Environmental Appeal Board

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DECISION NO. 2010-EMA-007(b)

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

BETWEEN:	455161 BC Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on December 14, 2010	
APPEARING:	For the Appellant: Wally Braul, Counsel	
	For the Respondent: Dennis Doyle, Counsel	

APPEAL

[1] 455161 BC Ltd. (the "Appellant") appeals against a decision of Vince Hanemayer, acting for the Director (the "Director"), *Environmental Management Act*, Ministry of Environment (the "Ministry"), in relation to the Appellant's application for a certificate of compliance ("COC"). The Appellant applied for a COC in relation to remediation conducted on the Appellant's property at 2495 Highway 97 South, Westbank, BC (the "Property"). The Appellant submits that the Director advised the Appellant that he would neither approve nor reject the Appellant's application unless the Appellant agreed to remediate certain neighbouring properties that may contain contaminants that migrated from the Property. The Director submits that he has not received all of the required information from the Appellant in support of its COC application, and therefore, he is not legally compelled to render a decision on the application.

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

[3] The Appellant requests that the Board order the Director to issue a COC without any requirement to remediate the neighbouring properties. Alternatively,

the Appellant requests that the Board order the Director to consider the Appellant's COC application without any requirement to remediate the neighbouring properties. In the further alternative, the Appellant requests that the Board order the Director to consider the application of the *Act*'s investigation and remediation order powers independent of the issuance of a COC if the Director seeks to impose investigation and remediation requirements in relation to the neighbouring properties.

[4] The appeal was heard by way of written submissions, at the Appellant's request and with the Director's agreement.

BACKGROUND

[5] The following background summary is based on the information and evidence that was provided by the parties. The Director's submissions included affidavit and document evidence regarding the history of the Ministry's involvement with the Property and certain adjacent properties, particularly those to the south and east of the Property. The Appellant submits that some of that evidence was not disclosed to it before the appeal process, and the Director's disclosure of that evidence is an unfair and unlawful attempt to assign remediation liability to the Appellant. Notwithstanding that the Board provided the Appellant with an opportunity to respond to the Director's submissions and evidence, the background is based primarily on undisputed facts. Where the facts are in dispute, the Panel has indicated so.

[6] The Panel has limited information about the history of the Property. However, there is no dispute that the Property was the site of a gas station for many years. A report dated September 4, 2002, by George Szefer, P.Eng., of Keystone Environmental Ltd., completed on behalf of the Ministry indicates that the gas station ceased to operate in or about 1994. It should be noted that Mr. Szefer is now an employee of the Ministry.

[7] On October 23, 1990, a Regional Waste Manager with the Ministry issued a letter to a former owner of the Property which concluded that, based on information supplied by Chevron Canada Ltd., there was hydrocarbon contamination in the Property's soil and ground water, but the owner could build on the Property without soil remediation if there was no recreational or residential development. The letter further states that the ground water had "extremely high" levels of benzene and ethylbenzene, and the owner "must be prepared to remediate the ground water if required by the Regional Waste Manager."

[8] On November 4, 1991, the Ministry issued a pollution abatement order to a former owner of the Property. That order required the remediation of water removed for fuel tank installation, and biannual ground water sampling at three bore holes, two of which were located on the Property. The other bore hole was located on the adjacent property to the south of the Property, at 3711 Elliott Road.

The order required that ground water samples be tested for total extractable hydrocarbons and total BTEX[1].

[9] In the present appeal, the Director has not argued that the 1991 pollution abatement order is a concern regarding the Appellant's COC application. However, the Director has identified the property at 3711 Elliott Road as an area where contamination may have migrated from the Property, and may remain at levels exceeding regulatory standards.

[10] According to the Director's evidence, the Appellant purchased the Property in or about November 1993.

[11] On September 10, 2001, a Regional Waste Manager with the Ministry issued a letter to Bert Willms, the Appellant's President. The letter states that the Ministry received a site profile for the Property on August 31, 2001, and the Regional Waste Manager required a preliminary site investigation to be done pursuant to section 26.2 of the former *Waste Management Act*. In particular, the Regional Waste Manager required investigation of the Property's ground water and the area where gas pump islands had been located, to determine if those areas were contaminated.

[12] On February 25, 2002, on behalf of the Appellant, EBA Engineering Consultants Ltd. sent the Ministry a Notification of Independent Remediation regarding the Property. At that time, section 28 of the *Waste Management Act* (now section 54 of the *Act*) provided that a person may carry out independent remediation regardless of whether a determination has been made that the site is a contaminated site, a remediation order has been issued with respect to the site, or a voluntary remediation agreement has been entered into. Any person undertaking independent remediation was required to promptly notify a manager (now a director) in writing on initiating remediation, and within 90 days of completing remediation. Also, under section 57 of the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*"), if a person carrying out independent remediation becomes aware of the migration or likely migration of contamination to a neighbouring site, the person must provide written notification to the neighbouring site's owner and provide a copy of that notification to a director. Similarly, under section 60.1 of the *Regulation*, a person who carries out a site investigation that discloses that contamination has migrated or is likely to have migrated to a neighbouring site must provide written notification to the neighbouring site's owner and provide a copy of the notification to the director.[2]

[13] The Appellant's Notification of Independent Remediation indicates that VPH[3] contaminants were found at a maximum concentration of 790 parts per million and that this level exceeds the "CL" (commercial land) limit in the *Regulation*. The

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[1] BTEX is an acronym that stands for benzene, toluene, ethylbenzene, and xylene, which are some of the volatile organic compounds found in petroleum derivatives such as gasoline.

