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Environmental Appeal Board

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APPEAL NO. 2006-EMA-008(a)

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

BETWEEN:	BC Hydro and Power Authority	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Ocean Construction Supplies Ltd. 427958 B.C. Ltd. (dba the Super Save Group of Companies)	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on November 30, 2006	
APPEARING:	For the Appellant: David G. Perry, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: 427958 B.C. Ltd.: James R. Kitsul, Counsel Ocean Construction Supplies Ltd.: Clifford G. Proudfoot, Counsel Sara J. Gregory, Counsel	

PRELIMINARY ISSUE OF JURISDICTION

The BC Hydro and Power Authority ("BC Hydro") appealed the June 12, 2006 decision of Mike Macfarlane on behalf of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"), to issue an amended approval in principle (the "Amended AIP"). The contentious amendments, conditions 2 and 3 in Schedule "B" of the Amended AIP, require BC Hydro to prepare a remediation plan and advise how it will remediate contamination that has migrated from its properties to adjacent parcels of land owned by 427958 BC Ltd., doing business as the Super Save Group of Companies ("Super Save"), and Ocean Construction Supplies Ltd. ("Ocean Construction").

Although it filed an appeal with the Board, BC Hydro states that the Board has no jurisdiction over the appeal because the issuance of the Amended AIP is not a "decision" as defined in section 99 of the *Environmental Management Act* (the

"*Act*"). It explains that it is filing the appeal in order to protect its rights in the event that it is wrong, and the Board does have jurisdiction to hear the appeal.

Although the question of whether an AIP (or an amendment thereof) is an appealable decision has been raised in previous appeals, this question has never been decided by the Board with the benefit of full argument. Therefore, prior to accepting BC Hydro's appeal as filed, the Board must determine whether it has the jurisdiction to do so. The Board invited submissions from all of the parties on this issue.

This preliminary matter was heard by way of written submissions.

BACKGROUND

Since 1996, BC Hydro and Transport Canada have worked together to develop a remediation strategy for a contaminated site comprised of three parcels of land which are owned by BC Hydro (the "BC Hydro Properties"). The BC Hydro Properties are located in the City of Victoria at or near Rock Bay, and are adjacent to property owned by the federal Crown and administered by Transport Canada.

The BC Hydro Properties, as well as much of the sediment within Rock Bay and portions of the Transport Canada property, are (or were, prior to remediation) contaminated with coal tar and coal tar components, as well as other materials such as ammonia liquors, cyanide, hydrocarbon fuels, oxide box wastes, wood waste, and metals. The contamination is largely a result of historical commercial and industrial activities in and around Rock Bay, including the operation of a coal gas manufacturing plant from 1862 to the late 1940's by a predecessor of BC Hydro.

Transport Canada's property is federal land, and is not subject to the Province's contaminated sites legislation. However, it entered into an agreement with BC Hydro to carry out remediation jointly, and to meet provincial remediation standards. Their joint efforts ultimately resulted in a 2003 remedial action plan. This plan involved the excavation, disposal and replacement of all soil with contaminant concentrations exceeding the commercial and industrial land use standards set out in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*CSR*"), and the excavation/dredging and disposal of all sediments in the bay with contaminant concentrations exceeding the standards set out in the *Special Waste Regulation*, B.C. Reg. 63/88 (now called the *Hazardous Waste Regulation*). This plan became the basis for BC Hydro/Transport Canada's request to the Ministry for an approval in principle, which would allow them to begin remediation in accordance with the plan.

Approvals in principle are authorized under the *Act* by section 53(1), as follows:

53 (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

Additional provisions relating to approvals in principle are set out in the *CSR*. Specifically, section 47 states:

Approval in principle

47 (1) A responsible person may apply for an approval in principle of a proposed remediation plan under section 53 (1) of the Act by submitting a request in writing to a director and attaching or ensuring the director already has

(a) copies of any preliminary and detailed site investigation reports prepared for the site,

(b) copies of any other site investigation and assessment reports prepared for the site, and

(c) the proposed remediation plan for which the approval in principle is sought.

…

(2) Before issuing an approval in principle under section 53 (1) of the Act, a director may request any additional information and reports the director considers necessary to assess whether the standards, criteria or conditions prescribed in section 17, 18 or 18.1 of this regulation are likely to be complied with when the proposed remediation plan has been implemented.

(3) When issuing an approval in principle under section 53 (1) of the Act, a director may specify conditions for any or all of the following:

(a) implementing some or all of the activities described in a proposed remediation plan;

(b) risk assessment and risk management measures which may be required for part or all of a site for any reason;

(c) preparation, registration, and criteria for final discharge of a covenant under section 219 of the *Land Title Act* as may be required under section 48;

(d) carrying out confirmatory sampling and analysis after treatment or removal of contamination;

(e) testing and monitoring to evaluate the quality and performance of any remediation measures;

(f) any financial security required by the director in accordance with section 48;

(g) any actions which the director could require in a permit under section 14 of the Act.

Thus, as the Board has observed in a previous case, the Director's role in the approval in principle process is to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the *Act* (dealing with contaminated site remediation), including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites: *427958 B.C. Ltd. (dba the Super Save Group of Companies) v. Deputy Director of Waste Management*, (Appeal No. 2004-WAS-007(a), November 2, 2004) (unreported).

After reviewing the 2003 remedial action plan, the Deputy Director of Waste Management issued the original approval in principle to BC Hydro on April 30, 2004 (the "AIP"). The AIP authorized BC Hydro to implement scenario 4 of the 2003 remedial action plan.

