

Environmental Appeal Board

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DECISION NO. 2006-EMA-012(a)

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

BETWEEN:	Ed Ilnicki	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	Peter John Singh Dhaliwal; Rajinder Singh Dhaliwal; Jang Singh Dhaliwal and Ajmer Kaur Dhaliwal	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board David H. Searle, C.M., Q.C., Panel Chair	
DATE:	June 26, 2007	
PLACE:	Abbotsford, BC	
APPEARING:	For the Appellant: Ed Ilnicki For the Respondent: Dennis Doyle, Counsel	

APPEAL

This is an appeal by Ed Ilnicki (the "Appellant") against the August 28, 2006, Pollution Prevention Order OS-18191 (the "Order") of Jennifer L. McGuire, Regional Manager, Environmental Protection Division, Lower Mainland Region, Ministry of Environment (the "Ministry"), requiring:

- the Appellant; and
- Peter John Singh Dhaliwal, Rajinder Singh Dhaliwal, Jang Singh Dhaliwal, and Ajmer Kaur Dhaliwal (together referred to as the "Dhaliwals"),

to comply with five requirements, pursuant to section 81 of the *Environmental Management Act* (the "Act"). When the Respondent made the Order she was acting in the capacity of a Director under the *Act*.

The authority of the Environmental Appeal Board to hear this appeal is found in section 100 of the *Act*. Pursuant to section 103 of the *Act* the Board may:

- (a) send the matter back to the person who made the decision, with directions,
- (b) confirm, reverse or vary the decision being appealed, or

- (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

The Appellant asks the Board to reverse the decision of the Respondent to issue the Order.

BACKGROUND

To understand the history leading up to the issuance of this Order, and in the interest of brevity, reference to the Board's prior decision in *Ed Ilnicki v. Director, Environmental Management Act et al.* (Decision No. 2006-EMA-004(a), November 21, 2006)(unreported), is essential. That decision involved the issuance of an Information Order to this same Appellant, by the same Respondent, pursuant to section 77 of the *Act*. The Appellant appealed the Information Order to the Board. On November 21, 2006, the Board dismissed the appeal and confirmed the Information Order in the above-noted decision. The evidence before this Panel is that the Information Order, and the decision of that Panel, have been ignored by the Appellant which has led, in part, to this new Order being issued.

Ms. McGuire issued the Order pursuant to section 81 of the *Act*, the relevant part of which is subsection (1):

Pollution prevention orders

- 81 (1) If a director is satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution, the director may order a person referred to in subsection (2), at that person's expense, to do any of the following:
- (a) provide to the director information the director requests relating to the activity, operation or substance;
 - (b) undertake investigations, tests, surveys or any other action the director considers necessary to prevent the pollution and report the results to the director;
 - (c) acquire, construct or carry out any works or measures that are reasonably necessary to prevent the pollution;
 - (d) adjust, repair or alter any works to the extent reasonably necessary to prevent the pollution.

Pollution is defined in section 1 of the *Act* as follows:

"pollution" means the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment;

The Order refers to Foy Street and states that the Director has reasons to believe that pollution is likely to occur there. That belief is based upon inspections

conducted by the Ministry, referred to in the Order. Reference is made in the Order to substances found at Foy Street as being: Class 3 flammable liquids; Class 4 flammable solid; Class 5 oxidizing substances; Class 6 Toxic substances; waste oil; and leachable waste – all of which are hazardous wastes.

Hazardous waste is defined in section 1 of the *Hazardous Waste Regulation*, B.C. Reg. 63/88. The portions relevant to this appeal are as follows:

“Hazardous waste” means

(a) dangerous goods that are no longer used for their original purpose if they

(i) are no longer used for their original purpose, and

(ii) meet the criteria for Class 2, 3, 4, 5, 6, 8 or 9 of the federal dangerous goods regulations,

including those that are recycled, treated, abandoned, stored or disposed of, intended for recycling, treatment or disposal or in storage or transit before recycling, treatment or disposal,

...

but does not include

...

