Environmental Appeal Board

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DECISION NO. 2015-EMA-002(a)

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

BETWEEN:	Pinnacle Renewable Energy Inc.	**APPLICANT (THIRD PARTY)**
AND:	Geoffrey Nielsen Thomas H. Coape-Arnold Kenneth R. Fiddes	**APPELLANTS**
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 August 26, 2015	

APPEARING:	For the Applicant:	Simon H. Wells, Counsel
	For the Appellants:	Kenneth R. Fiddes Thomas H. Coape-Arnold Geoffrey Nielsen
	For the Respondent:	Meghan Butler, Counsel

PRELIMINARY APPLICATION

APPLICATION

[1] On July 30, 2015, Pinnacle Renewable Energy Inc. ("Pinnacle") applied to strike certain grounds for appeal from the January 13, 2015 Notice of Appeal filed jointly by the Appellants Geoffrey Nielsen, Thomas H. Coape-Arnold, and Kenneth R. Fiddes.

[2] The Appellants filed their appeal against a December 17, 2014 decision of Cassandra Caunce, delegate of the Director (the "Director"), Ministry of Environment, to issue permit 107369 (the "Permit") to Pinnacle. The Permit allows Pinnacle to discharge particulates to the air from a proposed wood pellet manufacturing plant, subject to certain terms and conditions. The plant is proposed

for Lot 2, Sections 23 and 24, Township 6, Osoyoos Division, Yale District, Plan 18721, Except Plans H18529 and KAP83143, located in the community of Lavington, in the District of Coldstream, approximately 15 kilometres east of Vernon, British Columbia.

[3] Pinnacle argues that three of the Appellants' grounds for appeal relate to decisions made by other public bodies regarding municipal zoning and the agricultural land reserve, which are not within the Board's jurisdiction.

[4] This application has been conducted by way of written submissions.

BACKGROUND

[5] The Board has compiled this background from the Statements of Points and documents submitted by the parties to date.

The land

[6] The proposed wood pellet manufacturing plant is to be located on a parcel of land owned by Timber Investments Ltd. ("Timber Investments"). The land is adjacent to a sawmill owned by Tolko Industries Ltd. ("Tolko"), which is wholly owned by Timber Investments. The proposed plant would produce pellet fuel from sawdust and shavings from Tolko's sawmill, as well as other sawmills in the region. However, the land is located within the agricultural land reserve and was originally zoned "rural two", not "industrial".

[7] In 2013, Timber Investments applied to the Agricultural Land Commission for permission to use 2.9 hectares of the land for a "non-farm use" under section 20(3) of the *Agricultural Land Commission Act*. In a March 26, 2014 resolution, the Agricultural Land Commission approved that request. The resolution states that the 2.9 hectares can be used for the purpose of a pellet plant, subject to the following:

> 1. …
> 2. Approval for non-farm use is granted for the sole benefit of the applicant and is non-transferrable.
>
> … this decision does not relieve the owner or occupier of the responsibility to comply with applicable Acts, regulations, bylaws of the local government and decisions and orders of any person or body having jurisdiction over the land under an enactment.

[8] Timber Investments also applied to the District of Coldstream to rezone the land for industrial use. After two public hearings in August of 2014, the District approved the rezoning application.

The discharge application and Permit

[9] On June 3, 2014, Pinnacle applied to the Ministry of Environment for an air discharge permit for the proposed pellet plant. Various First Nations and public bodies were notified of the application, comments were sought, and an air dispersion modelling study was conducted.

[10] The Director issued the Permit to Pinnacle on December 17, 2014, pursuant to her authority under section 14 of the *Environmental Management Act* (the "*Act*"). The Permit authorizes the discharge of emissions to air from five sources at the proposed plant: two biomass belt dryers, a pelletmill baghouse, a hammermill baghouse, and a truck tipper suction system. The Permit sets the "maximum net combined discharge" of total particular matter for the five sources at 10.314 kilograms per hour. Among other things, the Permit also sets conditions for baghouse operations, fugitive dust control, source monitoring, sampling, reporting, and emission offsets with Tolko's sawmill.

[11] Shortly after obtaining the Permit, Pinnacle and Tolko formed a limited partnership to "lease the lands located at Lavington" and to construct, own and operate the wood pellet manufacturing plant on those lands.

The appeal and the application to strike

[12] The Appellants filed their joint appeal on January 13, 2015, listing six main grounds for appeal.[1] The Appellants state that the proposed site for the plant is located within 300 metres of an elementary school, public park and public skating rink. They are concerned that the Permit will not protect the local air quality for the children at the school or the general public.