[2] The notice requirements regarding neighbouring sites were added to the *Regulation* as a result of amendments that took effect on February 4, 2002, by B.C. Reg. 17/2002.

[3] "VPH" is an acronym that stands for volatile petroleum hydrocarbon.

document describes a soil remediation strategy that involves excavating contaminated soils from the Property, taking samples of the excavated soils, and transporting the excavated soils to a treatment facility. The document also indicates that VPH contaminants were found in ground water at a maximum concentration of 48,500 parts per billion and that this level exceeds the "AW" (aquatic life) limit in the *Regulation*.

[14] In addition, the Notification of Independent Remediation states the existence of the following "offsite impacts":

> Inferred to extend approximately five metres east of common property boundary.
>
> Neighbouring property owner cooperative and fully aware of the situation.
>
> Formal notice of off-site contamination to follow within 15 days.

[15] The above-noted "offsite impacts" pertain to the adjacent property to the east of the Property, which has a street address of 2489 Highway 97 South.

[16] On February 28, 2002, EBA Engineering Consultants Ltd. sent a notice to the owner of 2489 Highway 97 South. The notice states, in part:

> EBA Engineering Consultants Ltd. (EBA), on behalf of A.E. Willms, the owner of the above noted property, hereby provides notification that hydrocarbon contamination has migrated, via groundwater flow, from [the Property] onto your property (2489 Highway 97 South (Main Street), Westbank, BC). This written notification is undertaken as required by law under the BC Contaminated Sites Regulation (CSR), and has been provided subsequent to verbal notification.
>
> The hydrocarbon contamination on your site was noted during recent soil remediation at [the Property]. With your knowledge and cooperation, soil remediation was undertaken at your site at the same time.

[17] Section 28(4) of the *Waste Management Act* provided that the person who carried out independent remediation may request, "and on receiving information respecting independent remediation, suitable to a manager", the manager may:

> (a) review the remediation in accordance with the regulations and any requirements imposed under subsection (3) (d), and
>
> (b) issue… a certificate of compliance…

[18] Section 54(4) of the *Act* contains almost identical language, except that the phrase "on receiving adequate information respecting the independent remediation, a director may…" has replaced the former language.

[19] Accordingly, in May 2002, Mr. Willms applied to the Ministry for a COC in relation to the Property. Three reports prepared by EBA Engineering Consultants Ltd. were submitted in support of that COC application. The Ministry referred the application and supporting documents to George Szefer, a professional engineer with Keystone Environmental Ltd., for external review.

[20] In a report dated September 4, 2002, Mr. Szefer advised the Ministry that he had completed his review of the Appellant's application and supporting documents,

and concluded that there was insufficient information to support the conclusions in the reports prepared by EBA Engineering Consultants Ltd. He advised that more work needed to be done to address certain "on-site" and "off-site" issues. The "on-site" issues were in relation to the Property, and the "off-site" issues in relation to the adjacent property to the east at 2489 Highway 97 South.

[21] In a letter dated September 11, 2002, the Ministry advised Mr. Willms that the Ministry agreed with Mr. Szefer's conclusion that there was insufficient information to support the conclusions in the reports prepared by EBA Engineering Consultants Ltd., and the COC application would not be processed until the Appellant provided further information.

[22] Meanwhile, according to a May 2007 letter from the Appellant's legal counsel to the Ministry, from 2002 to early 2005, the Appellant and the owner of 2489 Highway 97 South tried to negotiate a solution to the contamination on that property. During that time, the Appellant was given access to 2489 Highway 97 South for drilling and excavation of contaminated soil. However, in early 2005, their relationship broke down, and the owner of that property denied the Appellant further access.

[23] In March 2006, Summit Environmental Ltd. undertook remediation at the Property on behalf of the Appellant. According to affidavit evidence from Mr. Szefer, which the Director provided in support of his appeal submissions, soil contamination was removed to the southern Property boundary. In his affidavit, he states in part as follows:

> ... although the soil contamination is no longer present on the source property, the [soil quality data] results nonetheless indicate that prior to the 2006 remediation work, contamination was present along the southern property boundary and based on the degree and proximity of the contamination to the southern boundary, I have concluded that contamination is likely to have migrated to the adjacent property to the south [3711 Elliott Road] and is likely to have caused contamination of the neighbouring property.

[24] In April 2006, Summit Environmental Ltd. completed a report on behalf of the Appellant titled, "Stage 2 Preliminary Site Investigation: 2495 Highway 97 South, Westbank, B.C." The Director refers to that report in his submissions but did not provide a copy to the Board.

[25] On November 17, 2006, a Contaminated Sites Officer with the Ministry sent a letter to the Appellant's counsel which states, in part:

> We would require the following to be submitted to our office in order to obtain a certificate of compliance for the site (which would not have to include offsite areas):
>
> - an application for a C of C for property to boundaries
> - a summary of actions to date outlining attempt to gain access to affected party site (include dates, names of parties involved, and what was discussed)

- assurance from consultant that contamination from offsite will not enter back onto source site
- commitment to remediate offsite at a later date if access is granted in the future

[26] On May 10, 2007, Summit Environmental Consultants Ltd. completed a combined preliminary site investigation report, detailed site investigation report, and confirmation of remediation report for the Property on behalf of the Appellant. The Director refers to that report in his submissions, but did not provide a copy to the Board.

