by registered mail sent to the last known address of the person.

(2) Any notice under this Act may be given by registered mail sent to the last known address of the person.

(3) If a notice under this Act is sent by registered mail to the last known address of the person, the notice is deemed to be served on the person to whom it is addressed on the 14th day after deposit with Canada Post unless the person received actual service before that day.

Section 3 of the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82, (the "*Regulation*") is also relevant to the preliminary issue of whether the appeal is within the statutory time limitation and states:

Appeal practice and procedure

3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.

(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

Finally, the following definitions in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 are also relevant to the preliminary issue of whether the appeal is within the statutory time limitation:

Expressions defined

29 In an enactment:

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver;

"may" is to be construed as permissive and empowering;

DISCUSSION AND ANALYSIS

1. Was the appeal filed within the statutory time limit?

The Appellant submits that September 19, 2005 is when he received notice of the Director's decision for purposes of calculation of the time limit to appeal. Accordingly, the time for filing his appeal expired on October 19, 2005. He submits that he met this time frame. The Notice of Appeal was postmarked October 19, 2005, at the Delta postal outlet.

The materials provided by the Appellant in support of his Notice of Appeal show that on September 19, 2005, Mr. Graham sent an email to staff in the Ministry of Environment stating "Your letter of 24 Aug 05 arrived". On October 6, 2005, he sent a further email to the unit head in the Ministry, copied to the Director, stating "This email indicates the letter was received by regular mail on Sept. 19. (It had been previously sent by courier but not delivered). Do you agree this is the timeline for the appeal clock?" The unit head replied on October 7, 2005, by reiterating the requirements of the legislation stating, " I checked with our solicitor to make sure I could give you the correct answer to your question below. Apparently, you have 30 days from when you got notice of the Director's decision to register an appeal with the Environmental Appeal Board." This response was also copied to counsel for the Director.

In his notice of appeal, Mr. Graham states:

> It is noted that the letter describing the decision was dated August 24, 2005. However, due to the failure of the courier to deliver the decision, it was re-sent by regular mail and received on September 19, 2005. I arranged with the Director's secretary to acknowledge receipt. The email acknowledging receipt is placed in the Appendix as Document 3. A response from MOE that it considers September 19, 2005 to be the timeline is Document 4. This appeal will be filed within 30 days; that is, on or before October 19, 2005.

Mr. Graham also states in his Notice of Appeal that:

> I spoke with the Director on the phone from the field on August 25, in which he confirmed I would not be permitted to write the October exam. The written notification was received on September 19, 2005 (Document 1).

The Director, however, submits that the applicable date from which the time limitation begins is not when the mailed copy of the decision was received by Mr.

Graham on September 19. Rather, it is 30 days from when Mr. Graham received actual notice of the decision which, the Director submits, occurred on or about August 25, 2005.

The uncontested evidence provided to the Board by way of the affidavit of the Director is that the August 24 determination letter was sent by facsimile transmission to the telephone number listed on Mr. Graham's resume as his phone/fax number. The fax activity report shows a 2-page transmission completed to that number at 14:22 and 14:48 on August 24, 2005. The Director further deposes that:

> On August 25, 2005 I received a telephone call from a person identifying himself as Steve Graham. At that time there was a general discussion over roster eligibility criteria and concerns were raised by Mr. Graham over findings contained in my letter of August 24, 2005. At the time of our telephone conversation Mr. Graham specifically requested that exam results not be destroyed as was mentioned in my determination letter, because he was contemplating an appeal of my determination.

In addition to faxing the letter, the Director's letter was couriered to the address appearing on Mr. Graham's records for the delivery of documents, to the attention of Mr. Graham. However, the evidence of both parties is that the courier did not deliver the letter to Mr. Graham. In his Notice of Appeal, the Appellant refers to the courier's "failure" to deliver the letter. The Director's evidence is that he was advised by his assistant that delivery was "refused". In any event, the courier package was returned to the Director's office intact on September 9, 2005. There is no direct evidence before the Board from the courier as to the reason the letter was not delivered. The letter was subsequently redirected to Mr. Graham through the regular mail.