[13] The Board acknowledged the Notice of Appeal on January 15, 2015. Tolko was invited to participate as a Third Party in the appeal, but declined by letter dated June 15, 2015.

[14] The appeal was originally set to be heard over a two-week period between September 21 and October 2, 2015. On July 30, 2015, Pinnacle filed its application to strike three grounds for appeal. Prior to the closing of submissions on the application to strike, an application to postpone the hearing was filed by the Director. The Board granted this application. Hearing dates are now set for two weeks in April, 2016.

[15] Pinnacle's present application, is to strike all or part of three grounds for appeal:

- ground 3 in its entirety;
- the last paragraph of ground 4 (as it pertains to zoning); and
- the last paragraph of ground 5.

[16] The full text of the grounds at issue in this application are as follows:

> 3. No Authority in the Applicant for Non-Farm Use of land in ALR
>
> Lot 2 Section 23 and 24 … is within the Agricultural Land Reserve. Authority for non-farm use on 2.9 hectares of "The Land" was provided by the Agricultural Land Commission to Timber Investments Ltd., the owner of the land. This authority was provided with the proviso that it is for pellet production and is non-transferrable. The Air Discharge Permit was

[1] An additional ground for appeal alleging a violation of the *Canadian Charter of Rights and Freedoms* was abandoned by the Appellants by letter dated July 22, 2015.

issued to Pinnacle Renewable Energy Inc. Pinnacle Renewable Energy Inc. is not permitted to carry on a non-farm use on the property. For this reason alone the application for air discharge permit should have been denied.

The Agricultural Land Commission was, on October 21, 2014, asked to reconsider their decision, pursuant to s. 33 of the *Agricultural Land Commission Act*. Despite further request [sic] the Commission has not dealt with the issue. It is submitted this undue delay of rightful process should be resolved prior to any final issuance of permits by the Ministry of the Environment.

4. Inadequacy of Public Consultation, Failure to Give Notice and Failure to Link Permit Applications

   [...]

   Additionally it is submitted that the rezoning of the property by the District of Coldstream was based on an application which did not involve the use of bag houses, nor did it involve the addition of offset requirements placed on Tolko. [The District of] Coldstream had no opportunity of reviewing the additional fire and explosion hazards produced by the baghouses as they were not aware of same. Coldstream has the responsibility of dealing with fire and explosion hazards pursuant to their bylaws.

5. Technical Deficiencies in the Permit

   [Four bullets precede the bullet at issue in this application]

   - The permit was granted to the applicant who was allowed to carry on the discharge on the land which is described in the application as 'The location of the facilities from which the discharge originates and the point of discharge is Lot 2, Sections 23 and 24, Township 6, Osoyoos Division, Yale District, plan 18721, Except Plan H18529 and KAP 83143'. Even if the applicant was permitted a non-farm use, which it is not, the permit should have been issued allowing the carrying on of the discharge on only 2.9 hectares of the subject property, not the entire property.

[17] Pinnacle argues that the issues raised in the above-noted grounds are not within the Board's jurisdiction; rather, they raise issues within the jurisdiction of other statutory bodies and decision-makers which the Board has no authority to review or supervise.

[18] The Director supports Pinnacle's application to strike these grounds for appeal.

[19] The Appellants oppose the application and maintain that all of their grounds for appeal fall within the Board's jurisdiction.

ISSUE

[20] In this decision, the Board has considered the following issue:

1. Are the disputed grounds for appeal beyond the jurisdiction of the Board?

THE TEST

[21] In *Cobble Hill Holdings Ltd. v. British Columbia (Director, Environmental Management Act)*, 84 C.E.L.R. (3d) 216, [2014] B.C.E.A. No. 1 (Q.L.) [*Cobble Hill*], the Board established the applicable test for striking a ground for appeal from a Notice of Appeal filed under the *Act*. The Board first noted that its jurisdiction is derived from, and governed by statutes: it has no inherent jurisdiction. Therefore, in order to determine whether something is within its jurisdiction, the first step is to consider the relevant statutory provisions.