BC Hydro submits that, to date, it and Transport Canada have spent approximately $35 million towards remediation of the site under this AIP.

The preliminary issue now before this Panel relates to the jurisdiction of the Board over BC Hydro's appeal of the Amended AIP, which addresses contamination that has migrated off the properties covered by the AIP; specifically, the properties of Super Save and Ocean Construction.

Super Save owns property adjacent to the BC Hydro Properties and has operated a gas station on that property for several years. Ocean Construction also owns property on or near Rock Bay, adjacent to the BC Hydro Properties. Investigations of both neighbouring properties have indicated that they are contaminated. Super Save and Ocean Construction have been asking the Ministry to investigate the migration of contamination to their properties, and have sought to have their properties included in BC Hydro and Transport Canada's remediation plan for some time. This finally occurred after studies were conducted that confirmed the contamination and its links to the BC Hydro Properties and the Director amended the AIP to add conditions 2 and 3. This came about as follows.

After a new 2004 remediation plan was prepared for BC Hydro and Transport Canada by Morrow Environmental Consultants Inc., BC Hydro consented to an amendment of the AIP. That amendment required BC Hydro to submit to the Director further information regarding a fourth parcel of land owned by BC Hydro. Specifically, it required:

> A detailed technical characterization and summary report of soil and groundwater quality in area 1 (PID 009-742-565)… that existed immediately prior to and during site remediation activities. In addition to any other information presented, this characterization shall specifically address the issue of migration of contaminants to and/or from the properties adjacent to this area.
>
> [emphasis added]

A number of reports were prepared and submitted to the Ministry on behalf of Ocean Construction, Super Save and BC Hydro.

All of those reports are discussed in a Ministry report titled, *Technical Review, Approval in Principle Amendment*, dated June 9, 2006 (the "Technical Review"), prepared by Julia Brooke, P. Eng., Senior Contaminated Sites Officer with the Ministry. One of the report's conclusions is that the area of contamination associated with the former manufactured gas plant at Rock Bay extends beyond the property boundaries identified in the AIP – that "indicators strongly suggesting that neighbouring properties in locations to the north and west of Area 1, including the Super Save and Ocean Construction (Lehigh) properties, contain contamination originating at the fmgp [former manufactured gas plant] at Rock Bay."

The Technical Report also discussed the Director's authority to amend the AIP. There is no express authority for the Director to amend an approval in principle in either section 53 of the *Act* or section 47 of the *CSR*. However, the Technical Report points out that the AIP is a "permit" under section 47(6) of the *CSR*. Section 47(6) states:

> **47** (6) An approval in principle for a remediation plan issued under this section is a permit within the meaning of the Act for any facility which
>
> (a) is located on the site to which the remediation plan applies,
>
> (b) is specifically identified in the remediation plan, and
>
> (c) is used to manage any contamination which is located on the site for which the remediation plan applies.
>
> [emphasis added]

Since the Director may amend a permit on his own initiative under section 16(1) of the *Act*, the Technical Report states that he can amend the AIP. Section 16(1) of the *Act* states:

Amendment of permits and approvals

16 (1) A director may, subject to section 14 (3) [permits], this section and the regulations, for the protection of the environment,

(a) on the director's own initiative if he or she considers it necessary, or

(b) on application by a holder of a permit or an approval,

amend the requirements of the permit or approval.

[emphasis added]

The Director issued the Amended AIP on June 12, 2006, which authorizes BC Hydro to implement remediation of certain contaminated lands in accordance with the 2004 remedial action plan. Schedule "B" of the Amended AIP contains two paragraphs that were not in the AIP as amended in November 2004. Those paragraphs state, in part, as follows:

> 2. A revised remediation plan, prepared by a qualified environmental consultant…, shall be submitted to the Director for approval on or before June 30, 2006. The revised remediation plan shall be inclusive of off site areas (adjacent to the original BC Hydro and Transport Canada Rock Bay Remediation Project boundaries), to include lands affected by contamination originating at and/or having migrated from the former manufactured gas plant previously located on the BC Hydro property…
>
> 3. The remediation plan prepared pursuant to clause 2 above shall clearly indicate how BC Hydro intends to undertake remedial activities in a timely manner such that the activities associated with off site contaminated areas are fully integrated with the timeline and proposed remedial activities for the presently designated Stage III area, or alternatively, how BC Hydro intends to facilitate remediation that shall be carried out in a manner to accommodate future use and development of the impacted lands.

A Ministry letter that accompanied the Amended AIP states, in part, as follows:

> Please find enclosed an amended approval in principle for the lands referenced above. The approval has been amended taking into consideration *Contaminated Sites Regulation* section 47 (6) and *Environmental Management Act* section 16 (1).
>
> …

> The approval in principle is a decision that may be appealed under Part 8 of the *Environmental Management Act*.

Thus, in the Director's view, the Amended AIP was appealable to the Board.

Section 100 of the *Act* establishes the right of appeal to the Board. It states:

> **100**(1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division…
>
> [emphasis added]

"Decision" is defined in section 99 of the *Act* as follows:

> **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, cancelling or refusing to amend a permit, approval or operational certificate,
>
> (e) including a requirement or a condition in an order, permit, approval or operational certificate,
>
> (f) determining to impose an administrative penalty, and
>
> (g) determining that the terms and conditions of an agreement under section 115 (4) have not been performed.

