

**DECISION NO. 2011-EMA-004(a)**

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

<b>BETWEEN:</b>	BCR Properties Ltd.	<b>APPELLANT</b>
<b>AND:</b>	Manager, Risk Assessment and Remediation	<b>RESPONDENT</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 November 5, 2011	
<b>APPEARING:</b>	For the Appellant: J.B. Brodie For the Respondent: Dennis Doyle, Counsel	

**PRELIMINARY ISSUE OF JURISDICTION**

[1] BCR Properties Ltd. ("BCR") appealed a decision issued by Peggy Evans, Manager, Risk Assessment and Remediation (the "Manager"), Ministry of Environment (the "Ministry"), in response to BCR's application for a water use determination in relation to a former rail yard located at 39500 Government Road (the "Site"), Squamish, BC. Specifically, BCR applied for a determination regarding the applicability of the drinking water use standards in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*"), to the Site.

[2] After reviewing BCR's Notice of Appeal, the Environmental Appeal Board (the "Board") requested written submissions from the parties regarding whether the Manager's letter constitutes an appealable "decision" under sections 99 and 100 of the *Environmental Management Act* (the "*Act*"). In order for the Board to accept the appeal, the appealed matter must fall within one of the subsections set out in the definition of "decision" in section 99, and it must be a decision of a "director or district director" in accordance with section 100(1) of the *Act*.

[3] This preliminary question of jurisdiction was heard by way of written submissions.

**BACKGROUND**

[4] The *Regulation* contains standards that specify the acceptable concentrations of substances in soil, surface water, groundwater, vapour and sediments at contaminated sites. Schedule 6 of the *Regulation* contains tables specifying the concentrations of certain substances that are permissible for each of four water use

standards: aquatic life (AW); irrigation (IW); livestock (LW); and, drinking water (DW). The *Regulation* defines "drinking water use" as meaning "the use of water for the purpose of consumption by humans."

[5] Owners or operators of a contaminated site may request that a director with the Ministry make a determination about whether the prescribed water uses apply to surface water and groundwater at a site. Under section 12(4) of the *Regulation*, a director may specify the surface water uses or groundwater uses which apply, at any given time, to a particular site.

[6] The Ministry has published a document titled *Technical Guidance 6 on Contaminated Sites* ("TG6"), which provides guidance on applications for water use determinations in relation to contaminated sites. The version of TG6 that applies in this case has an effective date of February 1, 2011, and states, in part, as follows:

Site owners or operators may formally request a Director to make a determination about whether any of the water uses apply to a particular site. Such a request must be accompanied by a completed Contaminated Sites Service Application form and supporting documentation prepared by a qualified professional.

[7] On May 30, 2011, BCR applied to the Ministry for a water use determination in relation to groundwater at the Site. The application was prepared by Piteau Associates, and set out a rationale as to why the drinking water use standards in the *Regulation* should not apply to the Site, and the Site should be exempted from those standards. BCR's submissions to the Board indicate that it has spent 7 years and \$11 million remediating the Site.

[8] On August 30, 2011, BCR received a letter dated August 23, 2011, from the Manager in response to BCR's application. The letter states, in part, as follows:

The ministry has reviewed the application... dated May 30, 2011. The document was prepared by Piteau Associates and describes investigations regarding the applicability of drinking water standards at [the Site].

...

The letter request by Piteau Associates for Water Use Determination at the [Site] provides the following rationale as to why DW use according to TG6 does not apply...

The intention of TG6 is to protect current and future drinking water use of all viable aquifers below a site. The presented rationale... is not sufficient arguments to obtain a DW [drinking water standards] use exception. Based on the presented rationale DW standards apply to the site.

...

This decision is based on the most recent information available to the ministry regarding the [Site]. The ministry, however, makes no representation or warranty as to the accuracy or completeness of this information.

[9] The letter is signed by Ms. Evans, and below her signature is the title "Manager, Risk Assessment and Remediation".

[10] BCR filed an appeal of the Manager's letter. In its Notice of Appeal, BCR requests a "reversal of the decision that DW standards should apply at the Site, so that only AW standards apply."

[11] In a letter dated September 29, 2011, the Board requested submissions from the parties on whether the Manager was acting as a delegate of a director under the *Act*, and had the authority to make an appealable "decision" as a director under section 100(1) of the *Act*. The Board also requested submissions on whether the letter constitutes an appealable "decision" as defined under section 99 of the *Act*.