Although the Board gave him the opportunity, the Appellant did not refute the evidence that the Director faxed a copy of the decision, discussed its contents with Mr. Graham by telephone, and dispatched a courier to deliver the original letter to Mr. Graham's house. The Panel further notes that Mr. Graham's Notice of Appeal corroborates the Director's evidence regarding the telephone conversation on August 25, 2005.

Based on the evidence submitted to the Board, the Panel finds that the Director made three attempts to give notice of his determination, two of which were successful. The Panel accepts the Director's evidence that his first attempt was to fax a copy of the letter to Mr. Graham's number on August 24, 2005, and that the transmission was completed on that date. The Panel also accepts the Director's evidence that Mr. Graham called him by telephone the following day, and that he specifically discussed the contents of that letter with Mr. Graham. Mr. Graham's request to the Director during that conversation that his April exam results not be destroyed, as stated in the faxed letter, is further evidence that Mr. Graham was aware of the contents of the letter. In light of the evidence provided, it is reasonable to conclude that Mr. Graham did, in fact, receive the faxed copy of the letter. Therefore, he Panel is satisfied that Mr. Graham had actual notice of the determination under appeal as of August 25, 2005. Thus, the Board's earlier

conclusion in its letter of November 1, 2005 to accept September 19 as the date of receipt of notice was erroneous.

The Panel finds that the Director's second attempt to give notice by dispatching an original copy of the letter by courier to the Appellant's address was not successful. While the Panel is satisfied that there was attempted delivery of the letter by the courier company, the letter was not in fact delivered to Mr. Graham, nor was it left at his address. There is not sufficient evidence to make a finding as to why the delivery was not successful or to impute constructive notice to Mr. Graham as a result of the attempted delivery by courier. Finally, it is common ground that the third attempt at providing notice by regular mail was successful as of September 19, 2005.

The only direction in the *Act* regarding service of notice in this situation is section 133(2) of the *Act* which provides that, " Any notice under this Act may be given by registered mail sent to the last known address of the person." The language used in the statute is permissive as it uses the word "may" and not "shall". This is confirmed by section 29 of the *Interpretation Act*, which states that the word **"may"** in an enactment "is to be construed as permissive and empowering." As a permissive provision, it is apparent that a decision may be served in the way listed, or via other means. Therefore, while the *Act* allows notice to be given by registered mail, that is not the only allowable method of service.

In *Luoma v. Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Forests)*, 2000 BCSC 468, the appellant sought to appeal to the Supreme Court from decisions of the Forest Appeals Commission and the Forest Appeal Board. The respondents sought an order dismissing the appeal as out of time. The decision appealed from was sent by fax to the office of the appellant's solicitor and the appellant himself later received a copy of the decision by mail. The appellant sought to use the date of service by mail as the relevant time. The respondents took the position that service of the decisions was effected by delivering the decisions by facsimile to the number noted as the address for service in the office of counsel for the appellant. The relevant section of the *Forest Practices Code of British Columbia* at that time stated:

164 (1) A notice or other document that the government, board or commission is required or permitted to give to a person under this Act, the regulations or the standards may be given by giving it, or a copy of it, to the person as follows:

(a) if the person is an individual,

(i) by leaving it with the individual,

(ii) by leaving it at the individual's last or most usual place of residence with someone who is or appears to be at least age 16 years, or

(iii) by mailing it by registered mail to the individual's last known postal address;

...

(2) A notice or other document that is mailed to a person by registered mail under subsection (1) is conclusively deemed to be received by the person on the eighth day after it is mailed.

The Court held at paragraph 28 that:

> ... I accept [counsel for the respondents'] argument that the wording of s. 164(1) of the *Code* is permissive and therefore is not to be read wholly literally or exclusively. The wording does not exclude the possibility that the Commission is entitled to develop practices and procedures for matters such as notice, so long as those procedures are reasonable and fair....