[22] The Board also adopted the test used by Canadian courts to strike claims. That is, claims should be struck only when it is "plain and obvious that the claim at issue cannot succeed". The Board explained why it chose this test, and how it would be applied, in paragraphs 46-50 as follows:

> 46. In addition, statutory interpretation – particularly interpreting the limits of one's jurisdiction – is, unfortunately, not as simple as Cobble Hill appears to suggest. The language used in legislation is not always amendable to "black and white", "yes and no" answers. There are often many grey areas. In these circumstances, a proper interpretation may benefit from a factual context, evidence, and additional argument. In the context of an application to strike, it would be careless - and could result in significant unfairness - to strike a claim or a ground for appeal unless it is 'plain and obvious' that such a claim or ground for appeal is not within the tribunal's jurisdiction.
>
> 47. Although the 'plain and obvious' test establishes a high threshold to meet in order to succeed on an application, the Panel is of the view that the threshold should be high. In addition to the reasons provided above, during a preliminary application neither the parties, nor the Board, have had time to fully comprehend the legislative framework and the implications of different interpretations of the legislation. There are occasions when evidence can be helpful to interpreting the 'mischief' intended to be prevented by the legislation, the consequences of certain interpretations, as well as any technical meanings of words within a specialized area or context.
>
> 48. In addition, one of the reasons for the existence of administrative tribunals is to make the process more accessible to parties who are not represented by legal counsel. The threshold must be high to ensure that they have a chance to be heard on matters that are, arguably, within the tribunal's jurisdiction.
>
> 49. With this latter point in mind, the Panel agrees with the philosophy adopted by the courts that a claim, in this case a Notice of

> Appeal, should be read 'as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies' (per *Speckling*).
>
> 50. Accordingly, the test to be applied on these applications will be whether, based upon a generous reading, it is plain and obvious that the appeal, or the ground for appeal, is beyond the statutory jurisdiction of the Board.
>
> [Emphasis added]

[23] This Panel agrees with, and adopts the test from *Cobble Hill*.

RELEVANT LEGISLATION

[24] As stated by the Board in *Cobble Hill*, the Board's jurisdiction is derived from and, and governed by, statutes. In the present case, as was the case in *Cobble Hill*, the statutory parameters to be considered are those governing the Director's discretion to issue the Permit; i.e., section 14 of the *Act* and any relevant regulations. Section 14 provides as follows:

Permits

14 (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

(a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;

(b) require the permittee to give security in the amount and form and subject to conditions the director specifies;

(c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

(d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

(f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy potential from wastes.

(2) A permit does not authorize the introduction of hazardous waste into the environment unless it specifies the characteristics and quantity of hazardous waste that may be introduced.

...

[25] In section 1 of the *Act*, "environment" is defined as "air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed".

[26] The *Public Notification Regulation*, B.C. Reg. 202/94 (the "*Regulation*") sets out the requirements for a permit application, as well as the notification requirements. Section 2 states:

Application for a permit, approval or amendment

2 (1) Every person who applies for a permit or approval must make an application on a form supplied by a director, sign and date the application and provide the following information:

(a) the name, address and postal code of the applicant;

(b) a clear description of the source and location of the waste, including any commonly known name of the plant, operation or storage facility;

(c) if applicable, the legal description of the land or the premises where the plant, operation or source and treatment works are or will be located;

(d) the legal description of the place where the waste is or will be discharged or emitted or the storage is or will be located;

(e) a description of the waste in general terms based on the origin or nature of the operation that produced it;

(f) the characteristics of the waste in specific terms including the content of potential pollution causing substances expressed in metric scientific units;

(g) the volume of material to be discharged, emitted or stored during a specific time period.

...

(4) An application under this section must be submitted to a director by the applicant or the applicant's agent and, unless the director requires otherwise, an obligation imposed by this regulation on an applicant may be carried out by the applicant's agent.

Information respecting the application

3 The applicant must, on the request of a director, provide the director with one or more of the following:

(a) particulars concerning the applicant's title to the works and the land on which the waste originates;

(b) details of the works;

(c) a description of all lands on which it is proposed to construct the works;

(d) information respecting any other matter the director considers relevant to the application.

[27] There are specific public notice requirements set out in sections 4 to 6 of the *Regulation*. The *Regulation* then sets out how persons who have been given notice may communicate with the director, and the obligations of the director with respect to those communications. Sections 7 and 8 of the *Regulation* state:

Notice by concerned persons

7 (1) A person who may be adversely affected by the granting of a permit, … may, within 30 days after the last date of posting, publishing, service or display required by this regulation, notify a director in writing stating how that person is affected.

…

Clarification of application

8 (1) The applicant must, if required by a director, offer to meet with any person or persons who, in the opinion of the director, may be adversely affected by the discharge, emission or storage, to explain and clarify the intent of the application and to describe the discharge, emission or storage and its potential effect on the receiving environment.