[27] On May 15, 2007, the Appellant filed the COC application that led to this appeal. With its application, the Appellant submitted several documents including the May 2007 report by Summit Environmental Consultants Ltd., and a recommendation letter and review report prepared by Robert M. Symington of Gandalf Consulting Ltd. on behalf of the Appellant. Mr. Symington is a professional geoscientist and was, at all material times, an approved professional[4] under the *Act*. Mr. Symington recommended that a COC be issued for the Property. In his letter, he explains that his recommendation is limited to the Property, and that "offsite" areas were not investigated for the purposes of his recommendation. His review report states, in part:

> ... the results show that there is sufficient evidence to show that offsite migration has occurred, but that mitigation measures at the site consisting of a plastic curtain wall have been implemented to reduce the potential recontamination of the subject site.
>
> Gandalf believes that the data and presentation provided provides a high level of confidence that the site has been remediated to the appropriate commercial land use standards and mandatory no water use standards...
>
> In Gandalf's opinion there is no need for further investigation for the onsite areas of the site but [Gandalf] has also concluded that the Ministry of Environment will have to consider any appropriate requirements with respect to potential offsite concerns. The client was made aware of Gandalf's concerns with the offsite areas, the regulatory implications and the potential that the application for the COC would be refused.

[28] On July 26, 2007, a Contaminated Sites Officer with the Ministry sent a letter to Mr. Symington advising that the Ministry required clarification of one issue; namely, whether Mr. Symington could provide assurance that the Property "would

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[1] [4] Section 39(1) of the *Act* states that, for the purposes of Parts 4 and 5 of the *Act*, **"approved professional"** means a person who is named on a roster established under section 42(2). The *Act* and the *Regulation* allow the Director to consider the opinion of a person on the roster of approved professionals in making decisions about issuing certain instruments under the *Act*, including COCs.

not be recontaminated from the presence of contaminants remaining on the offsite property?"

[29] In early August 2007, Ministry staff became aware that 2489 Highway 97 South had been sold. The Ministry contacted the new owners, who advised that they had purchased the property on September 1, 2006.

[30] The Appellant submits that, between May 18, 2007 and May 25, 2010, it held negotiations and discussions with the Director and other Ministry representatives over the COC application, but no agreement was reached.

[31] On May 26, 2010, the Appellant filed its appeal with the Board. The Appellant submits that the situation had reached a stalemate, with the Director unwilling to either approve or reject the Appellant's application. In support of its Notice of Appeal, the Appellant provided excerpts from communications it received from the Director, his legal counsel or other Ministry staff between November 17, 2006 and April 23, 2010. The following portions of an April 23, 2010 email from the Director's legal counsel to the Appellant's legal counsel were reproduced in the Appellant's Notice of Appeal:

> I have been unable to find any communications on my file that would constitute a rejection of the recommendation for a COC in this matter. My client has further confirmed there has been no rejection and no notice under [section] 49(8) [of the *Regulation*].
>
> The Director's position remains that proper adjudication of this application requires confirmation that the entire extent of contamination has been dealt with as required under Protocol 6.
>
> ...
>
> The Director's position remains that the full extent of contamination must be addressed in order that the COC application can proceed to a proper adjudication in accordance with the requirements of the statute including protocol 6. Of course the passage of time has compounded the problem because of questions about the reliability of the data due to the passage of time and the adoption of new [*Regulation*] criteria such as vapour standards.
>
> ...
>
> In the circumstances the Director has indicated he is not prepared to reject the QP's (Qualified Professional) recommendation as long as these information voids persist with respect to the current extent of the contamination.

[32] Protocol 6 is a protocol established by the Director under section 64 of the *Act*, and it specifies when the Director may rely on an approved professional's recommendation regarding an application for certain instruments under the *Act*, including COCs. Protocol 6 is discussed further below.

[33] Before the Board accepted the appeal, it requested submissions from the parties as to whether the Director had made an appealable "decision" as defined in section 99 of the *Act*.

[34] On August 25, 2010, the Board issued its preliminary decision that the Director had made an appealable decision within the meaning of section 99 of the

Act (*455161 BC Ltd. v. Director, Environmental Management Act*, Decision No. 2010-EMA-007(a)).

[35] The Appellant submits that the Director's decision is an unlawful attempt to impose liability on the Appellant for remediating adjacent areas as a condition of issuing a COC for the Property. The Appellant argues that the Director is delaying considering its COC application until the Appellant accedes to this condition. The Appellant submits that the Director has no authority to impose such a condition, and he has no authority to suspend making a decision on the COC application in the circumstances. Furthermore, the Appellant submits that the Director is incorrectly relying on Protocol 6 to assign liability for remediation. The Appellant argues that the Director should use the mechanisms and processes that are provided in Part 4 of the *Act* if he seeks to impose liability on the Appellant for investigating and remediating the neighbouring areas.

[36] The Director submits that the appeal should be denied because:

- the full extent of contamination from the Property has not been delineated and, accordingly, the environmental impact is unknown at this time;
- a Notice of Potential or Actual Migration of Contamination under section 60.1 of the *Regulation* has not been provided to the owners of certain properties to the south and the east of the Property;
- the May 2007 recommendation of the approved professional (i.e., Mr. Symington) does not meet the requirements of Protocol 6; and,
- the status of the remediation on the Property has not been reviewed by the Director and the current state of remediation is unknown at this time.

ISSUES

[37] The issue in this appeal is:

> Whether the Board should order the Director to issue, or alternatively consider issuing, a COC for the Property without any further requirements for the Appellant to investigate or remediate the neighbouring properties.