This Panel accepts that the *Act* in this case sets out a permissive, non-exhaustive method of service. This means that the Director can rely on other methods, provided those methods abide by the principles of procedural fairness, which dictate that notice must be given in a manner that is reasonable to inform those concerned. It can be inferred from the wording of the *Act* that the statutory limitation period for appealing a decision begins to run when notice of the decision is first given to the appellant, whether the mode of delivery is by mail, personal delivery or facsimile transmission.

In this case, the Panel finds that providing Mr. Graham with a faxed copy of the decision constitutes fair and reasonable notice of the Director's decision in these circumstances. The Panel finds that the facsimile was received by Mr. Graham as is evidenced by the telephone discussion he had with the Director regarding the contents of the decision the following day. Receipt of the original copy of the decision was not required in order to effect valid service where actual notice of the decision was provided earlier.

The time limit for filing an appeal under section 101 of the *Act* is "30 days after notice of the decision is given." The Panel finds that actual notice has been established for the purposes of section 101 of the *Act*, on August 25, 2005. Therefore, Mr. Graham's Notice of Appeal should have been filed by September 26, 2005. The 30-day limitation referred to in section 101 of the *Act* is reinforced by section 3 of the *Regulation*, which requires that "every appeal shall be taken within the time allowed by the enactment that authorizes the appeal" (emphasis added). As Mr. Graham's appeal was not commenced until October 19, 2005, the Panel finds that his appeal is out of time.

Statutory bodies, such as the Board, receive their jurisdiction from their enabling statutes. Neither the *Act* nor the *Regulation* expressly provide the Board with the power or discretion to extend the time for filing an appeal under the *Act*. In addition, the legislation uses imperative language when describing time limits within which a person must file an appeal to the Board. Given that the Board is a creature of statute, filing an appeal within the prescribed time limit is a condition precedent to the Board having jurisdiction over an appeal. As such, the Panel finds that the Board has no jurisdiction to hear this appeal as the Notice of Appeal was filed after the statutory appeal period had expired.

2. Do any or all of the determinations made by the Director, as set out in his letter of August 24, 2005, constitute a "decision" which may be appealed to the Board under the *Act*?

The Panel has considered this issue in the event that it is wrong in its conclusion that valid notice of the Director's decision was given on August 25, 2005, and that the appeal is, therefore, out of time.

The Director submits that the determinations on qualifying experience contained in his letter of August 24, 2005, relate to the application of policies and procedures that he developed. These policies and procedures set out the classes of persons under section 42 of the *Act* from which Roster appointments can be made. The Director further submits that these decisions do not fall within the special definition of "decision" contained in section 99 of the *Act*, which limits the scope of matters that can be appealed to the Board. Section 99 states:

> **Definition of "decision"**
>
> **99** For the purpose of this Division, "decision" means
>
> (a) making an order,
>
> (b) imposing a requirement,
>
> (c) exercising a power except a power of delegation,
>
> (d) issuing, amending, renewing, suspending, refusing or cancelling a permit, approval or operational certificate,
>
> (e) including a requirement or a condition in an order, permit, approval or operational certificate,
>
> (f) determining to impose an administrative penalty, and
>
> (g) determining that the terms and conditions of an agreement under section 115 (4) [administrative penalties] have not been performed.

There is no dispute that the definition of "decision" in section 99 is exhaustive. Thus, for the Board to have jurisdiction over an appeal, the decision to be appealed must be included within one of the subparagraphs of section 99.

The Director's letter does not constitute the imposition of an administrative penalty and does not involve an order, permit, approval or operational certificate, as enumerated in subparagraphs (a), (d), (e), (f) or (g). Therefore, the only possible definitions that could apply in this case are "imposing a requirement" or "exercising a power" under sections 99(b) or (c) respectively.

With respect to imposing a requirement, the Director submits that the "requirement" in the Procedure for a certain level of relevant experience is simply a discretionary policy developed to identify classes of qualified persons for the purposes of section 42 of the *Act*. He submits that these types of requirements do not constitute "a requirement" imposed by any provision of the *Act*, as envisioned by section 99(b). The Director further submits that the letter under appeal is a reflection of his assessment of whether the Appellant comes within any of the classes set out in the Procedure. As such, it is more appropriately characterized as

determining whether a pre-existing policy requirement has been met, rather than the imposition of that requirement. The Panel agrees.