…

[28] The Board's jurisdiction and powers in relation to appeals under the *Act* are set out in Part 8 of the *Act*. Of relevance to these applications are the following sections:

Appeals to Environmental Appeal Board

100(1) A person aggrieved by a decision of a director ... may appeal the decision to the appeal board in accordance with this Division.

...

Procedure on appeals

102(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

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

DISCUSSION AND ANALYSIS

1. Are the disputed grounds for appeal beyond the jurisdiction of the Board?

[29] As a preliminary point it should be clarified that, in making a decision on this application, the factual assertions set out in the Notice of Appeal and the parties' submissions are not being accepted by the Panel as "the facts" simply because they are asserted in the appeal or are referred to in this decision. Factual assertions will be the subject of evidence at the hearing, and may also be the subject of objections and contrary evidence at the hearing. Ultimately, the Hearing Panel will be required to determine the facts, their relevance to the issues, and apply the facts to the law in order to make a decision on the merits of the appeal.

[30] In addition, as the Board noted in *Assistant Regional Water Manager and the Ministry of Forests, Lands and Natural Resources Operations v. Jill Fitzpatrick* (Decision No. 2013-WAT-004(a), June 16, 2014), at paragraph 29:

> 29. The Panel also notes that many of the paragraphs at issue contain multiple points and arguments, some of which are of debatable relevance. Unfortunately, the nature of an application to strike at this juncture forces a preliminary determination of relevancy. Given the potentially serious consequences to an appellant that may flow from the Board's decision on an application to strike (i.e., it can limit the scope of an appeal and the arguments to be made), as stated in *Cobble Hill*, the test establishes a high threshold and the paragraphs should be read 'as generously as possible'. To achieve the latter, the Panel will attempt to evaluate the main theme or thrust of the disputed paragraphs, rather than focusing on the minutiae, in order to determine whether it is plain and obvious that the paragraphs are beyond the Board's jurisdiction, or are clearly irrelevant to the appeal. If it is not plain and obvious that the paragraph should be struck, the Applicants' jurisdictional concerns, and their concerns with factual and legal relevancy, will have to be raised again and addressed in the usual way during the hearing.

Pinnacle's submission

[31] Pinnacle submits that, based upon a generous reading of the Appellants' Notice of Appeal, it is plain and obvious that the disputed grounds for appeal are beyond the statutory jurisdiction of the Board.

[32] Pinnacle submits that the Board's statutory jurisdiction in this case is limited by the statutory parameters of the Director's discretion under section 14 of the *Act*, just as it was in *Cobble Hill*. As found by the Board in *Cobble Hill* at paragraph 84, the "Board's jurisdiction is constrained by the Director's decision-making jurisdiction under section 14."

[33] The opening words of paragraph 14 of the *Act* are as follows:

> **14** (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit: ….
>
> [Emphasis added]

[34] Pinnacle submits that the underlying objective of the *Act* is the protection of the environment, which includes preventing pollution of the environment. It submits that the definition of "environment" in section 1 of the *Act* is solely applicable to the "natural world": *Cobble Hill* at paragraphs 92-93. As a result, Pinnacle submits that the jurisdiction of the Director and the Board is focused solely on environmental concerns and protections, and whether there are, or will be, environmental problems resulting from the issuance of a permit authorizing the introduction of waste into the environment: *Cobble Hill*, at paragraphs 116 and 121.

[35] In light of the limited scope and considerations of the Director's decision-making authority under the *Act*, Pinnacle submits that neither the Director, nor the Board, has jurisdiction over land use planning decisions (municipal or agricultural) in respect of the land in question, nor do they have jurisdiction over the decision-making processes of the bodies responsible for those decisions. Pinnacle argues that the Board has no jurisdiction to review bylaws, regulations or decisions of either the District of Coldstream or the Agricultural Land Commission. Pinnacle also notes that the Permit itself clearly states that it is up to the permittee (Pinnacle) to comply with applicable legislation (and bylaws). The cover letter to the Permit states: "It is also the responsibility of the permittee to ensure that all activities conducted under this authorization are carried out with regard to the rights of third parties, and comply with other applicable legislation that may be in force."