On July 13, 2006, BC Hydro filed a Notice of Appeal regarding the Amended AIP. In its Notice of Appeal, BC Hydro submits that:

> …the Amended AiP is not a "decision" as defined under the [*Act*] and cannot be appealed to the Environmental Appeal Board.
>
> The present appeal is filed by BC Hydro to avoid loss of its appeal rights in the event that the issuance of the Amended AiP is subsequently held by the Environmental Appeal Board or a Court of competent jurisdiction to be a decision under the [*Act*].

BC Hydro also argues that the deeming of some aspects of an approval in principle to be a permit under section 47(6) of the *CSR* is of no force and effect, or alternatively, if section 47(6) of the *CSR* is valid, it should be read down such that

only a "facility" mentioned in a approval in principle is subject to a permit, and in this case, no such facility is part of the Amended AIP.

Super Save and Ocean Construction submit that the Board has jurisdiction over the appeal. Super Save provided no further submissions on the issue. However, Ocean Construction argues that the Amended AIP is a decision within the meaning of section 99(b) of the *Act* because it is the "imposition of a requirement." Alternatively, Ocean Construction submits that it is a decision under sections 99(d) and (e) of the *Act* because it is amending or imposing a requirement to an approval or a permit.

The Director took no position on the Board's jurisdiction over the appeal and Transport Canada did not respond to the invitation to provide submissions.

ISSUES

This primary issue raised by the parties is whether the Amended AIP is a "decision" for the purposes of section 99 of the *Act*.

RELEVANT LEGISLATION

Although most of the relevant legislation is cited in the text of this decision, it is of assistance to set out the full section in the *Act* that deals with approvals in principle. Section 53 provides as follows:

Approvals in principle and certificates of compliance

53 (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

(2) For the purpose of subsection (1), if a director has issued an approval in principle with respect to a proposed remediation plan for a site, the site is considered to be a contaminated site at the time the approval in principle was issued, despite the absence of a determination under section 44 (1) [determination of contaminated sites].

(3) A director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if

(a) the contaminated site has been remediated in accordance with

(i) the numerical or risk based standards prescribed for the purposes of the definition of "contaminated site",

(ii) any orders under this Act,

(iii) any remediation plan approved by the director, and

(iv) any requirements imposed by the director,

(b) information about the remediation and any substances remaining on the site has been recorded in the site registry,

(c) a plan has been prepared for the purpose of monitoring any substances remaining on the site and works have been installed to implement the plan, if required by the director,

(d) any security in relation to the management of contamination, which security may include real and personal property in the amount and form and subject to the conditions specified by the director, has been provided and the requirements respecting that security prescribed in the regulations have been met, and

(e) the responsible person, if required by the director in prescribed circumstances or for prescribed purposes, has prepared and provided to the director proof of registration of a restrictive covenant under section 219 of the Land Title Act acceptable to the director.

(4) For the purpose of subsection (3) if a director has issued a certificate of compliance with respect to remediation of a site, the site is considered to have been a contaminated site at the time remediation of the site began, despite the absence of a determination under section 44 (1) [determination of contaminated sites].

(5) A director may withhold or rescind an approval in principle or a certificate of compliance if

(a) conditions imposed on the approval or certificate are not complied with, or

(b) any fees payable under this Part or the regulations are outstanding.

(6) A director may issue an approval in principle or a certificate of compliance for a part of a contaminated site.

DISCUSSION AND ANALYSIS

Whether the Amended AIP is a "decision" for the purposes of section 99 of the *Act*.

This jurisdictional issue arises because neither an approval in principle, nor an amendment to an approval in principle, are expressly included in the definition of "decision" in section 99 of the *Act*, and it is well established that the only decisions that may be appealed to the Board are those listed in section 99 of the *Act*; the definition of "decision" in the *Act* is a complete code for determining what matters may be appealed to the Board (e.g., *Imperial Oil Ltd. v. Ron Driedger*, 2002 BCSC 219 (hereinafter *Imperial Oil*), which approved the Board's decision in *McPhee v. Deputy Director of Waste Management* (Appeal No. 98/08, December 14, 1995), [1995] BCEA No. 52 (hereinafter *McPhee*); *Beazer East Inc. v. Director of Waste Management* (Appeal Nos. 2002-WAS-016(a) and 2002-WAS-017(a), October 23, 2002)(unreported)).

If the definition of decision had included "approval in principle" and "amending an approval in principle", BC Hydro would clearly be able to appeal the Director's decision to include conditions 2 and 3 in Schedule B, and the appeal would proceed in the normal course. However, these words are not included and therefore, to be appealable, one must be able to fit this amendment into one of the other categories in the definition.

It is clear that the Ministry was of the view that the AIP was a permit, based on section 47(6) of the *CSR*. The Ministry was also of the view that the Director had jurisdiction to amend the AIP based on his power under section 16 of the *Act* to amend permits. Because amending a permit is clearly appealable under subsection 99(d), and including a requirement or a condition in a permit is appealable under subsection 99(e), according to the Ministry's analysis, the amendments at issue in this case are appealable to the Board.

In a somewhat unusual twist, the Appellant in this case, BC Hydro, disagrees. Although it filed an appeal, it argues that the Director's decision is not an appealable decision for various reasons. At the heart of its argument, BC Hydro disagrees that *all* approvals in principle are permits for the purposes of the *Act*. It submits that this is not what is intended or authorized by the wording of the section of the *CSR*. Moreover, to the extent that the section deems certain approvals in principle (for defined facilities) as permits, the section is *ultra vires* the *Act*. BC Hydro submits that on the facts, and in law, its AIP is not a permit and, therefore, the Director had neither the authority to unilaterally amend the AIP, nor the authority to impose the additional conditions.