With respect to exercising a "power" for purposes of section 99(c), the Director submits that the power being exercised must be one that is directly related to a power explicitly conferred by the *Act*. The Director further submits that his powers under section 42 are limited to determining classes of persons and designating Roster members from those classes of persons. He submits that any supplementary decision-making cannot be considered the exercise of a power within the meaning of section 99(c).

In support of his submissions, the Director relies on *Imperial Oil Limited v. Ron Driedger*, 2002 BCSC 219. In that case the Supreme Court of British Columbia considered the scope of "decision" under the same provision in the former *Waste Management Act* (then section 43[1]), and whether an appeal would lie to the Board from a Director's requirement relating to the issue of an Approval in Principle (AIP) to remediate certain contaminated lands. In that case, the respondent decided to issue the AIP but proposed to withhold it until such time as a settlement had been reached with the property owners affected by the contamination. In her decision, Madame Justice Ross stated:

> [50] There remains then the question of whether this decision falls within the scope of the imposition of a requirement or an exercise of a power pursuant to s. 43(b) or (c) respectively. I have concluded that it does not. I agree with the analysis of the Board in *McPhee*, supra, that the meaning of the acts referred to in s. 43 is to be found in the provisions of the Act. The powers and requirements referred to are the powers and requirements specified in the Act. I was not referred to, nor could I find on review, a provision of the Act which contemplated or authorized the action taken in this case by the Respondent.
>
> [51] I therefore conclude that the decision of the respondent with respect to the AIP is not subject to an appeal to the Board. It is, however, a decision which is subject to judicial review and to an order of mandamus under s. 2 of the *Judicial Review Procedure Act*.

There is no specific power or requirement in the *Act* for the Director to make assessments of relevant experience for determining eligibility to take a professional expert examination. These processes have been developed and set out by the Director in the Procedure. The Panel agrees with the Director's submission that this appeal relates to policies, processes and experience assessments under the Procedure, and the Director's application of those policies and procedures to Mr. Graham are not, in and of themselves, actions authorized or specified in the *Act*.

Having said that, it is arguable that the Director's application of the Procedure is simply a precondition to the exercise of his statutory power to add names to the Roster under section 42(3)(b). As such, it may be that, in some circumstances, it

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[1] Section 43 of the repealed *Waste Management Act* is parallel to section 99 of the *Environmental Management Act*.

could constitute an exercise of a power under the *Act*. However, this analysis does not apply to the Director's determination in this case since the determination in this case does not involve the exercise of a power; rather, it involves the refusal to exercise the power to add Mr. Graham to the Roster.

Such a refusal does not constitute a "decision" under section 99(c).

The issue of whether a refusal to exercise a power is an appealable decision has been considered in a number of previous Board decisions. In *Canadian National Railway v. Regional Waste Manager* (Appeal No. 2001-WAS-025, May 24, 2002)(unreported) (hereinafter *Canadian National Railway*), the Board considered how to interpret the "decision" definition section, and specifically whether a refusal to exercise a power is included. In that case the Board stated at page 10:

> In specifying the types of decisions that could be appealed in the Act, the Panel notes that the legislature only set out one power in the "negative"; subsection 43(d) includes the "**refusal or cancellation** of a permit, approval or operational certificate" [emphasis in original]. The other subsections, including subsection 43(c), are framed in the positive. Despite the many examples where the legislature has specifically authorized appeals from a "failure or refusal" to act, it did not do so in subsections 43(a)(b)(c) and (e). The Panel finds that this indicates that the legislature did not intend for those subsections to include the negative. The Panel adopts the following findings in *McPhee* [Darcy McPhee v. Deputy Director of Waste Management, (Appeal No.95/08, December 14, 1995)(unreported)].
>
> > A reading of section 25 [now section 43] seems to clearly indicate that there must generally be a positive act, which would constitute an appealable provision. Each enumerated head under the section refers to a specific exercise of statutory power. The Board agrees… that if a refusal to make a decision were to be included under this section the legislature would have specifically stated it.
>
> Accordingly, the Panel finds that the failure or refusal to "exercise a power" is not an appealable decision.