RELEVANT LEGISLATION

[38] The following sections of the *Act* are relevant to this appeal. Other relevant provisions, including sections of the *Regulation*, are set out below in the text of this decision.

Approvals in principle and certificates of compliance

53 (1) For the purposes of exercising powers and performing duties under this section, a director may rely on any information the director considers sufficient for the purpose, including, but not limited to, a preliminary site investigation, a detailed site investigation, a risk assessment, a remediation plan or a summary of site condition.

...

(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,

...

(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).

(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.

Independent remediation procedures

54 (1) A responsible person may carry out independent remediation in accordance with the minister's regulations whether or not

(a) a determination has been made as to whether the site is a contaminated site,

(b) a remediation order has been issued with respect to the site, or

(c) a voluntary remediation agreement with respect to the site has been entered into.

(2) Any person undertaking independent remediation of a contaminated site must

(a) notify a director in writing promptly on initiating remediation, and

(b) notify the director in writing within 90 days of completing remediation.

(3) A director may at any time during independent remediation by any person

(a) inspect and monitor any aspect of the remediation to determine compliance with the regulations,

(b) issue a remediation order as appropriate,

(c) order public consultation and review under section 52, or

(d) impose requirements that the director considers are reasonably necessary to achieve remediation.

(4) On request of a person carrying out independent remediation and on receiving adequate information respecting the independent remediation, a director may

(a) review the remediation in accordance with the regulations and any requirements imposed under subsection (3) (d), and

(b) issue an approval in principle or a certificate of compliance under section 53.

...

Selection of remediation options

56 (2) When issuing an approval in principle or a certificate of compliance, a director must consider whether permanent solutions have been given preference to the maximum extent practicable as determined in accordance with any guidelines set out in the regulations.

DISCUSSION AND ANALYSIS

Whether the Board should order the Director to issue, or alternatively consider issuing, a COC for the Property without any further requirements for the Appellant to investigate or remediate the neighbouring properties.

Parties' submissions

[39] The Appellant submits that the Director's decision is an attempt to impose remediation liability on the Appellant in a manner that is unauthorized by the *Act*; namely, by delaying or withholding consideration of the Appellant's COC application until the Appellant commits to remediating contamination on neighbouring properties. The Appellant submits that the Director is incorrectly relying on Protocol 6 to assign liability for remediation. The Appellant argues that the Director has no authority in these circumstances to impose a "remediation condition" on the Appellant, or to suspend making a decision on the Appellant's COC application. Further, the Appellant submits that there is insufficient evidence for the Director to conclude that the neighbouring properties contain contamination that exceeds the regulatory standards or has migrated from the Property.

[40] The Appellant submits that, if the Director wants the Appellant to investigate the alleged contamination on neighbouring properties, he may issue a site investigation order under section 41 of the *Act*. Similarly, if the Director wants the Appellant to remediate the alleged contamination on neighbouring properties, he

may declare the areas to be a contaminated site pursuant to section 44 of the *Act*, and issue a remediation order under section 48 of the *Act*. The Director has done neither of those things.

[41] In summary, the Appellant argues that an approved professional has recommended issuance of a COC for the Property in accordance with Protocol 6, and the Director has no authority to suspend or withhold considering its COC application pending the Appellant's commitment to remediate alleged contamination on other properties, especially if the alleged contamination is of uncertain origin.

[42] The Director submits that his decision is appropriate in the circumstances and is consistent with the *Act*, the *Regulation* and Protocol 6. Specifically, the Director submits that he has not received all of the required information from the Appellant including a delineation of the full extent of the contamination that originated from the Property.

[43] In support of those submissions, the Director provided document evidence including an affidavit from Mr. Szefer, a Senior Contaminated Sites Officer with the Ministry, who reviewed the Appellant's 2002 COC application when he was previously employed at Keystone Environmental Ltd. Mr. Szefer attests that in 2009, after becoming an employee of the Ministry, he reviewed the documents submitted in support of the Appellant's 2007 COC application, including Mr. Symington's 2007 recommendation letter and review report. Mr. Szefer attests that, based on his review of those documents and the previous 2002 COC application, the previously identified soil contamination is no longer present on the Property, but contamination has "likely" migrated from the Property to portions of the adjacent property to the east (2489 Highway 97 South) that were not excavated during the 2002 remediation, and to another property further to the east (2483 Highway 97 South). He also attests that there is evidence that contamination has migrated from the Property to the adjacent property to the south (3711 Elliott Road). He states that Mr. Symington's recommendation that a COC be issued for the Property does not take into account the migration and/or likely migration of contamination to those areas.

[44] The Director submits that section 56(2) of the *Act* requires him to consider, when issuing a COC, "whether permanent solutions have been given preference to the maximum extent practicable in accordance with any guidelines set out in the regulations". The Director further submits that Protocol 6 is a regulation within the meaning of section 56(2), and Protocol 6 requires an approved professional to address the entire extent of contamination at a site for the purposes of recommending to the Director that a COC should be issued. The Director submits that the entire extent of the contamination in this case has not been addressed in Mr. Symington's recommendation letter and review report.

[45] The Director also submits that, under section 52 of the *Regulation*, he need not consider a COC application until all required information has been provided to him. Section 52(1) of the *Regulation* states:

> **52** (1) A director need not consider an application for an approval in principle or certificate of compliance until all required information has been provided to the director for review.

