

---

**DECISION NO. 2010-EMA-002(b)**

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

<b>BETWEEN:</b>	Ruth Madsen	<b>APPELLANT</b>
<b>AND:</b>	Director, <i>Environmental Management Act</i>	<b>RESPONDENT</b>
<b>AND:</b>	Aboriginal Cogeneration Corporation	<b>PERMIT HOLDER</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on September 8, 2010	
<b>APPEARING:</b>	For the Appellant: Glen W. Bell, Counsel For the Respondent: Dennis Doyle, Counsel For the Permit Holder: Kim Sigurdson	

**APPLICATION TO ADJOURN THE HEARING *SINE DIE***

[1] This is an application by the Appellant, Ruth Madsen, to adjourn the hearing of her appeal indefinitely. The hearing is currently scheduled to take place in Kamloops from December 20th to the 23rd, 2010.

[2] Ms. Madsen's appeal is against a decision made by Jason Bourgeois on behalf of the Director, *Environmental Management Act*, Ministry of the Environment (the "Ministry"), to issue air emission permit #103943 to the Aboriginal Cogeneration Corporation ("ACC"). The permit was issued on January 7, 2010 and authorizes ACC to discharge emissions to the air from a "Biomass to Energy facility" to be located at 1782 Mission Flats in Kamloops, BC. The emissions would be from two 1-megawatt internal combustion engine generators and an auxiliary enclosed combustor. The authorized fuel is "untreated wood residues or chipped creosote treated rail ties originating from Canadian Pacific Railway (CPR)." The permit specifies the maximum rate of discharge, the maximum concentration of total particulate matter (including condensable organics) to be discharged and the maximum opacity. The permit also sets out sampling, monitoring and reporting requirements.

[3] In a letter dated September 1, 2010, counsel for the Appellant asks for the December 2010 hearing to be adjourned generally pending a commitment from ACC that it intends to proceed with the permitted project. Counsel writes:

It has recently come to my attention that the Respondent [sic], Aboriginal Cogeneration Corporation, announced last Spring after the public meeting in Kamloops that it would not be building its permitted facility in Kamloops. However, it would keep the permit and not abandon it while it sought out other sites. "We're going to put it someplace else," Mr. Sigurdson is quoted as saying in the Globe & Mail. .... He is also reported as having said, "...it definitely won't be built here [Kamloops]. 'We've given our word.'" ACC has not denied any of these reports. ...

This position is very problematic for all of the other parties to this appeal, and to the Board itself. It means that the Appellant and the Ministry of Environment must expend substantial time and resources for no apparent purpose. In addition, the Board will incur its own costs in hearing the appeal and making a decision. Whatever the outcome of the appeal, it will be a hollow exercise if the proponent has no intention of implementing the permit.

... The Respondent [sic] permit-holder should not be allowed to manipulate the permitting process in a way which imposes substantial costs on other parties, and on the Board, for no practical purpose. This constitutes an abuse of the Board's process.

[4] The Appellant applies to the Board for the following order:

This appeal is adjourned indefinitely, to be resumed if the Respondent permit-holder notifies the Board in writing that it intends to implement waste management permit #103943.

[5] The Board offered all parties an opportunity to comment on this application.

[6] In a letter dated September 3, 2010, the Director states, "In view of the apparent lack of relevance of the subject permit, the Respondent supports the application to have the matter adjourned generally."

[7] In a letter dated September 6, 2010, the Permit Holder, ACC, objects to the application. It states as follows:

ACC has not abandoned Permit #103943, nor has it given the minister cause to suspend or cancel permit #103943. ... It is ACC's position that the Appellant must either commit to the expenditure of time and resources necessitated by their appeal, or they must abandon their appeal.

The existence of a suspended appeal is a significant encumbrance to ACC. It hinders future actions by ACC in this and other jurisdictions. In the absence of an outright abandonment of the appeal by the Appellant, ACC wishes to proceed with the appeal on the dates proposed by the Board ...

**BACKGROUND TO THE APPLICATION**

[8] Some of the background to this appeal has been set out in a previous decision of the Board on a preliminary issue of jurisdiction (see *Ruth Madsen v. Director, Environmental Management Act*, Decision No 2010, EMA-002(a), March 22, 2010). For the purposes of this application, the following history is relevant.

[9] The appeal was initially filed in February of 2010. The Notice of Appeal identifies numerous grounds for appeal which have been summarized as follows:

- the precautionary principle was not considered by ACC or the Ministry;
- the permit is unreasonable and will cause unreasonable adverse effects on the people of Kamloops, particularly for people with lung disorders;
- there is already poor air quality in Kamloops, and the cumulative effects of the emissions were not thoroughly considered;
- creosote is a hazardous waste, creosote incineration has only happened in a lab, and toxic chemicals found in creosote will show up in the air and/or water or as toxic ash;
- the permit is unreasonable because it allows the risk of pollution to the air and water, the people and salmon, while the sole benefit is revenue generation for ACC;
- emissions from the stacks will not be monitored at start up and shut down, and the flare stack will have no pollution controls;
- the permit will have an adverse effect on tourism, fishing, and housing prices in the Kamloops area;
- the permit will cause toxic chemicals to land on peoples organic gardens, making food unsafe to eat; and
- the Ministry did not follow procedural fairness and one of the Ministry officials was biased and prejudged the outcome before the permit was issued.