(s) waste that

(i) has a pH greater than or equal to 11.5 and less than or equal to 12.5, and

(ii) would be a hazardous waste only because it is classified under the federal dangerous goods regulation as class 8;

In section 1 of the *Act*, “waste” is defined as including “hazardous waste”.

In the Order, Ms. McGuire imposed similar requirements to those contained in the prior Information Order, though in the form of a pollution prevention order directed to the Appellant and to the Dhaliwals (the latter having taken no part in the appeal for reasons that will be explained later). However, whereas the Information Order referred to materials stored by the Appellant at his place of business, described as Suite 105 – 31234 Wheel Avenue, Abbotsford, BC (“Wheel Avenue”), the Order now under appeal is made in respect of 1717 Foy Street, Abbotsford, BC (“Foy Street”).

The requirements set out in the Order are as follows:

1. Retain a qualified third party consultant with expertise in the hazardous waste industry to conduct an inventory and characterization of the hazardous materials currently stored at 1717 Foy Street, Abbotsford, BC. The third party consultant must be a qualified professional (i.e. an applied scientist or technologist who is registered in British Columbia with a professional organization that has an enforceable Code of Ethics). Through education, experience,

accreditation and knowledge, the third party consultant shall be reasonably expected to provide advice on hazardous materials classification, including, but not limited to: identification, physical and chemical characterization, quantity estimates, and compatibility issues. The name and qualifications of the third party consultant shall be submitted to the Director no later than **September 1, 2006 at 16:00**. The consultant selected must be acceptable to the Director.

2. Provide, or cause to be provided, to the Director written confirmation of the methodology to be used by the approved qualified consultant for classifying and and/or determining the types and quantities of hazardous materials found at 1717 Foy St., Abbotsford, BC. As an example, such methodologies could include: Hazcat kits for gross testing, and sampling and analysis. The proposed methodology shall be submitted to the Director no later than **September 11, 2006 at 16:00**. The selection of the methodology must be acceptable to the Director.
3. Provide, or cause to be provided, to the Director no later than **September 18, 2006 at 16:00**, a detailed inventory and characterization of all hazardous materials found at 1717 Foy Street, Abbotsford, BC. The inventory shall be prepared and signed by the approved qualified consultant in accordance with the approved methodology, and shall contain the following information:
 - i. The type and size of each container
 - ii. The condition of each container
 - iii. An estimate of the quantity of hazardous material in each container
 - iv. The state/form of the hazardous material (i.e. liquid, solid or gas) in each container
 - v. The Transportation of Dangerous Goods Classification and the chemical identification of the hazardous material in each container
 - vi. A map or diagram showing the location of the containers.

The hazardous materials inventory must be prepared by the approved qualified professional, and must be conducted in accordance to [sic] the approved methodology from item number 2 above, and supported by analytical data and chemical evaluation.

4. Provide, or cause to be provided, to the Director no later than **September 18, 2006 at 16:00** detailed information on the origin and transportation of the hazardous materials currently found at the site, as well as any hazardous materials that have been shipped off the site since January 1, 2006. This information shall include, but is not limited to, all associated documentation including manifests, and

identification of the Transporters used to move the hazardous materials.

5. Provide to the Director by **September 18, 2006 at 16:00** a description in writing of how the parties will bring the hazardous wastes currently being stored at 1717 Foy St, Abbotsford, BC into compliance with the *Act* and the *HWR* [*Hazardous Waste Regulation*]. At a minimum, this submission shall consist of a Clean-Up Plan (the Plan) that includes, but is not limited to, the following components:
 - i. A timeline for implementation and completion of the activities detailed in the Plan
 - ii. An explanation of who will be assisting in the implementation of the Plan
 - iii. A detailed explanation of the steps to be taken to achieve compliance with the *Act* and the *HWR*.

[emphasis in original]

At the hearing, evidence was led that substantially all of the materials that were stored at Foy Street were moved by the Appellant in the months of September and October 2006, to 2790 Gloucester Way ("Gloucester") in Langley, BC. It is because of this last move that the Dhaliwals are not involved in this appeal, as they are owners of Foy Street. The Appellant contends that the move from Foy Street to Gloucester was justified as being more suited to his tray-washing business. The Appellant admitted that he moved the materials in question from Wheel Avenue to each of the above business premises using his own vehicles, without authorization from the Ministry.