[36] Pinnacle submits that, as the grounds at issue have nothing to do with protection of the environment or prevention of pollution, they are outside of the parameters of section 14 and the *Act*. Pinnacle submits that consideration of matters within the jurisdiction of these other bodies would amount to an improper fettering or delegation. Pinnacle further notes:

> The Appellants have more appropriate alternate remedies to address their concerns. They can bring the information in question to the Regional District and the Agricultural Land Commission, and, if

> dissatisfied with the response, they can apply for a judicial review by the courts.

The Director's submission

[37] The Director agrees with Pinnacle that the disputed grounds 3 and 4 are outside of the Board's jurisdiction, and ought to be struck for the same reasons given by Pinnacle. Specifically, the Director does not have jurisdiction under section 14 of the *Act* to take zoning, or other land use planning decisions, into consideration when deciding whether or not to issue a permit authorizing the introduction of waste into the environment. As the Director does not have this jurisdiction, neither does the Board. Rather, when considering an application for a permit, or when considering an appeal of a permit, the legislation requires the focus to be on the impact of the proposed activity on the "environment", as that term is defined in section 1 of the *Act*.

[38] The Director also agrees that the disputed paragraph in ground 5 ought to be struck, but for different reasons than those given by Pinnacle. The Director submits that the Permit specifically identifies the site reference points from which the discharge is authorized: discharge is not authorized from the entire property.

[39] In addition, the Director states that, in 2014, the Agricultural Land Commission approved an application to construct a pellet plant on 2.9 hectares of land under non-farm use in the Agricultural Land Reserve, which would replace an existing permitted non-farm use respecting the storage of wood chips that was granted in 2005. The Director then states:

> … the legal description of the parcel within the Permit – i.e., as covering the entire parcel rather than a 2.9 ha [hectare] portion thereof – is immaterial to whether the conditions of the Permit protect the environment and human health. The Permit authorization letter dated December 17, 2014 makes clear that the Third Party is responsible for ensuring that all activities conducted under the authorization of the Permit must comply with the rights of third parties and other applicable legislation that may be in force. In other words, if the ALC's [Agricultural Land Commission's] authorization limits the construction and operation of the pellet plant to a 2.9 ha portion of the subject property, then irrespective of what the Permit says, the pellet plant is only permitted to operate on the portion of land that the ALC has given it express authorization to use for that purpose.

[40] The Director submits that it is "plain and obvious" that this ground has no reasonable prospect of success.

The Appellants' submission

[41] Contrary to the assertions of Pinnacle and the Director, the Appellants state that they are not asking the Board to review bylaws, regulations or decisions of either the District of Coldstream or the Agricultural Land Commission. They agree that their remedy for the rezoning and non-farm use decisions lies with the other

bodies, not the Board. However, in the Appellants' view, their grounds for appeal are not asking the Board to provide a remedy for those decisions. Rather, their references to zoning and non-farm use are relevant to section 14 permitting decisions, and are within the Board's jurisdiction to address.

[42] Regarding ground 3 – the non-farm use of land within the Agricultural Land Reserve - the Appellants provided detailed submissions in support of their position that this ground should not be struck. They submit that the use of farm land for non-farm uses is a matter related to protecting the environment, which is clearly an appropriate consideration under the *Act*, as confirmed in *Cobble Hill*. They state that protection of the land upon which the food we eat may be grown is fundamental to human development, and its health is an external condition that is fundamental to human life. In accordance with *Cobble Hill*, the Appellants submit that the use of farm land is, therefore, a "use connected to the appropriateness and impact of the proposed activity on the environment".

[43] However, in this case, the Appellants note that the Agricultural Land Commission's approval of a non-farm use on the land was issued solely to Timber Investments and is non-transferrable. Unlike the facts in *Cobble Hill*, the Appellants submit that this is not a case of specific zoning. They submit that the landowner (Timber Investments) "cannot authorize a non farm use on the land and the Director cannot authorize same."

[44] The Appellants maintain that, as a matter of law, the decision of the Agricultural Land Commission is binding on the Ministry of Environment. In support, the Appellants cite sections 2 and 3 of the *Agricultural Land Commission Act*, as follows:

Application of other Acts

2(1) This Act and the regulations are not subject to any other enactment, whenever enacted, except the *Interpretation Act*, the *Environment and Land Use Act* and the *Environmental Management Act* and as provided in this Act.

(2) Despite section 14(2) of the *Interpretation Act*, this Act binds the government.

[Appellants' emphasis]

Power under other Acts

3 A minister or an agent of the government must not exercise a power granted under another enactment except in accordance with this Act and the regulations.

[Appellants' emphasis]

[45] The Appellants submit that the Director, as part of government, was bound by the fact that the Agricultural Land Commission limited the non-farm use to Timber Investments, and that approval was non-transferrable.