As background to its arguments, BC Hydro states that permits and approvals in principle are entirely different statutory instruments: a permit exempts its holder from the broad prohibition in the *Act* against introducing waste into the environment, whereas an approval in principle is an agreement between a

remediating party and the Ministry which sets out certain criteria for remediating a contaminated site.

BC Hydro explains that an approval in principle is just one method for remediating contaminated sites. It points out that the *Act* contemplates a variety of methods for remediation of contaminated sites, including remediation orders, voluntary remediation agreements, approvals in principle, and independent remediation. BC Hydro further explains that approvals in principle require significant investigation before remediation commences, and a director's approval of the remediation plan. It states approvals in principle are distinct from other methods of remediation because the remediating parties are not compelled to remediate, and the process allows for certificates of compliance as an incentive. It states that these certificates are valuable because they offer proof that the Ministry is unlikely to take further regulatory steps regarding a property, and they are often required before banks will extend mortgage financing on contaminated or previously contaminated properties. BC Hydro submits that approvals in principle also provide benefits to directors in the form of administrative efficiencies.

In this case, BC Hydro and Transport Canada have voluntarily developed a remediation plan to address the contamination, sought an approval in principle for the plan (the AIP) and have spent millions of dollars on remediation to date. BC Hydro submits that remediating parties will have less incentive to pay the fees and endure the lengthy reviews associated with approvals in principle if the approval in principle can be unilaterally amended by a director, especially, as in this case, where the amendment expands the scope of the area being remediated.

BC Hydro submits that responsible persons will instead choose other remediation options such as independent remediation (under section 54 of the *Act*), which requires minimal reporting to the Ministry and typically proceeds without Ministry approval of the remediation plan, or a voluntary remediation agreement (under section 51 of the *Act*). At the end of the day, the Ministry will issue a certificate of compliance for sites remediated in accordance with any of these options (including approvals in principle), provided that the remediation meets the standards required under the *Act*. Alternatively, responsible persons may delay clean-up until the Ministry issues a remediation order requiring them to do so.

Turning to the wording of the legislation, BC Hydro submits that section 47(6) should not be read to deem an approval in principle, in its entirety, to be a permit. BC Hydro submits that, properly read, an approval in principle is only a permit "for any facility" that meets the criteria listed in section 47(6); specifically, facilities that are located on a contaminated site, are specifically identified in the remediation plan, and are used to manage contamination. "Facility" is defined in section 1 of the *Act* to include "any land or building, and any machinery, equipment, device, tank, system or other works".

BC Hydro argues that this section is intended to make it easier to remediate contaminated sites by exempting the holders of approvals in principle from the

requirement to obtain a permit for certain remediating facilities. For example, in some cases, remediation will require the installation of groundwater treatment or soil treatment facilities. If such facilities introduce waste into the environment, they would normally require a permit to operate. An approval in principle that contemplates such facilities would not require an additional permit because section 47(6) deems the approval in principle itself to be a permit for the purposes of that facility.

When read in this manner, BC Hydro submits that the section is consistent with the purposes of the *Act*, which include encouraging the remediation of contaminated sites. It relieves the holder of an approval in principle from the "red tape" associated with applying for and paying for a permit for certain facilities, and relieves the Ministry from the burdens of issuing additional permits when the facility is covered by an approval in principle.

On the facts of this case, BC Hydro submits that the Amended AIP does not deal with a "facility" described in section 47(6); therefore, no appeal lies to the Board. In particular, the contentious amendments require BC Hydro to develop a remediation plan, and have nothing to do with a "facility". Moreover, the amendments deal with properties that are outside of the site identified in Schedule "A" of the Amended AIP, whereas section 47(6) deals with facilities "on the site".

Finally, BC Hydro argues that there are far-reaching implications and unintended consequences if the Board interprets this section of the regulation to deem all approvals in principle to be permits for the purposes of the *Act*. For example, it means that section 47(6) of the *CSR*:

- creates appeal rights with respect to "issuing, amending, renewing, suspending, refusing, canceling or refusing to amend" an approval in principle (see section 99(d) of the *Act*);
- allows a director to amend an approval in principle on his or her own initiative; and,
- creates an offence for failing to comply with the terms of an approval in principle, with related enforcement powers including restraining orders, administrative penalties, and forced inspection of vehicles.

BC Hydro submits that this cannot be the intention and, if it is, it is contrary to the wording of the legislation, is without statutory authority, conflicts with the *Act*, and would be *ultra vires* the *Act*.

Ocean Construction submits that section 47(6) of the *CSR* does not conflict with the *Act*, because section 47(6) is not compelling something that the *Act* forbids, nor is it telling those to whom it applies to do inconsistent things. Rather, approvals in principle may be considered a different class of permit from permits issued under

section 14 of the *Act*, with different rules governing them. Ocean Construction submits that many aspects of approvals in principle are analogous to permits. For example, both regulate activities in relation to the environment, and section 47(3)(g) of the *CSR* states that, when issuing an approval in principle, a director may specify conditions including "any actions which the director could require in a permit". Additionally, section 47(7) of the *CSR* exempts approvals in principle from the public notice that is normally required for permits:

> **47** (7) In relation to an application for an approval in principle described in subsection (6), the *Public Notification Regulation* does not apply with respect to the facility, except for a hazardous waste treatment or disposal project under that regulation.