[46] He argues that section 49(2) of the *Regulation* specifies some of the required information for a COC application:

> **49** (2) In support of the application referred to in subsection (1), the person requesting the certificate of compliance must provide to the director the reports described in paragraphs (a) and (b) and ensure that the director has information on the items described in paragraphs (c) and (d):
>
> (a) preliminary and detailed site investigation reports;
>
> (b) a confirmation of remediation report which describes sampling and analyses carried out after remediation of the contamination including
>
> (i) a description of sampling locations and methods used,
>
> (ii) a schedule of sampling conducted, and
>
> (iii) a summary and evaluation of results of field observations and of field and laboratory analyses of samples;
>
> (c) compliance with all conditions set by a director under section 47(3) if an approval in principle was issued prior to remediation;
>
> (d) the quality and performance of remediation measures on completion of remediation, including compliance with the remediation standards, criteria or conditions prescribed in this regulation.

[47] However, the Director argues that "all required information" under section 52(1) of the *Regulation* may also include relevant information that is not specifically referred to in section 49(2) of the *Regulation*. In that regard, the Director submits that the Appellant needs to provide more information about: the level of remediation at "the site" and whether it meets the criteria in section 56 of the *Act*; the extent of contamination that exists to the south of the Property; why the 2002 remediation on 2489 Highway 97 South did not extend to further areas where contamination was known to exceed standards; and, whether contamination might now exist on the Property due to the time elapsed since the Appellant's application was filed, and the possibility of contaminant migration from service stations located to the west and northwest of the Property or from activities on the Property since 2007.

[48] The Director also submits that remediation standards have changed since the application was filed in 2007, and there is now a vapour standard for hydrocarbon contamination that the Appellant has not addressed.

[49] Furthermore, the Director submits that the Appellant has not provided notice of potential or actual migration of contamination to the owners of the properties at 2483 Highway 97 South or 3711 Elliott Road, as required by section 60.1 of the *Regulation*.

[50] Regarding the Appellant's submission that the Director has no jurisdiction to impose a "remediation condition", the Director argues that the jurisdiction to impose such a condition is consistent with his discretion under section 53(6) of the

Act to issue a COC for part of a contaminated site. However, he maintains that he did not impose a "remediation condition" in this case due to the incomplete information about the nature and extent of the contamination. He submits that he adopted that position after the Ministry became aware that 2489 Highway 97 South had been sold and the new owners would allow the Appellant to access their property. The Director further submits that his position regarding the incomplete information was outlined in communications between the parties which were reproduced in the Appellant's submissions.

[51] In summary, the Director submits that he has not received all of the required information from the Appellant in support of its COC application, and therefore, he is not legally compelled to review the application.

[52] In reply, the Appellant submits that the Director does not have unlimited discretion regarding COC conditions merely based on legislative silence over whether the Director can require a COC applicant to remediate another person's property. Rather, the Appellant argues, the jurisdiction to impose a remediation condition must be based on clear legislative authority and be consistent with the overall purpose of Part 4 of the *Act*. The Appellant submits that the Director's insistence on the remediation condition is inconsistent with the substantive and procedural provisions in Part 4 that govern liability for the remediation of contaminated sites. The Appellant also submits that the evidence submitted by the Director regarding the alleged contamination on adjacent properties should be subjected to the processes set out in Part 4 of the *Act*, which provide procedural safeguards and substantive criteria regarding what constitutes a contaminated site and who may be held liable for remediation.

Panel's findings

[53] The parties disagree on the nature of the Director's decision. Consequently, before analyzing the main issue, the Panel has considered the nature of the decision that is under appeal.

What is the "decision" under appeal?

[54] In the Board's preliminary decision on whether the Director made an appealable "decision", the Panel found that the Director was either "imposing a requirement" as referred to in section 53(3)(a)(iv) of the *Act*, or "withholding a… certificate of compliance" as referred to in section 53(5) of the *Act*. In that decision, the Board cautioned that those findings were limited to deciding the preliminary issue of jurisdiction. The Panel has now considered the parties' full submissions on the Director's jurisdiction in relation to COCs and the nature of the Director's decision, including evidence of communications between the parties both before and after the Appellant filed its 2007 COC application.

[55] On a review of the evidence, the Panel finds that the Director's position, in terms of what he required from the Appellant in order to consider the COC application, shifted over time. Indeed, the Director acknowledged in his submissions that his position changed regarding what information he required from the Appellant. For example, in a November 17, 2006 email, Ministry staff stated that the Director may issue a COC that was limited to the Property if the Appellant provided certain information along with "assurance from a consultant that

contamination from offsite will not enter back onto source site" and a "commitment to remediate offsite at a later date if access is granted in the future." However, the April 23, 2010 email from the Director's legal counsel states that the Director would not consider the COC application until he received "confirmation that the entire extent of contamination has been dealt with as required by Protocol 6".

[56] The Panel finds that the evidence discloses an explanation for the change in the Director's position. The Panel finds that, in November 2006, when the Appellant was asked to commit to remediating offsite at a later date "if access is granted in the future", the Ministry was uninformed about the change in ownership of the neighbouring property. The Director's evidence is that, in November 2006, the Ministry believed that the Appellant still had no access to the neighbouring property to the east. Before August 2007, the Ministry was unaware that the neighbouring property had been sold on September 1, 2006, and that the new owners would have given the Appellant access to their property. There has been no suggestion that the Ministry was at fault for that misunderstanding.