[46] Regarding the application to strike ground 4, the Appellants submit that this application lacks any substance and ought to be denied. They note that Pinnacle does not provide any support or basis for its application to strike this ground. More importantly, the Appellants state that they are not asking the Board to determine whether the proposed facility is permitted by the zoning bylaws. They agree that

zoning is not within the Board's jurisdiction in the context of this appeal, and state that they only refer to zoning in the context of the notification and consultation process issue that they raise in this ground. The Appellants state:

> The evidence at the hearing of this matter, relating to that issue, will be that the information provided by Pinnacle … to the District of Coldstream and all the other parties who were notified was clearly, in the end, misinformation, as the permit was issued based on different criteria than what was presented to the municipality and the other parties notified. The Appellants are not asking the Board to go behind the rezoning, we argue that the notification was inadequate. ….

[47] The Appellants explain that the information provided to the public, the District of Coldstream, and all other bodies (including First Nations), was information dealing with the first technical assessment for the proposed plant which was titled "final report". However, significant changes to the proposed plant were made in three subsequent "final" reports. The Appellants submit that the contents of the technical assessment provided during the notification stage, constitutes "misinformation" to the public, the District (which considered that information approving the rezoning), and all other bodies.

[48] Regarding the disputed paragraph in ground 5, the Appellants argue that Pinnacle has not made a case for striking this ground for appeal and, in any event, they are not suggesting that they Board ought to go behind the Agricultural Land Commission's decision. Rather, they are simply saying that there is a "technical deficiency" in the Permit; that is, the land description in the Permit covers land far in excess of that authorized for non-farm use (i.e., in excess of the 2.9 hectares). The Appellants submit that this application to strike ought to be denied.

Pinnacle's reply

[49] Pinnacle disagrees with the assertion that the interpretation and enforceability of the non-farm use authorization is within the jurisdiction of the Board. Rather, it is something granted by the Agricultural Land Commission and its legal effect is "clearly a matter for the Agricultural Land Commission". Pinnacle reiterates that the Permit at issue does not authorize Pinnacle to operate in contravention of any other statute. It points out that the Permit does not prevent the Agricultural Land Commission from enforcing and administering its own approvals and/or its statutory requirements.

[50] Regarding zoning, Pinnacle notes that the Appellants appear to concede that certain grounds for appeal are not within the Board's jurisdiction, but go on to assert that they are relevant to another ground for appeal; i.e., whether there was a fair hearing before the decision-maker below in terms of notification and consultation. Pinnacle states that this is not an answer to the application to strike.

[51] Pinnacle further submits:

> … we should not be adjudicating issues in this appeal outside the jurisdiction of the decision-maker below, whether it be the question of whether the duly granted Non-Farm Use status of the site will facilitate

> lawful operation of the facility under the Agricultural Land Reserve Act or whether or not the Local Regional District was aware of (or concerned about) the exact configuration of the facility when making a general land use decision such that the hearing before that body was unfair. Such tangents will accomplish nothing other than lengthening the hearing and driving up the legal costs for Pinnacle. Those are issues to be decided in proceedings before or concerning those other bodies.
>
> For example, the Appellants wish to argue that Pinnacle failed to disclose adequate information to the Local Regional District. Such information would be used by the District to evaluate the general desirability of the proposed land use, not the particular operational details of a facility. The Appellants' arguments should and could be made to the Local Regional District or by way of an appeal or judicial review of an impugned decision by that district. It cannot be properly or adequately litigated here in the context of an appeal of a decision of a different public body engaged in discharging a different jurisdiction.

[52] Pinnacle further points out that, if the Board agrees to hear these arguments regarding the fairness of the other bodies' processes or the adequacy of disclosure to them by Pinnacle, then the other bodies ought to be heard by the Board, such as by adding these other bodies as parties to the appeal. This will ensure a complete record and thorough understanding of the issues. Pinnacle submits that the Appellants may not be aware of all of the communications that have occurred, directly or indirectly with these bodies and the Appellants are not in a position to "speak for" these bodies and their respective jurisdictions. Further, such arguments impose a burden on Pinnacle to clarify what happened by adducing evidence of its own, which will also be imperfect as it cannot speak for these bodies or their respective priorities and jurisdictions.