In support of those submissions, Ocean Construction cites a number of judicial decisions regarding the presumption against internal conflict in statutory interpretation, including *Friends of the Old Man River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3.

Ocean Construction notes that the *Act* defines "facility" broadly, to include "land" itself. Therefore, contrary to BC Hydro's assertion, there are, in fact, facilities (i.e., the land) on the site encompassed by the AIP that are, or will be, used to manage contamination on the site, pursuant to the terms of the AIP as amended.

Finally, Ocean Construction submits that BC Hydro's policy rationale is flawed. Ocean Construction maintains that, while the legislature may have intended to encourage the use of approvals in principle, it did not do so at the cost of ensuring comprehensive remediation by responsible persons. Moreover, Ocean Construction notes that the AIP, and its subsequent amended forms, expressly states that the Ministry reserves the right to add requirements or make amendments. Ocean Construction submits that this includes the amendments in this case, which address contamination on adjacent properties.

The Panel's Findings

Section 47(6) states that an approval in principle is a "permit within the meaning of the Act <u>for any facility</u>" [underlining added] that meets the criteria listed. In the Panel's view, this language indicates that an approval in principle is a permit only insofar as it applies to such facilities; namely, those that are located on a contaminated site, specifically identified in the remediation plan, and used to manage contamination. Thus, the provisions in the *Act* that relate to permits, including the definition of "decision" in section 99 and the power to amend permits in section 16, only apply to the aspects of an approval in principle that serve as a permit for such a facility. Consequently, the Panel finds that the purpose of section 47(6) is limited to exempting the holders of approvals in principal from the requirement under the *Act* to hold a permit for such a facility.

The Panel agrees with BC Hydro that there are policy reasons to limit application of the word "permit" in the section and this interpretation does not lead to an absurd result.

The Panel agrees which BC Hydro's characterization of the difference between permits and approvals in principle. They are entirely different statutory instruments. A permit exempts its holder from the broad prohibition in the *Act* against introducing waste into the environment – it allows someone to, in simplistic terms, "pollute". An approval in principle addresses the opposite: the clean-up of pollution. An approval in principle is essentially a director's endorsement, subject to any conditions specified by the director, of a remediation plan that has been proposed by a remediating party.

The Panel finds that the purpose of section 47(6) of the *CSR* is to make it easier for holders of approvals in principle to remediate its contaminated site by exempting them from the requirement to obtain a permit for certain facilities. As noted by BC Hydro, remediation of a site may require the installation of groundwater treatment or soil treatment facilities. If such facilities introduce waste into the environment, they would normally require a permit to operate. Section 47(6) allows for faster and less costly remediation because the holders of approvals in principle need not also obtain a permit for those facilities.

In addition, limiting appeals to the "permit" aspects of an approval in principle ensures that remediation is not delayed by an appeal of the entire approval in principle. The ability to appeal the "permit" aspects of an approval in principle protects the rights of those who may be aggrieved by the discharge of waste from the "facility" while not unduly delaying other aspects of the remediation process. In this sense, section 47(6) is consistent with one of the primary purposes of Part 4 of the *Act*: it encourages the timely remediation of contaminated sites.

Finally, the Panel notes that if section 47(6) is interpreted as deeming an approval in principle, in its entirety, to be a permit, it would lead to a number of conflicts with the *Act*. For example, it would effectively amend the definition of "permit" to include approvals in principle issued under section 53 of the *Act*. It would add approvals in principle, and all of the matters contained within them, to the list of matters in section 99 that may be appealed to the Board, despite the fact that the legislature chose not to include the phrase "approval in principle" in section 99.

In addition, this interpretation would create confusion when applying the offence provisions. Under section 120(6) of the *Act*, it is an offence if a permit holder "introduces waste into the environment without having complied with the requirements of the permit". However, the primary purposes of approvals in principle pertain to the remediation of contaminated sites, not the discharge of waste into the environment. It is also notable that section 120(17) of the *Act* lists a number of offences pertaining to contaminated sites, yet it does not mention approvals in principal. For example, under sections 120(17)(c), (f), and (h), respectively, it is an offence if a person "fails to comply with a remediation order",

"fails to comply with the requirements of a director in a voluntary remediation agreement", or "fails to comply with requirements of a director… regarding independent remediation". If the legislature had intended for it to be an offence to breach any aspect of an approval in principle, it could have expressly done so in the *Act*.

The Panel's interpretation is also internally consistent with other sections of the *CSR*. In particular, it provides an explanation for section 47(3)(g) of the *CSR*, which authorizes a director, when issuing an approval in principal, to specify conditions including "any actions which the director could require in a permit under section 14 of the Act."

Additionally, the exemption in section 47(7) of the *CSR* of applications for approvals in principle from the public notification requirements of the *Public Notification Regulation* (which normally applies to permits) is consistent with the fact that the "permit" aspects of an approval in principle are ancillary to the primary purpose of remediation.

In summary, the Panel finds that the provisions in the *Act* that relate to permits only apply to the aspects of an approval in principle that serve as a permit for a "facility" described section 47(6). Thus, a director's powers under the *Act* in relation to permits only apply to those aspects of an approval in principle.