[57] The Appellant argues that the Director had no authority to ask the Appellant for a commitment to remediate the adjacent property, but the Panel finds that this is a moot point because the evidence indicates that the Director stopped asking for that commitment after the Ministry became aware of the change in circumstances with the neighbouring property. In particular, the April 23, 2010 email from the Director's counsel does not seek that commitment from the Appellant.

[58] Furthermore, the Panel finds that the "decision" under appeal is not the Director's request that the Appellant commit to remediating the neighbouring property. Rather, it is the decision that is set out in the April 23, 2010 email, as no other "decision" was appealed within the 30-day time period required under the *Act*.

[59] Specifically, for there to be a valid appeal, the Director's decision must not only be a "decision" within the definition of section 99 of the *Act*; in addition, the appeal must be commenced "30 days after notice of the decision is given" as required by section 101 of the *Act*. Any prior documents that may have contained "decisions" within the definition of section 99 were not appealed within the 30-day period. The Panel finds that the prior letters and other communications received by the Appellant may be relevant evidence in the present appeal, but they are not the "decision" that has been appealed.

[60] The Board alluded to this at paragraph 27 of its preliminary decision, where it held that the decision in the April 23, 2010 email was either "imposing a requirement" or "withholding a… certificate of compliance". For added certainty, the Panel confirms that the following portions of the April 23, 2010 email set out the appealed decision:

> The Director's position remains that proper adjudication of this application requires confirmation that the entire extent of contamination has been dealt with as required under Protocol 6.
>
> ...

> The Director's position remains that the full extent of contamination must be addressed in order that the COC application can proceed to a proper adjudication in accordance with the requirements of the statute including protocol 6. Of course the passage of time has compounded the problem because of questions about the reliability of the data due to the passage of time and the adoption of new [*Regulation*] criteria such as vapour standards.
>
> ...
>
> In the circumstances the Director has indicated he is not prepared to reject the QP's recommendation as long as these information voids persist with respect to the current extent of the contamination.

[61] In summary, the decision under appeal is the Director's decision not to review or adjudicate the 2007 COC application without further information about the entire extent of the contamination originating from the Property and whether it has been dealt with as required by Protocol 6.

[62] Having determined what decision is under appeal in this case, the Panel next considered the parties' arguments that are focused on the decision. In particular, the Panel considered the nature of Protocol 6, because the Director relies on it in his decision and he submits that it is a "regulation". The Panel also considered whether compliance with Protocol is required, and whether the Appellant's 2007 COC application complies with the applicable provisions of the *Act*, the *Regulation*, and Protocol 6.

What is the nature of Protocol 6, and did the Appellant's 2007 COC application comply with the applicable provisions of the Act, the Regulation, and Protocol 6?

[63] In his submissions, the Director relies on the July 28, 2004 version of Protocol 6, which states, in part:

> Under the *Environmental Management Act*, a director is authorized to rely on the advice of approved professionals in the performance of specific contaminated sites functions. This protocol specifies when these professionals may recommend that an application be processed in this manner.
>
> ...
>
> Notes
>
> 4. Applications for an approval in principle, certificate of compliance or a combination of an approval in principle and certificate of compliance addressing the *entire extent* of contamination are acceptable. Applications for an approval in principle or certificate of compliance for *part of a site* (ie, a site affected by contamination migrating from a source property) are eligible for the roster of approved professionals. However, if the entire extent of contamination is not addressed, then the roster application must include a statement of assurance confirming that any measures necessary to prevent re-contamination of the affected property have been, in the case of a certificate of compliance… put in place.
>
> [italics in original]

[64] In addition, footnote 1 on page 2 of Protocol 6 states:

> In accordance with sections 15, 43, 47 and 49 of the Regulation, a director may endorse a... certificate of compliance based on the recommendation of an approved professional. Alternately, the director may decline to process any application incorporating a recommendation by an approved professional. If declined, the director must provide written reasons to the applicant and the professional association of which the approved professional is a member. This is a decision of the director and may be appealed.

[65] The Director submits that Protocol 6 is a regulation within the meaning of section 56(2) of the *Act*. Section 56(2) of the *Act* states:

> **56** (2) When issuing an approval in principle or a certificate of compliance, a director must consider whether permanent solutions have been given preference to the maximum extent practicable as determined in accordance with any guidelines set out in the regulations.

[66] The Director's authority to establish Protocol 6 is set out in section 64 of the *Act*, as follows:

> **64** (1) A director may establish protocols, consistent with this Act and the regulations, in relation to any of the following:
>
> …
>
> (d) establishing substantive and procedural requirements for persons planning, conducting or reporting on the remediation of a contaminated site, which may be different for sites contaminated with particular types of contamination;
>
> …
>
> (2) For the purposes of protocols established under subsection (1), a director may establish protocols in respect of the following:
>
> …
>
> (o) establishing standards for qualified professionals in relation to
>
> (i) the performance of activities under this Act, and
>
> (ii) conflict of interest;
>
> (o.1) summarizing or specifying activities, including the preparation of specified reports or documents, that may or must be performed by an approved professional;
>
> (3) Section 41 of the *Interpretation Act* and the *Regulations Act* do not apply in relation to a protocol under this section.
>
> (4) On and after the date that a protocol under this section is published in accordance with the minister's regulations, a director may refuse to accept anything governed by the protocol that is not in compliance with it.