From his evidence and argument at the appeal, it is apparent that the Appellant's refusal to obey both the Information Order and the Order is based upon the following logic:

1. To retain a qualified third party consultant to conduct an inventory and characterize the materials is too costly and unnecessary. It is unnecessary because he knows what is contained in each container. All the Ministry needs to do is ask (and believe) him.
2. As he has never, in all his 40 working years in business, had a spill or been convicted of a spill, "why all the fuss?"
3. The materials do not fall within the definition of "waste" or "hazardous waste" as they are being used by him for their original purposes in the course of his various businesses.

ISSUES

The Panel has considered the following issues in this appeal:

1. Did the Director have reasonable grounds to make the Order?

2. Is there justification for asking for third party verification as required in the Order?
3. Assuming that the materials in question are used by the Appellant in the course of his various businesses, should the Order still be made?
4. Should the Appellant's record of "no significant spills" exempt him from the application of the *Hazardous Waste Regulation*.

EVIDENCE AND ARGUMENT

The evidence of the Appellant is that he engages in several different areas of work: as an electrician, heavy duty equipment mechanic, a washing business that washes and sanitizes up to 3,000 meat trays a day, and a home restoration business that kills mould found in houses after they have been used as illegal "grow-ops". In all of these businesses, he uses the various chemicals found on his premises.

The Appellant argues that these substances are not "waste", but are materials he uses in his various businesses "for their original purposes." He admits that he mixes various chemicals to create the soap that he uses in his tray washing business and that materials, such as acetone, are used and then reused after being mixed with styrene.

The Appellant describes himself as "self taught" for the most part, and believes that the Ministry lacks the expertise that he has developed, for example, in the making of soap using basic chemicals. He is seeking membership in a professional body, the Association of Professional Engineers and Geoscientists of BC, for recognition of his expertise as an engineer in environmental matters. His credentials are currently under assessment.

At the hearing, the Appellant provided an inventory which referred to many full or half full barrels of resin and acetone, paint, grease, glue, insulation, driveway sealer, etc. However, this inventory was not prepared by a qualified third party consultant with expertise in the hazardous waste industry, acceptable to the Director, as required by the Order.

The Appellant feels enormously aggrieved by the Ministry's actions over the years. He submits that these actions amount to "undue harassment". The Appellant also accuses the Ministry of slandering him to his 3,000 customers, and of "driving him to the brink".

The Respondent called two witnesses in support of its case: Greg Kanya and Ms. McGuire.

Mr. Kanya is the environmental emergency response officer with the Ministry who conducted an inspection of the Appellant's business premises on June 22, 2006. His observations, which were provided to Ms. McGuire, include the following:

- The material in question was stored on pallets on gravel out of doors.
- There was no space between containers, thereby preventing access.

- Some containers had no lids or open bungs¹
- Visible staining on the ground around drums, suggesting spills.
- The tray washing operation was being discharged to the ground.
- Labeling of drums was inadequate.
- The area was not secure.

Mr. Kanya returned to Foy Street on July 11, 2006. He collected numerous samples from barrels located on the site, and took PH readings that showed the contents had PH levels greater than 12.5, which is hazardous waste according to subsection (s) of the definition. Of particular importance to this case is an Environment Canada "Legal Analysis" described in Table 2 as "Acetone and Styrene Results" showing samples from three different barrels that had been described by the Appellant as containing "virgin" acetone, but which the analysis shows as containing various levels of styrene in the acetone.

In her evidence, Ms. McGuire listed the Appellant's numerous regulatory shortcomings and non-compliance with the legislation spanning several years, beginning in December 2003, and ending in the Order now under appeal. The Ministry's investigative and enforcement activities include a declaration of an emergency by the Minister, which resulted in the Ministry having to move onto a prior site and engage in site management, at significant cost to the province.