[53] Pinnacle notes that it is not the case that the Appellants have been silenced and their concerns have gone unanswered. Pinnacle states that it has already responded to and answered the opposition of the Appellants in hearings before the Regional District, the Agricultural Land Commission, the school board and other public bodies. It submits that this appeal of the Permit ought to be confined to the issues pertaining to the appropriateness of the issuance of the Permit.

The Panel's Findings

Non-farm use

[54] Pinnacle applies to strike ground 3 in its entirety, and the final paragraph of ground 5, as they relate to the non-farm use decision of the Agricultural Land Commission. For convenience, these grounds are reproduced below.

> 3. No Authority in the Applicant for Non-Farm Use of land in ALR
>
> Lot 2 Section 23 and 24 … is within the Agricultural Land Reserve. Authority for non-farm use on 2.9 hectares of "The Land" was provided by the Agricultural Land Commission to Timber Investments Ltd., the

> owner of the land. This authority was provided with the proviso that it is for pellet production and is non-transferrable. The Air Discharge Permit was issued to Pinnacle Renewable Energy Inc. Pinnacle Renewable Energy Inc. is not permitted to carry on a non-farm use on the property. For this reason alone the application for air discharge permit should have been denied.
>
> The Agricultural Land Commission was, on October 21, 2014, asked to reconsider their decision, pursuant to s.33 of the *Agricultural Land Commission Act*. Despite further request the Commission has not dealt with the issue. It is submitted this undue delay of rightful process should be resolved prior to any final issuance of permits by the Ministry of the Environment.
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> 5. Technical Deficiencies in the Permit
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> […]
>
> The permit was granted to the applicant who was allowed to carry on the discharge on the land which is described in the application as 'The location of the facilities from which the discharge originates and the point of discharge is Lot 2, Sections 23 and 24, Township 6, Osoyoos Division, Yale District, plan 18721, Except Plan H18529 and KAP 83143'. Even if the applicant was permitted a non-farm use, which it is not, the permit should have been issued allowing the carrying on of the discharge on only 2.9 hectares of the subject property, not the entire property.

[55] The Panel finds that, on a generous reading, these grounds for appeal are beyond the Board's jurisdiction. While aspects of farming and/or growing food for human consumption, could fall within the definition of "environment" in the *Act*, land use restrictions related to farming are not matters protected or enforced by the *Act*. Put differently, even if the entire property at issue is within the agricultural land reserve, and not the subject of a non-farm use exemption, the Director can issue a waste discharge permit under section 14 of the *Act*. There is nothing in the *Act* that prohibits the issuance of a permit on the basis of land use restrictions. Further, while the *Regulation* requires a description of the land and who has legal title to the land, it does not require any information about legally allowable land uses or land use restrictions.

[56] In *Cobble Hill*, the Board stated as follows at paragraph 176: "… the Director's jurisdiction is to be focused on environmental impacts - matters related to protecting the environment - not to considerations of zoning or potential enforcement issues by a municipal body". Although this statement is made in relation to zoning, the Panel finds that it applies equally to considerations of the agricultural land reserve, and potential enforcement issues by the Agricultural Land Commission. The Panel finds that neither appropriate zoning, nor exemptions from the agricultural land reserve, are preconditions for the issuance of a permit under the *Act*.

[57] Regarding the latter, if the proposed plant does not comply with the Agricultural Land Commission's March 26, 2014 resolution, the Panel notes that the Commission has a number of enforcement options available to address this situation which include making an order for compliance and issuing a stop work order. In addition, the Panel notes that section 57 of the *Agricultural Land Commission Act* makes it an offence to use land for a non-farm use without permission under section 20 of that Act.

[58] The Appellants argue, however, that the Director, as part of government, was bound by the fact that the Agricultural Land Commission limited the non-farm use to Timber Investments, and that approval was non-transferrable. They submit that section 3 of the *Agricultural Land Commission Act* makes this clear when it states that "A minister or an agent of the government must not exercise a power granted under another enactment except in accordance with this Act and the regulations." However, section 2(1) of that Act states that the *Agricultural Land Commission Act* and regulations "are not subject to any other enactment, whenever enacted, except the … *Environmental Management Act …*." This means that the enactment under which the Director made her decision is not subject to the *Agricultural Land Commission Act*.