Turning to the facts in this case, the Panel finds that the amendments made by the Director are not concerned with a "facility" contemplated in section 47(6) of the *CSR*. It is clear to the Panel that the "facility" in question must be covered by an *existing* remediation plan. Section 47(6) states that the approval in principle issued for a remediation plan is a permit for any facility that:

> (a) is located on the site to which the remediation plan applies,
>
> (b) is specifically identified in the remediation plan, and
>
> (c) is used to manage any contamination which is located on the site for which the remediation plan applies.
>
> [emphasis added]

Since an approval in principle is the Ministry's endorsement of what is, in essence, a type of voluntary remediation, it makes sense that it is the parties' remediation plan which is the basis for the approval, and it is a facility covered by the plan that is considered a "permit" within the meaning of the *Act*.

On the facts of this case, the contentious amendments do not apply to the contaminated site defined in the remediation plan, as approved in Schedule "A" of the AIP, as amended. Rather, the amendments would require a new or revised

remediation plan to cover a new site, beyond the site which is covered by the existing remediation plan. Therefore, the Panel finds that the amendments do not amount to amending a portion of an approval in principle that serves as a "permit" for a facility described in section 47(6) of the *CSR*.

For all of these reasons, the Panel finds that the amendments in this case were not "amending a permit" within the meaning of section 99(d) of the *Act* or "including a requirement or a condition in a permit" within the meaning of section 99(e) of the *Act*. Accordingly, the Panel agrees with BC Hydro that the Amended AIP is not an amended permit, as set out in subsection 99(d) of the *Act*, and, therefore, is not an appealable decision.

At this point, it should be noted that BC Hydro also made thorough and compelling arguments on the *vires* of section 47(6) of the *CSR*. However, upon a careful review of the submissions, it does not appear that BC Hydro gave notice to the Attorney General of British Columbia as required under section 8(3) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Although one of the lawyers working for the Ministry of Attorney General was counsel to the Director, this does not satisfy the notice requirement and the Panel was unable to consider that argument further.

Although the Panel accepts BC Hydro's position that the Director's decision is not appealable as a permit, or amended permit, Ocean Construction suggested that the Director's decision should be characterized in a different manner, thus bringing it within one of the other subsections of section 99 of the *Act*.

Ocean Construction submits that section 99 was not intended to exclude significant, conclusive actions taken by a director from the appeal process, and that the issuance of the Amended AIP is the type of action that is caught by section 99. It submits that the legislature chose to set up the Board as a specialized tribunal with jurisdiction to decide environmental appeals, and that the appeal process is designed to counterbalance the broad powers conferred on directors by giving parties an opportunity to assert their rights before a specialized tribunal as quickly as possible: *Swamy v. Tham Demolition Ltd*., [2000] B.C.J. No. 1734 (hereinafter *Swamy*). It further submits that the legislature did not intend to limit the Board's jurisdiction to hearing appeals on a purely formal or technical basis: *Houweling Nurseries Ltd. v. Greater Vancouver (Regional District) District Director*, [2005] B.C.J. No. 1347 (hereinafter *Houweling*).

With these points in mind, Ocean Construction submits that the decision at issue should be characterized as either the imposition of a *requirement* under subsection 99(b) of the *Act*, or as the amendment of an *approval*, or the imposition of a requirement to an *approval*, under subsections 99(d) and (e) of the *Act*.

Is the Amended AIP an "approval" for the purposes of subsections 99(d) and (e) of the *Act*?

The word "approval" appears in section 99, but that word is defined in section 1(1) of the *Act* as follows:

> **"approval"** means an approval under section 15 or under a regulation;

Ocean Construction maintains that the Amended AIP is an approval issued under a regulation, because it was "approved" by the Director under the provisions of the *CSR*.

The Panel finds that an approval in principle is not an "approval" for the purposes of section 99 of the *Act*. "Approval" is defined in section 1(1) of the *Act*, whereas "approval in principle" is defined in section 39 of the *Act*. Section 39 states:

> **"approval in principle"** means an approval in principle under section 53 [approvals in principle and certificates of compliance];

Ocean Construction argues that the definition of "approval" includes approvals issued under a regulation. However, the Panel finds that approvals in principle are not issued under a regulation or under section 15 of the *Act*; rather, they are issued under section 53 of the *Act*. Although the use of the word "approval" in section 53(5) of the *Act* may be confusing, the Panel finds that it is used in that context to mean an "approval in principle". It is not indicative of an intention for approvals in principle, issued under Part 4 of the *Act*, to be an "approval" as defined in section 1(1).

Thus, the Panel concludes that the word "approval" is section 99 of the *Act* was not intended to include "approval in principle" and the Amended AIP is neither "amending an approval", within the meaning of section 99(d) of the *Act* nor "including a requirement or a condition in an approval" within the meaning of section 99(e) of the *Act*.

Is the Amended AIP the imposition of a "requirement" for the purposes of subsection 99(b) of the *Act*?

Ocean Construction argues that the word "requirement" should be given its ordinary meaning because the word is not defined in the *Act*. It relies upon the following dictionary definitions of "requirement", cited in the *Shorter Oxford English Dictionary,* (2nd. Ed.)(Oxford: Oxford University Press, 2002) and *The Dictionary of Canadian Law*, (3rd. Ed.)(Toronto: Thomson, 2004), respectively:

> Something to be called for or demanded, a condition which must be complied with.

> Any demand, direction, order subpoena or summons.