[12] In a letter dated October 21, 2011, the Board requested further written submissions from the parties, regarding whether the Manager's letter constitutes "imposing a requirement" under section 99(b) of the *Act*.

[13] BCR submits that the letter may be appealed to the Board, because the Manager was acting as a director when she issued the letter, and the letter constitutes "imposing a requirement" within the meaning of section 99(b) of the *Act*.

[14] The Manager submits that, at all material times, Ms. Evans was not delegated as a director. The Manager also submits that the letter does not constitute "imposing a requirement," and therefore, is not a "decision" as defined under section 99 of the *Act*.

## **ISSUES**

[15] The two issues are as follows:

1. Whether the Manager was acting as a delegate of a director at the material time, and therefore, had the authority to make a "decision" as a director.
2. If so, whether the August 23, 2011 letter constitutes "imposing a requirement" under section 99(b) the *Act*.

## **RELEVANT LEGISLATION**

[16] Sections 12(2), (4) and (5) of the *Regulation* are relevant to water use determinations, and state as follows:

- 12** (2) For the purpose of using the standards in this regulation, the surface water uses or groundwater uses which apply, at any given time, to a particular site or part of a site are based on
- (a) the uses of the surface water or groundwater at the site or on neighbouring sites, and
  - (b) the potential for the groundwater or surface water to cause pollution.

...

- (4) A director may specify the applicable water uses under subsection (2) from the following:
- (a) aquatic life water use;
  - (b) irrigation water use;
  - (c) livestock water use;
  - (d) drinking water use.
- (5) In specifying the primary land use, water use or sediment use under subsections (3), (4) and (4.1), a director must take into account current and reasonable potential future land, water and sediment uses based on the following factors...

[17] Section 3 of the *Act* provides for delegation of a director's statutory powers:

**3** (1) Subject to the limitations in section 57 [*delegation of responsibilities to municipalities or other ministries*], a director may delegate any of his or her powers, duties or functions under this Act, except the power to establish protocols, to any person, subject to the terms and conditions the director considers necessary or advisable.

(2) In this Act a reference to the director includes a reference to a delegate of the director.

[18] Part 8 of the *Act* sets out the appeal provisions, including sections 99 and 100:

**Definition of "decision"**

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

- (a) making an order,
- (b) imposing a requirement,
- (c) exercising a power except a power of delegation,
- (d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,
- (e) including a requirement or a condition in an order, permit, approval or operational certificate,
- (f) determining to impose an administrative penalty, and
- (g) determining that the terms and conditions of an agreement under section 115 (4) have not been performed.

### Appeals to Environmental Appeal Board

- 100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.
- (2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

### DISCUSSION AND ANALYSIS

#### 1. Whether the Manager was acting as a delegate of a director at the material time, and therefore, had the authority to make a "decision" as a director.

##### *Parties' submissions*

[19] BCR submits that it applied for a director's determination in accordance with TG6, and on August 23, 2011, it received a negative determination signed by Ms. Evans, for which it was billed \$1980.00. BCR argues that only a director is authorized to make such determinations, and therefore, Ms. Evans must have been delegated to act as a director when she made the determination. BCR points out that section 3 of the *Act* states that "in this Act a reference to the director includes a reference to a delegate of the director."

[20] BCR also submits that on three other occasions, before and after August 23, 2011, Ms. Evans approved certificates of compliance under the *Act*, and the words "for Director" appeared under her signature. BCR argues that it would be unlikely for Ms. Evans' delegate status to have stopped and started on an irregular basis.

[21] The Manager submits that there is no evidence on the face of the August 23, 2011, letter that Ms. Evans was acting in a representative capacity for a director.

[22] The Manager provided a copy of a document titled "Director's Delegation", signed on November 19, 2007 by James Hofweber, Director of Waste Management, Ministry of Environment. The Manager submits that the Director's Delegation expressly states that the delegation was to Ms. Evans in her capacity as a Senior Contaminated Sites Officer, and was effective only as long as she remained in that capacity. The Manager submits that she is no longer a Senior Contaminated Sites Officer, and the record shows that she was not in that position at the material time in this case.

[23] In summary, the Manager submits that Ms. Evans was not a director's delegate when she signed the August 23, 2011 letter.

[24] In reply, BCR submits that it seeks fair treatment in its dealings with the Ministry. It applied for a director's determination, and it provided supporting materials to the Ministry in accordance with TG6. BCR submits that the Manager's determination is arbitrary, unsupportable on environmental grounds, and has come too late in the remediation process.