[10] After various preliminary matters were decided, the Board wrote to the parties on April 20, 2010 and advised that a hearing had been scheduled. The Board scheduled a five-day oral hearing for this appeal to commence on September 13, 2010 in Kamloops. The Appellant's Statement of Points were due on August 16, 2010.

[11] On August 16th, the Board received a letter from counsel for the Appellant, advising that he had recently been retained by the Appellant and asked the Board to postpone the hearing of the appeal until the Fall of 2010, or early 2011. After taking submissions on this request and considering all of the information provided, the Board granted the request.

[12] Following the postponement, the Board sought the next available dates from the parties and also asked for the parties positions on whether the appeal could be heard by way of written submissions. The Appellant objected to a written hearing.

[13] After considering the parties' schedules, the Board determined that the earliest available dates for an oral hearing were in December of 2010. By letter dated August 30, 2010, the Board scheduled a four-day hearing to commence on December 20, 2010.

[14] On September 1, 2010, the Appellant made the subject application for the hearing to be adjourned generally pending a commitment from the Permit Holder that it intends to proceed with the permitted project. The Appellant provided a copy of two newspaper articles, one from the Globe and Mail published on March 25, 2010, and one from the Kamloops Daily News dated August 31, 2010, both containing quotes from the President of ACC, Kim Sigurdson, stating that the facility will not be built in Kamloops. ACC does not deny these quotes in its submissions to the Board.

## **ISSUE**

[15] The only issue to be determined is whether the application should be granted in the circumstances of this case.

## **DISCUSSION AND ANALYSIS**

[16] This is an unusual application for the Board. It is unusual because there is no indication that the rights under the permit will ever be exercised and yet the Permit Holder wants the appeal to proceed, despite the time and expense involved in preparing for and attending an appeal hearing and the uncertain outcome.

[17] In considering this application, the Board finds that the factors that weigh in favour of the adjournment are as follows:

- the permit authorizes emissions from a specific site/facility in Kamloops;
- the focus of the appeal, as evidenced by the grounds for appeal, is on the impact of the emissions on the residents and environment of Kamloops – it is this particular air shed and environment that will be the focus of the evidence and argument;
- if ACC has no intention of building the facility in Kamloops, the relevance of the evidence and argument, and the appeal generally, is lost; and
- the hearing of this appeal will require the expenditure of public money.

[18] At the present time, there is no evidence that the permitted plant will be built on the Kamloops site; in fact, the best evidence before the Board is that it will not be built there. As a result, if the Board accedes to ACC's request for the hearing to proceed in December, the Board's decision, whether it confirms, reverses or varies the permit, becomes purely academic. While the decision may be of some general interest, it comes at significant expense not only to the Appellant, but also to the BC public.

[19] The Board has considered the submissions of ACC that the existence of a suspended appeal is a significant encumbrance to ACC because it hinders future actions by the company in BC and other jurisdictions. However, ACC does not

explain how the appeal encumbers ACC or what those "future actions" may be. Therefore, the Board is unable to evaluate or assess the likelihood or extent of the alleged impact.

[20] Conversely, what is known is that the Ministry considered ACC's application and ultimately decided to issue the permit. Although there is an appeal of the permit, the appeal does not operate as a stay and no stay has been ordered. In other words, ACC has a valid enforceable permit and may lawfully exercise those rights regardless of whether there is an appeal. ACC's statement that the appeal poses a significant encumbrance is therefore questionable, particularly if ACC does not intend to exercise the rights under this permit in Kamloops. Further, there is no legal prohibition to ACC obtaining a similar permit from the Ministry or a regulatory agency in another jurisdiction in order to construct a similar facility in a different location. Each permit application is decided on its own merits.

[21] Based on the above considerations, the Board simply cannot justify holding a four-day oral hearing, considering technical evidence on the impact of the permit on the air quality and environment of Kamloops, when the uncontested evidence is that the Permit Holder does not intend to exercise its rights under the permit in that location. Accordingly, the application to adjourn the hearing *sine die* is granted.

[22] However, should the facts underlying this decision change, the active status of the appeal may be restored and a hearing scheduled provided the conditions described in the order below are met.

## DECISION

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

[24] For all of the reasons set out above, the Board adjourns the hearing *sine die* (indefinitely). However, the requested order is varied as follows:

The hearing of appeal 2010-EMA-002 set for December 20-23, 2010 is hereby adjourned *sine die*.

This order may be rescinded on the presentation of substantive and compelling evidence from any party that the rights under the permit are being, or are reasonably likely to be, exercised in Kamloops, or on the presentation of substantive and compelling evidence from the Permit Holder that its ability to exercise its rights under the permit is being frustrated because of the existence of the appeal.

"Alan Andison"

Alan Andison, Chair  
Environmental Appeal Board

September 16, 2010