[67] The Panel finds that the Director's authority under section 64 is not to make "regulations". Section 64 expressly states that the Director may establish "protocols, consistent with this Act and the regulations." The Panel notes that the

Director may establish "protocols", not "regulations", under this section. Section 64 also requires that a protocol must be "consistent with… the regulations", which infers that a protocol is not a regulation. In contrast, section 63.1 of the *Act* expressly authorizes the Director to make certain "regulations" in relation to contaminated sites. In addition, sections 62 and 63 of the *Act*, respectively, authorize the Lieutenant Governor in Council and the Minister of Environment to make certain "regulations" in relation to contaminated sites. The Panel finds that, if the legislature had intended the Director to have regulation-making authority under section 64, it could have said so, just as it did in sections 62, 63 and 63.1, but it did not.

[68] The Panel also notes that section 64(3) above states that section 41 of the *Interpretation Act*, which sets out certain powers in relation to making regulations, and the *Regulations Act*, which addresses the processes of depositing and publishing regulations, do not apply to Director's protocols. Those provisions further support the finding that a Director's protocol is not a regulation.

[69] For all of these reasons, the Panel rejects the Director's submission that Protocol 6 is a "regulation" within the meaning of section 56(2) of the *Act*.

[70] However, the Panel finds that the Director may require compliance with a protocol, because section 64(4) indicates that the Director "may refuse" to accept anything governed by a protocol that is not in compliance with that protocol, once the protocol has been published in accordance with the minister's regulations. Consequently, the Panel finds that a protocol is not legally binding, but a Director has discretion to require compliance with a protocol.

[71] While it may be appropriate in most circumstances for the Director to require an applicant to comply with Protocol 6, it is important to carefully consider the language in Protocol 6, and discern what it requires in relation to COC applications. In addition, the Panel emphasizes that the use of the word "may" instead of the word "must" in section 64(4) indicates that the Director has <u>discretion</u> to refuse to accept a COC application that is governed by Protocol 6. It is trite law that, under the common law principles of administrative fairness, discretion must be exercised in a manner that is consistent with the objectives of the enabling legislation, and take into account the relevant considerations. The decision-maker should not be influenced by irrelevant considerations.

[72] Note 4 in Protocol 6 states that applications for a COC addressing the entire extent of contamination "are acceptable." Note 4 does <u>not</u> state that applications addressing the entire extent of contamination "are required". Conversely, paragraph 4.5 of the June 16, 2010 version of Protocol 6 actually requires the latter. It states that "Any application for a Determination of Contaminated Site, Approval in Principle or Certificate of Compliance must address the entire area of contamination (including affected sites) and the entire area of all legal parcels affected by that contamination." The Panel refers to the language in paragraph 4.5 of the more recent version of Protocol 6 solely for the purpose of highlighting how it differs from the language in Note 4 of the July 28, 2004 version. As the Panel has noted above, the Director has relied on the July 28, 2004 version of Protocol 6. The Panel agrees with the Director that the July 28, 2004 version applies to the 2007 COC application.

[73] In addition, Note 4 states that applications for "part of a site (i.e., a site affected by contamination migrating from a source property) are eligible for the roster of approved professionals" if the application includes an approved professional's "statement of assurance confirming that any measures necessary to prevent re-contamination of the affected property have been, in the case of a certificate of compliance… put in place."

[74] The Panel finds that the language in Note 4 expressly contemplates that approved professionals may make recommendations regarding COC applications for part of a contaminated site that are governed by Protocol 6. The Panel finds that this is consistent with the Director's discretion to issue a COC for part of a site under section 53(6) of the *Act*, which states:

> **53** (6) A director may issue an approval in principle or a certificate of compliance for a part of a contaminated site.
>
> [underlining added]

[75] In addition, the Panel finds that the language in Note 4 requiring an approved professional's assurance regarding whether measures are in place to prevent recontamination of the part of a site that is the subject of the COC application is consistent with the requirement in section 56(2) of the *Act* that the Director consider whether "permanent solutions have been given preference to the maximum extent practicable" when issuing a COC. The Panel finds that, if a COC application is for part of a site and there is a risk that contamination remaining in adjacent areas may migrate to the subject property, the issue of preventing recontamination of the subject property is a very relevant consideration.

[76] In the Appellant's 2007 COC application package, Mr. Symington's review report states as follows regarding the potential for recontamination of the Property:

> … The results show that there is sufficient evidence to show that offsite migration has occurred, but that mitigation measures at the site consisting of a plastic curtain wall have been implemented to reduce the potential for recontamination of the subject site.
>
> [underlining added]

[77] The Panel finds that this statement meets the requirement, in Note 4 of Protocol 6 regarding COC applications for part of a contaminated site, that an approved professional provided a statement of assurance confirming that measures necessary to prevent re-contamination of the affected property have been put in place. In addition, the Panel finds that Mr. Symington's statement above, together with his statement that "the data and presentation provides a high level of confidence that the site has been remediated to the appropriate commercial land use standards and mandatory no water use standards", meet the requirement in section 56(2) of the *Act* that permanent solutions have been given preference to the maximum extent practicable, in terms of issuing a COC that is limited to the Property as part of a site.

[78] The Director has not argued that the 2007 COC application fails to meet the requirements in section 49 of the *Regulation*. Rather, he argues that there is other "relevant information", not listed in section 49, that the 2007 COC application lacks

for the purposes of considering the application in accordance with section 52(1) of the *Regulation*.