Ms. McGuire provided a series of photographs of Foy Street which show pallets of barrels stacked on the ground in the open, some barrels are open (without bungs), others with conflicting labels, in support of her concerns. She reiterated the evidence of Mr. Kanya that some of the barrels were tested for PH, which exceeded 12.5, making them "hazardous waste".

Ms. McGuire testified that Foy Street is located above the Abbotsford/Sumas Aquifer, an aquifer not protected by a clay barrier between it and the surface. As a result, any pollutant spilled to the ground will inevitably find its way to the aquifer.

Finally, based upon the inspections done by Mr. Kanya and the samples taken and analyzed, Ms. McGuire believes that the Appellant's operation has been, and is being, performed in a manner that is likely to release a substance that will cause pollution.

DISCUSSION AND ANALYSIS

1. Did the Director have reasonable grounds to make the Order?

The answer is "Yes", based upon the inspections by and observations of Mr. Kanya, referred to above.

¹ "bung" is an apparatus used to seal a container, such as a bottle, tube or barrel. Unlike a lid which encloses a container from the outside without displacing the inner volume, a bung is partially inserted inside the container to act as a seal (e.g., a cork).

2. Is there justification for asking for third party verification as required in the Order?

The answer is "Yes", based on the chemical analysis done by Environment Canada referred to above. Having been told by the Appellant that it was "virgin" acetone in the barrels, i.e., pure acetone, the Ministry is justified in asking, as they have in the Order, for third party verification, even assuming that the Appellant's memory was faulty.

3. Assuming that the materials in question are used by the Appellant in the course of his various businesses, should the Order still be made?

The answer is "Yes". The Appellant's arguments are based upon his belief that the materials he uses are neither "waste" nor "hazardous waste". However, the materials in question need not be "waste" or "hazardous waste" to fall within the ambit of such an Order. Section 81 of the *Act* only requires that the "*activity or operation has been or is being performed in a manner that is likely to release a substance that will cause pollution*"; i.e., that will substantially alter or impair the usefulness of the environment. Therefore, the materials simply need to be "a substance" capable of causing pollution, if released. That coupled with a reasonable apprehension, from the manner in which they are used or stored, that there is a likelihood of release, is sufficient to support the Order. As is evident from the name of the Order itself, its purpose is to "prevent" pollution.

Should the Panel be in error on this point, there is also clear evidence of the existence of "waste" in the form of those three barrels analyzed to contain varying amounts of acetone and styrene, which the Appellant described as containing "virgin" acetone. Clearly, these materials have been used then returned to the barrels, possibly for re-use. In any event, the acetone in these barrels is no longer capable of being used for the original purpose, hence falls within the definition of "hazardous waste".

4. Should the Appellant's record of "no significant spills" exempt him from the application of the *Hazardous Waste Regulation*?

The answer is "No". The public policy purpose behind the *Hazardous Waste Regulation* and this Order is prevention. Clearly, a spill prevented through proper handling, storage, transportation and disposal is preferable to an uncontained spill. The Appellant's operations are located over the Abbotsford/Sumas Aquifer. He is not entitled to put that source of fresh water at risk.

DECISION

In making this decision, the Panel has considered all of the relevant documents and oral evidence, whether or not specifically reiterated herein.

For the reasons set out herein, the Panel confirms the Order, with the following modifications:

1. Add to the Order the current address to which the materials have been moved: 2790 Gloucester Way, Langley, BC.
2. Change the dates in the Order as follows:

Requirement No. 1 - August 03, 2007 at 16:00 hrs.

Requirement No. 2 August 17, 2007 at 16:00 hrs.

Requirements No. 3, 4, & 5 August 24, 2007 at 16:00 hrs.

Finally, the Panel notes that counsel for the Respondent asked for an Information Order in addition to the foregoing, but did not specify what additional information the Respondent required despite the fact that there was an adequate opportunity to do so.

Bearing in mind the extensive information required to be provided in the Order, and not knowing what else might be required, that further relief is denied.

The appeal is dismissed.

"David H. Searle"

David H. Searle, C.M., Q.C.

Panel Chair, Environmental Appeal Board

July 12, 2007