Similarly, in *Beazer East, Inc. v. Assistant Regional Waste Manager*, (Appeal No. 2003-WAS-002(a), February 5, 2004)(unreported), the Board referred to and adopted the reasoning in *Canadian National Railway* and found that the "failure or refusal to amend an order to include new previously unnamed parties [in an Amended Remediation Order] is not the "imposition of a requirement", an "exercise of a power" or the "inclusion of a requirement or condition" and is, therefore, not an appealable decision.

Although the Board is not bound by its previous decisions, this Panel also adopts the reasoning in *Canadian National Railway*. It finds that the Director's experience determination and the resulting failure or refusal to allow Mr. Graham to sit the October examinations, or to appoint him to the Roster, is not a "decision" under section 99 of the *Act*.

In addition, this reasoning is further supported by the Supreme Court of British Columbia, which recently considered section 43 of the *Waste Management Act* (now section 99 of the *Environmental Management Act*) in *Houweling Nurseries v. District Director of the GRVD et al*., 2005 BCSC 894 (hereinafter *Houweling*). In *Houweling*, the Court considered whether the Board erred in finding that it did not have jurisdiction to hear an appeal of the district director's decision. Although the Court found that the Board erred in its interpretation of section 43(d) of the former *Waste Management Act* [now section 99(d) of the *Act*], it affirmed the Board's interpretation of the first three subsections. In that decision, Madam Justice Gerow commented that:

> [32] The first three subsections of s. 43 [now section 99 of the *Act*] define "decision" as positive acts of the district director in (a) making an order; (b) imposing a requirement; and (c) exercising a power.
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> [33] The subsections were considered in *Imperial Oil Limited v. British Columbia (Ministry of Water, Land and Air Protection)* 2002, 98 B.C.L.R. (3d) 360, [2000] B.C.J. No. 295 (S.C.). Ross J. agreed with the analysis of the Board in *McPhee v. British Columbia (Ministry of Environment, Lands and Parks),* [1995] B.C.E.A. 52 (B.C.E.A.B.) that the meaning of the acts referred to in s. 43 is to be found in the provisions of the *Act*. In *Imperial Oil* there were no provisions in the *Waste Management Act* which contemplated or authorized the action taken by the decision maker, and therefore the court concluded that the decision was not subject to an appeal to the Board, but was subject to judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.
>
> [34] In *McPhee* the Board considered whether the refusal to make an order was an appealable decision under s. 25(b)(now s. 43(b)) of the *Waste Management Act.* In interpreting s. 25(b) the Board considered subsections (a), (b), and (c) and noted that each of the subsections refers to an action by the manager. The Board said that the same could be said for subsections (d) and (e) in that each of those subsections captures the decisions made by a manager when issuing or amending permits, approvals and operational certificates. The Board commented that the only subsection that contemplates permitting an appeal of a refusal to act is s. 25(d), but that subsection only applied to permits, approvals or operational certificates, not to orders. Given that (d) did not apply to orders it was unnecessary for the Board to deal with it. The Board held that s. 25(b) refers to a positive act, i.e. exercising a power, as an appealable decision, and did not include a refusal to make a decision on the issuance of pollution abatement order. Therefore the applicant did not have a right of an appeal to the Board under s. 25.
>
> [35] Neither *McPhee* nor *Imperial Oil* dealt directly with s. 43(d) which differs from the other subsections of s. 43 in that it expressly included within the definition of decision a "refusal" to act.

Based on the arguments and evidence presented, the Panel concludes that the determinations made by the Director as set out in his letter of August 24, 2005, do not constitute a "decision" which may be appealed to the Board under the *Act*.

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 finds that Mr. Graham's appeal was filed out of time and is statute barred. The Panel also finds that the decision under appeal is not a "decision" as defined in section 99 of the *Act* and is, therefore, beyond the jurisdiction of the Board.

Accordingly, the appeal is dismissed for lack of jurisdiction.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

January 24, 2006