[59] The Panel finds that there is simply no indication in the *Act* or the regulations that the Director's discretion under section 14 extends to land use issues. Like zoning, and the enforcement of zoning, issues related to the agricultural land reserve and any authorizations by the Agricultural Land Commission, or lack thereof, are within the jurisdiction of a separate, and unrelated, body. The Appellants are not correct that the effect of the Permit is to allow the proposed plant to violate the applicable laws or the decisions of other statutory bodies. The Permit only addresses the discharge to air from the proposed plant: it is not a blanket authorization for the entire project, and does not provide authorization for the proposed plant to be located on "the entire property". As stated by the Director in the cover letter to the Permit:

> This permit does not authorize entry upon, crossing over, or use for any purpose of private or Crown lands or works, unless and except as authorized by the owner of such lands or works. The responsibility for obtaining such authority rests with the permittee. …. It is also the responsibility of the permittee to ensure that all activities conducted under this authorization are carried out with regard to the rights of third parties, and comply with other applicable legislation that may be in force.
>
> [Emphasis added]

[60] For the foregoing reasons, the Panel finds that it is plain and obvious that ground 3 and the disputed part of ground 5 are beyond the statutory jurisdiction of the Board, and/or are irrelevant to a decision under section 14 of the *Act*. Pinnacle's application to strike these grounds is granted.

Zoning

[61] Pinnacle applies to strike the last paragraph of ground 4, which states:

> 4. Inadequacy of Public Consultation, Failure to Give Notice and Failure to Link Permit Applications
>
> […]
>
> Additionally it is submitted that the rezoning of the property by the District of Coldstream was based on an application which did not involve the use of bag houses, nor did it involve the addition of offset requirements placed on Tolko. [The District of] Coldstream had no opportunity of reviewing the additional fire and explosion hazards produced by the baghouses as they were not aware of same. Coldstream has the responsibility of dealing with fire and explosion hazards pursuant to their bylaws.

[62] It is not plain and obvious to the Panel that this paragraph is beyond the jurisdiction of the Board. Although the choice of wording in this ground could be interpreted as an attack on the District of Coldstream's zoning decision, the Appellants have assured the Board in their submissions that they understand the limits to the Board's jurisdiction regarding zoning, and emphasize that their focus is on the notification process – a process that is covered by the *Regulation* - and the content of the information provided as part of that process. The heading they used for ground 4 is consistent with this claim. In addition, the preceding paragraph under ground 4 is also consistent with this claim:

> Pinnacle gave public notice and held an open house based on an application that was subsequently rejected by the MoE [Ministry of Environment]. No further notice or public consultation was given. The action by Pinnacle to revise its application to include bag houses and necessary offset actions by a separate company, Tolko, constitutes a significant variation from Pinnacle's original proposal. This new joint proposal of pinnacle and Tolko was not subjected to full and adequate public notice and consultation as specified in the Notification Regulation. At the public open house held in July 2014, Pinnacle stated that bag houses were insufficiently safe to be used at this site due to the proximity of Lavington Elementary School. Bag houses are a significant explosion and fire hazard and the use of same by both Pinnacle and Tolko would be of significant interest to the public, including School District #22. Furthermore, the public would have been interested in the current and ongoing Tolko discharges, including interest in appropriate measurements.

[63] As the test to be applied requires a generous reading of the Appellants' claim, and the *Regulation* covers notification and provides an opportunity for persons "adversely affected" to notify the Director of how the person is affected (section 7(1) of the *Regulation*), it is not plain and obvious that this ground is beyond the Board's jurisdiction. Compliance with the *Regulation* is a matter that would be considered by the Director and, therefore, may be considered by the Board.

[64] However, the Panel appreciates Pinnacle's concern that the District of Coldstream has not appealed the decision, has not advised of any concerns with the

notification process, and is not a party to the appeal. Without proper authorization from the District of Coldstream, the Appellants do not have the authority to speak for the District or raise issues on its behalf. The Panel agrees that the Appellants, at times, seem to "cross the line" between making general arguments about notification and consultation, and speculating on what the District of Coldstream (and others) knew, and what it might have decided had the information provided been different. For instance, in their Statement of Points, the Appellants speculate as to whether the District's motions (e.g., resolution No. REG2014-213) would have been passed, and the zoning would have been approved, if it had different information before it. The Appellants are cautioned to keep their evidence and arguments focused on the legal issues within the Board's jurisdiction.

DECISION

[65] The Panel has considered all of the submissions and arguments made, whether or not they have been specifically referenced herein.

[66] For the reasons stated above, Pinnacle's application to strike ground 3 in its entirety and the last paragraph of ground 5 is granted. The portions of the Appellants' Statement of Points that relate to these grounds will be similarly struck.

[67] The application to strike ground 4 is denied.

[68] The application is allowed in part.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

November 2, 2015