[25] BCR argues that, if the determination rendered was not that of a director, then the determination is without merit, as is the Ministry's invoice for \$1980.00.

[26] In addition, BCR argues that the Manager's assertion that she was not acting as a director's delegate on August 23, 2011 is at odds with her signing a certificate of compliance "for Director" on September 28, 2011. BCR submits that the Manager must have again been assigned the powers of a director's delegate, and if so, the date when that occurred has not been divulged.

*Panel's findings*

[27] The Panel has considered the relevant sections of the *Act* and the *Regulation*. Section 12 of the *Regulation* clearly indicates that a "director" may specify the water uses that apply to a particular site. Section 3(1) of the *Act* authorizes a director to "delegate any of his or her powers, duties or functions under this Act... to any person, subject to the terms and conditions the director considers necessary or advisable", and section 3(2) of the *Act* states that "a reference to the director includes a reference to a delegate of the director". Consequently, a director may delegate his or her powers under section 12 of the *Regulation* to any person.

[28] In the present case, the November 19, 2007 Director's Delegation indicates that a director delegated his powers to the Manager, subject to certain terms and conditions. The Director's Delegation states, in part, as follows:

1. I, James Edward Hofweber, Director, hereby delegate to Margaret (Peggy) Lee Evans, Senior Contaminated Sites Officer, Land Remediation, the following:
  - Sections... of the *Environmental Management Act*;
  - The Contaminated Sites Regulation; ...
- ...
5. This delegation is in effect only as long as the delegate remains in his current capacity within government.

[29] Numbered paragraph 5 of the Director's Delegation expressly states that it is in effect only as long as Ms. Evans remained in the capacity within government that applied when the delegation was made; namely, in her capacity as a "Senior Contaminated Sites Officer, Land Remediation".

[30] The evidence indicates that BCR submitted its application for a water use determination in accordance with the guidance provided in TG6, and Ms. Evans' August 23, 2011 letter was issued in response to BCR's application. However, the Panel finds that the Manager signed the August 23, 2011 letter in her capacity as "Manager, Risk Assessment and Remediation", and not in the capacity of a "Senior Contaminated Sites Officer, Land Remediation". There is no evidence that the Director's Delegation was amended, or an updated Director's Delegation was signed, on or before August 23, 2011, to reflect the change in Ms. Evans' capacity within government. Consequently, the Panel finds that Ms. Evans was not acting in accordance with the terms and conditions of the Director's Delegation when she signed the letter, and therefore, she was not authorized to act as a director's delegate when she issued the letter.

## 2. Whether the August 23, 2011 letter constitutes “imposing a requirement” under section 99(b) the *Act*.

[31] BCR submits that the Manager exercised the powers of a director under section 12 of the *Regulation* when she issued the August 23, 2011 letter, and the letter constitutes “imposing a requirement” under section 99(b) of the *Act*. Moreover, BCR was billed for the determination that was rendered. BCR argues that, in these circumstances, it is reasonable to believe that it received a *bona fide* determination by a director’s delegate, regardless of the signature block on the letter.

[32] The Manager submits that the definition of “decision” in section 99 of the *Act* is exhaustive, and the letter does not constitute “imposing a requirement” under section 99(b) because it is not, on its face, a final decision. The Manager submits that section 12(4) of the *Regulation* allows a director to specify applicable water use categories when using the standards in the *Regulation* for decision-making purposes. The Manager argues that there is no right of appeal until a director applies those standards in the making of a decision.

[33] Specifically, the Manager submits that the August 23, 2011 letter purports to offer an interpretation of TG6, and Ms. Evans’ findings are qualified by the rationale presented by Piteau Associates, and offer the possibility that additional site-specific criteria might be considered in the future.

[34] Regarding TG6, the Manager submits that it provides guidance only, and its interpretation is not appealable separate from its application in making a “decision” within the meaning of section 99 of the *Act*.

[35] In addition, the Manager submits that no legal consequences flow from the August 23, 2011 letter.

[36] In support of those submissions, the Manager refers to the Board’s previous decisions in:

- *Canadian National Railway Company v. Regional Waste Manager* (Appeal No. 2001-WAS-025, May 24, 2002);
- *Beazer East, Inc. v. Assistant Regional Waste Manager* (Appeal No. 2003-WAS-002(a), February 5, 2004);
- *Imperial Oil et al v. Assistant Regional Waste Manager (Sanbo Developments Ltd., Third Party)* (Appeal No. 2001-WAS-014(a)/017(a)/018(a)/020(a)/021(a), January 23, 2002); and
- *Britannia Mines and Reclamation Corp. v. Director of Waste Management* (Appeal No. 2002-WAS-008(a), September 17, 2002).