Ocean Construction further submits that the wording of section 99 as a whole provides direction as to the proper interpretation of the term "imposing a requirement". Specifically, it submits that each of the actions listed in section 99 is intended to have different meanings. Therefore, the action of "imposing a requirement" in section 99(b) must have a different meaning than the action of "including a requirement… in an order, permit, approval or operational certificate" set out in section 99(e). In other words, section 99(b) must be interpreted to include a different set of requirements than those in section 99(e). Applying that reasoning to the present case, Ocean Construction argues that Schedule "B" of the Amended AIP imposes clear requirements, or conditions, with which BC Hydro must comply.

BC Hydro submits that Ocean Construction's interpretation of "requirement" in section 99(b) of the *Act*, is so broad that it would encompass virtually any action by a director, thereby making the remainder of section 99 redundant. It submits that the meaning of "requirement" must be informed by reference to specific steps that a director can take. For example, section 99(e) refers to the inclusion of a "requirement" in various instruments such as permits and orders. BC Hydro submits that the "requirements" set out in sections 14 through 16 of the *Act* are elements of a permit or approval. Section 16(1) states that:

> A director may, subject to section 14 (3), this section and the regulations, for the protection of the environment… amend the requirements of the permit or approval.
>
> [underlining added]

BC Hydro also identified a variety of other sections which specifically refer to a "requirement" (sections 19(1), 20(5)(b), 53(3)(a)(iv) and 54(3)(d)). Although the *Act* contemplates many situations where a director may impose requirements that could be appealed under section 99(b), none of those situations occurred in the subject case.

Additionally, BC Hydro submits that requirements are compulsory, whereas an approval in principle is a voluntary agreement between a director and the remediating party. If the remediating party fails to carry out the constituent parts of an approval in principle, then it may be rescinded or the director may withhold issuing a certificate of compliance. BC Hydro also notes that the constituent parts of an approval in principle set out in section 53(5), are called "conditions", not "requirements":

> (5) A director may withhold or rescind an approval in principle or a certificate of compliance if

(a) conditions imposed on the approval or certificate are not complied with, or

(b) any fees payable under this Part or the regulations are outstanding.

BC Hydro submits that, when the *Act* allows a director to impose compulsory measures such as "requirements", an appeal will lie to the Board. However, it characterizes an approval in principle as being contractual, or quasi-contractual in nature and that the remediating parties are not compelled to remediate. BC Hydro submits that where the arrangement is voluntary and quasi-contractual, as with an approval in principle, there is no need for an appeal because there is no infringement of the remediating party's rights that would require an appeal. If the remediating party is unsatisfied with the terms offered by the Ministry, then it can pursue independent remediation or do nothing. If a director is unsatisfied with remediation conducted under an approval in principle, then he or she can rescind it, and the remediating party may not receive a certificate of compliance after remediation is completed. If nothing is done, the Ministry may issue a remediation order to the responsible persons.

BC Hydro argues that there is no need for a director to impose compulsory requirements in the context of remediation under an approval in principle because the remediating party stands to lose the incentive that it sought by remediating under an approval in principle; namely, a certificate of compliance.

The Panel's Findings

It is a principle of statutory interpretation that "the words in an Act are to be read in their entire context and in their grammatical and ordinary sense, harmonious with the scheme of the Act, the intention of the Act and the intention of the legislature": *Haida Nation v. British Columbia (Minister of Forests)* (1997), 45 B.C.L.R. (3d) 80 (C.A.); and *Houweling* at paragraphs 26 to 28, citing *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915.

The Panel agrees with Ocean Construction that each of the actions listed in section 99 of the *Act* are intended to have a different meaning. In order for all of the subsections in section 99 to have a purpose, the action of "imposing a requirement" in subsection (b) must have a different meaning than the action of "including a requirement… in an order, permit, approval or operational certificate" in subsection (e). The question is whether the amendments that were made to Schedule "B" of the Amended AIP constitute imposing "requirements" within the meaning intended under the *Act*.

In ascertaining whether the act of amending the AIP was "imposing a requirement" within the meaning of the *Act*, the Panel has considered the words in section 99(b) in the context of other relevant provisions of the *Act*, including the sections that relate to approvals in principle, as well as other sections which contemplate a director "imposing a requirement".

Section 53(1) of the *Act* sets out the authority for issuing approvals in principle. It states:

> **53** (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site
>
> (a) has been reviewed by the director,
>
> (b) has been approved by the director, and
>
> (c) may be implemented in accordance with conditions specified by the director.
>
> [underlining added]

The language in section 53(1)(c) indicates that a director may, when issuing an approval in principle, specify "conditions" that apply to implementing the remediation plan. This leads to the question of whether there is any substantive difference between "specifying a condition" under section 53 and "imposing a requirement" within the meaning of section 99. It also leads to the question of whether such action is only authorized when an approval in principle is issued at first instance, or whether further conditions may be specified after an approval in principle has been issued, thereby amending the approval in principle.

Sections 47(1) through (5) of the *CSR* set out further powers of directors regarding applications for, and the issuance of, approvals in principal. For example, section 47(3) sets out a list of "conditions" that a director "may specify" "when issuing" an approval in principle. Section 47(5) states that a director "may issue" an approval in principle for a wide area site remediation plan if certain criteria are met. It should be noted that sections 47(1.4) and (1.41) expressly state that a director may "impose" certain "requirements" in relation to applications for approvals in principle. Those sections state as follows:

> **47**(1.4) A director may require that an application for an approval in principle in relation to a contaminated site, including a wide area site, that is classified under a director's protocol as a low or moderate risk site include a report and the recommendation of an approved professional that the application be approved.
>
> (1.41) If the director does not impose a requirement under subsection (1.4), the application may include a report and the recommendation of an approved professional in respect of whether the application should be approved and, if so, section 49.1 applies.
>
> [underlining added]

The Panel has reviewed section 53 of the *Act* and section 47 of the *CSR*, the legislative provisions governing all aspects of approvals in principle. When these sections are considered together, it is clear that a director, when considering an application for an approval in principle or issuing an approval in principle, may "impose" or "specify" "conditions" or "requirements".