[79] The Panel has considered the "relevant information" that the Director submits is lacking. The Panel finds that the concerns identified by the Director regarding the 2007 COC application primarily relate to the potential or likelihood of contaminant migration from the Property to nearby properties, and the lack of information about the extent of any contamination on those properties. The Panel finds that the evidence is inconclusive as to the level of contaminants on the properties to the south and the east. The Panel further finds that the evidence is inconclusive regarding whether the Property was the source of any contamination that may exist on those properties. However, the issue before the Panel is whether the lack of information or conclusive evidence on those points is sufficient to justify not considering the 2007 COC application.

[80] The Panel finds that it is clear that a Director may issue a COC for part of a contaminated site under section 53(6) of the *Act*. In the present case, there is evidence that there were contaminants in excess of regulatory standards on those properties in the past, but it unknown whether that is still the case or whether the Property was the source, as opposed to the gas station sites to the west and northwest which were identified by the Director. In these circumstances, the Panel finds that the Property may be considered "part of a contaminated site", and the 2007 COC application may be considered as an application for a COC for part of a site under section 53(6) of the *Act*.

[81] In addition, the Panel finds that the absence of information about the extent of any contamination remaining on the neighbouring properties is not a basis for not considering the 2007 COC application under section 52(1) of the *Regulation*. Mr. Symington, as the approved professional, emphasized that his recommendation was limited to the Property and was based on information that was limited to the Property. The Panel finds that, if the application is considered as pertaining to the part of the site that is the Property, it is unreasonable to decide that further information about alleged contamination on neighbouring properties is "required" or relevant, as long as a professional assurance has been given regarding measures taken to prevent recontamination, as required in Note 4 of Protocol 6. In this case, Mr. Symington gave his professional assurance regarding measures that were taken to prevent re-contamination of the Property.

[82] The Director identifies several additional concerns about the 2007 COC application, which he says constitute a lack of relevant information or "required information" within the meaning of section 52(1) of the *Regulation*. One of those concerns is that the application does not contain information addressing the vapour standard for hydrocarbon contamination. The Director acknowledges that this standard did not exist when the Appellant filed the 2007 COC application. The Panel notes that the Director provided no statutory authority for requiring the Appellant to meet a standard that did not exist when the application was filed. The Panel finds that it is unreasonable for the Director to refuse to consider the application unless the Appellant provides information about a standard that did not exist when the application was filed. Requiring that information would amount to requiring the Appellant to foresee the future. The Panel finds that the 2007 COC

application should be assessed based on the standards that existed when it was filed with the Ministry. In that regard, Mr. Symington concluded that the remediation of the Property met those standards, and a COC should be issued for the Property.

[83] Another concern identified by the Director is the suggestion that contamination may have migrated to the Property since May 2007, from up-gradient service stations located to the west and northwest of the Property or from post-2007 activities on the Property. However, the Panel finds that those matters were neither raised in, nor given as reasons for, the Director's April 23, 2010 decision, and the Director has provided no evidence to support those contentions. As such, the Panel finds that those concerns are purely speculative, and do not provide a basis for rejecting or refusing to consider the 2007 COC application.

[84] The final concern that the Director identifies is:

- the Appellant has not provided notice to the owners of 2483 Highway 97 South and 3711 Elliott Road under section 60.1 of the *Regulation* regarding the potential migration of contamination from the Property to those properties.

[85] The Panel finds that this is an outstanding requirement that the Appellant must meet before a COC may be issued for the Property. The requirement in section 60.1 has existed since February 4, 2002, before the Property was remediated and several years before the 2007 COC application was filed, and the issuance of a COC under section 53(3) must be "in accordance with" the *Regulation*.

[86] The Panel shares the Director's concerns about the need for further investigation and possible remediation of the neighbouring properties. In that regard, the Panel has considered the statutory powers available to the Director for addressing those concerns. The Panel finds that Part 4 of the *Act* provides the Director with a broad range of powers to address those concerns, including the discretion to issue a site investigation order under section 41 of the *Act*, to determine an area to be a contaminated site pursuant to section 44 of the *Act*, and to issue a remediation order under section 48 of the *Act*.

[87] In addition, the Panel has considered what options the Director would have if the Property became re-contaminated from off-site migration, but a COC had been issued for Property as part of a site. The Panel finds that, under section 60 of the *Act*, the Director retains the right to exercise any power or function under Part 4 of the *Act*, if certain information becomes available or activities occur on a site that may change its condition or use. Section 60 of the *Act* states:

> **Government retains right to take future action**
>
> **60** A director may exercise any of a director's powers or functions under this Part, even though they have been previously exercised and despite any voluntary remediation agreement, if
>
> (a) additional information relevant to establishing liability for remediation becomes available, including information that indicates that a responsible person does not meet the requirements of a minor contributor,

(b) activities occur on a site that may change its condition or use,

(c) information becomes available about a site or a contaminating substance at the site that leads to a reasonable inference that the site poses a threat to human health or the environment,

(d) a responsible person fails to exercise due care with respect to any contamination at the site, or

(e) a responsible person directly or indirectly contributes to contamination at the site after previous action.

[88] For all of these reasons, the Panel finds that it is appropriate in the circumstances to send this matter back to the Director with directions to issue a COC for the Property under section 53(6) of the *Act* once the Appellant provides the notices required under section 60.1 of the *Regulation*.

DECISION

[89] In making this decision, the Panel has carefully considered all of the submissions and arguments provided, whether or not specifically reiterated herein.

[90] For the reasons provided above, the Panel refers the matter back to the Director with directions to issue a COC for the Property pursuant to section 53(6) of the *Act*, subject to the conditions and further directions stated above.

[91] The appeal is allowed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

September 15, 2011