### *Panel's findings*

[37] As noted by the parties, the Board has previously interpreted section 99 of the *Act*, and its predecessor section 43 of the *Waste Management Act* (“*WMA*”), on a number of occasions.

[38] In all of those cases, the Board concluded that the legislature sought to limit the types of decisions that are subject to a right of appeal under the *Act* (and

previously the *WMA*), and that it chose to do so by carefully wording the definition of "decision". In addition, the Board has concluded that the subsections in the definition of "decision" are not intended to overlap; rather, they can be related to certain specific statutory provisions. This Panel agrees that the meaning of the acts (or refusals to act) referred to in section 99 must be found in the provisions of the *Act* or its regulations.

[39] Section 12(4) of the *Regulation* authorizes a director to "specify the applicable water uses under subsection (2)". Section 12(2) states "For the purpose of using the standards in this regulation, the surface water uses or groundwater uses which apply, at any given time, to a particular site..." Reading section 12(4) together with section 12(2), the Panel finds that a director has the authority to specify the water uses that apply to a given site. The applicable water use, as specified by a director, then correlates to the standards in Schedule 6 of the *Regulation*. The applicable water use, as specified by a director, affects the nature of the remediation required before a particular site may be eligible for a certificate of compliance and may no longer be considered a contaminated site.

[40] In the present case, the Panel finds that the Manager's August 23, 2011 letter does not simply offer an interpretation of TG6. Although the letter comments on the intended purpose of TG6 and the type of guidance TG6 offers, the letter goes much further than that. The letter expressly rejects BCR's application. The Manager clearly rejects BCR's application on the basis that the rationale provided in the application, by Piteau Associates, is insufficient to justify an exemption from the drinking water use standards. The letter clearly makes a finding or determination that the drinking water use standards apply to the Site, based on the information that was provided in the application and available to the Ministry. In that regard, the letter states:

The ministry has reviewed the application... dated May 30, 2011. The document was prepared by Piteau Associates and describes investigations regarding the applicability of drinking water standards at [the Site].

... The presented rationale... is not sufficient arguments to obtain a DW use exemption. Based on the presented rationale DW standards apply to the site.

...

This decision is based on the most recent information available to the ministry regarding the [Site]. The ministry, however, makes no representation or warranty as to the accuracy or completeness of this information.

[underlining added]

[41] There is no indication in the letter that the Manager's findings are not final, or are preliminary in nature.

[42] The fact that the Ministry issued an invoice for \$1980.00 to BCR in relation to the letter also supports the conclusion that the Manager was purporting to make a water use determination when she issued the letter.



[43] The Panel also rejects the Manager's submissions that the letter has no legal consequences. The Manager's finding that the drinking water use standards apply has the effect of determining the concentration of various substances that are considered acceptable in the groundwater at the Site, and consequently, it significantly effects the nature of the remediation required in order for the Site to be eligible for a certificate of compliance and no longer be considered a contaminated site.

[44] The Panel finds that the letter constitutes "specify[ing] the applicable water uses under subsection (2)" within the meaning of section 12(4) of the *Regulation*. Specifically, the Manager specified the groundwater uses which applied, at that time, to the Site. The Panel further finds that this constitutes "imposing a requirement" within the meaning of section 99(b) of the *Act*. The fact that the Manager was not acting under proper delegated authority and was unauthorized to make a director's decision under section 12(4) of the *Regulation* when she issued the letter does not change the nature of the "decision" set out in the letter.

## **DECISION**

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

[46] The Panel finds that the Manager's letter constitutes "imposing a requirement" within the meaning of section 99(b) of the *Act*, and as such would have been an appealable decision if the Manager was acting as a director's delegate within the terms of the November 19, 2007 Director's Delegation when she issued the letter.

[47] BCR made a proper application for a water use determination, and the Ministry is still under an obligation to make that determination. Accordingly, pursuant to section 103(a) of the *Act*, the matter is sent back to the Ministry, with directions that a director should make a determination under section 12(4) of the *Regulation*, as requested in BCR's May 30, 2011 application, in a timely manner.

"Alan Andison"

Alan Andison, Chair  
Environmental Appeal Board

November 10, 2011