It is also clear from the relevant provisions that the conditions or requirements are specified or imposed by a director unilaterally. An applicant submits their remediation plan to the director for approval, and the director reviews the plan. The director may approve the plan or not, and approval may be subject to the conditions that the director specifies. The applicant's agreement with any conditions specified by the director is not required. The director's conditions form a part of the approval in principle, and must be complied with before a certificate of compliance will be issued. This indicates that approvals in principle are not quasi-contractual agreements that are negotiated between a director and a remediating party, as suggested by BC Hydro.

Neither the *Act* nor the *CSR* indicate whether the power to impose requirements or specify conditions in relation to an approval in principle may be exercised after issuing an approval in principle. In the present case, the Director's action occurred after the AIP was issued. Other sections of the *Act* clearly distinguish between issuing and amending a statutory instrument, or set out express powers to impose requirements after an instrument has been issued. For example, section 14 of the *Act* sets out a director's powers in relation to issuing a permit, but section 16 authorizes a director to amend a permit. Section 48(1) of the *Act* authorizes a director to issue a remediation order, whereas section 48(12) authorizes a director to "amend or cancel" a remediation order. Similarly, section 54(3)(d) of the *Act* states that a director may "at any time during independent remediation… impose requirements that the director considers are reasonably necessary to achieve remediation. [underlining added]" Presumably, if the legislature had intended for a director to be able to amend an approval in principle, or specify a condition in (or impose a requirement in) an approval in principle at any time, it would have expressly provided directors with that power. The legislature has not done so.

The Panel notes that the only possible exception to the above analysis may be for a director to amend, pursuant to section 16 of the *Act*, the aspects of an approval in principle that function as a permit pursuant to section 47(6) of the *CSR*. Given the Panel's findings that an approval in principle serves as a permit only insofar as it pertains to a "facility" specified in section 47(6), section 16 may only apply to the "permit" aspects of an approval in principle. However, the Panel has already found that the clauses that were added to the AIP in this case do not pertain to a "facility" contemplated in section 47(6).

The Panel has reviewed other possible sections (e.g. section 60), and finds that none of them provide the necessary authority to add conditions after the approval in principle has been issued.

In addition, the Panel notes that, according to section 53 of the *Act*, a director's powers in relation to approvals in principle pertain to considering applications, reviewing the applicant's materials, issuing, withholding, and rescinding approvals in principle. This would suggest that a director seeking to specify further conditions or requirements in an approval in principle, after it has been issued, would have to first rescind the existing approval in principle, and then go through the application and review process before issuing a new approval in principle. Such a procedure did not occur in this case, and would be onerous and time consuming for both the Ministry and the remediating party. Given that there are less onerous alternatives available to both the Ministry and remediating parties if either is unsatisfied with an approval in principle, it seems unlikely that this would occur.

The Panel acknowledges that there may be valid reasons why a director would want to impose new conditions or requirements after an approval in principle has been issued, such as new information that indicates the approved remediation plan will not adequately address serious threats to human health or the environment. However, there are other remedies available to a director in such circumstances. For example, if a contaminated site is found to extend beyond the site boundaries defined in an approval in principle, and the holder of the approval in principle refuses to remediate the areas that are outside of the area defined in the approval in principle, a director could rescind the approval in principle. Alternatively, the director could leave the approval in principle in effect for that part of the site, and issue a remediation order for the remainder of the site. The Panel notes that section 53(6) of the *Act* expressly authorizes a director to issue an approval in principle for part of a contaminated site.

For all of these reasons, the Panel finds that, the legislature has not provided directors with the power to amend an approval in principle after it has been issued, or to impose new requirements or conditions in an approval in principle after it has been issued. If the legislature had intended otherwise, it could have expressly done so, given that it has done so in other sections of the *Act*.

Accordingly, the Panel finds that the Amended AIP is not "imposing a requirement" within the meaning of section 99(b) of the *Act*.

Summary

In summary, the Panel has found that the Director's issuance of the Amended AIP

- is not "amending a permit" within the meaning of section 99(d) of the *Act*, or "including a requirement or a condition in a permit" within the meaning of section 99(e) of the *Act*;

- is not "amending an approval" within the meaning of section 99(d) of the *Act*, or "including a requirement or a condition in an approval" within the meaning of section 99(e) of the *Act*; and

- is not "imposing a requirement" within the meaning of section 99(b) of the *Act*.

Based upon the arguments presented, the Panel finds that the issuance of the Amended AIP is not a "decision" for the purposes of section 99 of the *Act*.

The Panel notes that in coming to this decision, it has also dealt with the merits of BC Hydro's appeal; that is, the question of the Director's jurisdiction to unilaterally amend an existing approval in principle.

DECISION

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

For all of the reasons set out above, the Panel finds that the Amended AIP is not a "decision" for the purposes of section 99 of the *Act*. Therefore, the Board has no jurisdiction over the appeal.

Accordingly, the appeal is dismissed for lack of jurisdiction.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

June 5, 2007