Environmental Appeal Board

APPEAL NO. 98-HEA-12(b)

In the matter of an appeal under section 8 of the *Health Act*, R.S.B.C. 1996, c. 179.

BETWEEN:	Friends of Cortes Island Larry Cohen Comox-Strathcona Regional District British Columbia Shellfish Growers Association	**APPELLANTS**
AND:	Environmental Health Officer	**RESPONDENT**
AND:	Triple R Developments Ltd.	**PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on September 8, 1998	
PLACE OF HEARING:	Victoria, B.C.	
APPEARING:	For the Appellants:	

Friends of Cortes Island	Hubert Havelaar
Larry Cohen	Larry Cohen
Comox-Strathcona	Grant Anderson, Counsel
B.C. Shellfish	Ruth Salmon
For the Respondent:	Greg Vos
For the Permit Holder:	Bruce D. Ledingham

REQUEST FOR A WRITTEN HEARING AND SECURITY FOR COSTS

APPLICATIONS

In a letter dated August 18, 1998, the Permit Holder, Triple R Developments Ltd., asked the Board to order that:

1. the hearing of the appeals be conducted by way of written submissions, and

2. the Appellants post a bond to cover its costs in the appeals.

These applications were conducted by way of written submissions, concluding on September 8, 1998.

BACKGROUND

On May 22, 1998, Triple R Development Ltd. was issued Sewage Disposal Permit 15/98 for Lot 307, Sayward Land District, Except Parts in Plans 12035, 15458 and 18122 (Red Granite Point, Cortes Island).

The permit was appealed by the British Columbia Shellfish Growers Association ("BCSGA"), the Friends of Cortes Island ("FOCI"), Larry Cohen and the Comox-Strathcona Regional District (the "District").

The Board scheduled the four appeals to be heard together in an oral hearing on October 21 and 22, 1998, in Campbell River.

This hearing date was subsequently changed to October 8 and 9, 1998, at the request of the Permit Holder.

All of the Appellants objected to the new hearing dates and have asked that the hearing be rescheduled to a new, mutually agreeable date. No new date has yet been scheduled.

In a letter dated August 18, 1998, the Permit Holder asked the Board to change the method of hearing the appeals from an oral hearing, to a hearing by way of written submissions. It also asked the Board to require the Appellants to post a bond to cover the costs of the Respondent, the Board and itself in connection with these appeals.

The Board invited each of the parties to make submissions on these applications. Submissions were received from all parties.

It should be noted that this is the second permit that has been issued to the Permit Holder for the property. The first permit was issued in 1995 and was appealed to the Board by a different set of Appellants. On August 30, 1995, the Board upheld the issuance of that permit. The Permit Holder constructed and installed part of the permitted system, the absorption field, but did not install the package treatment plant. One year after its issuance, that permit expired. The Permit Holder was therefore required to reapply for a permit. A new permit was issued and is the subject of these appeals.

The Permit Holder argues that the permit now under appeal only covers the package treatment plant and that none of the Appellants have provided any new or negative information regarding the treatment plant. It argues that, in the circumstances, the appeal should be in writing and the Permit Holder's expenses should be covered by the Appellants.

ISSUES

1. Whether the hearing should be conducted in writing.

2. Whether the Appellants should be ordered to post a bond.

RELEVANT LEGISLATION

Section 4(2) of the Environmental Appeal Board Procedure Regulation states that

4 (2) The chairman shall within 60 days of receipt of the notice of appeal … determine whether … the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

Subsections 11(14.1) to (14.3) of the *Environment Management Act* are also relevant to the issues before the Board. These sections provide that:

11 (14.1) The appeal board may require the appellant to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated expenses of the respondent and the anticipated expenses of the appeal board in connection with the appeal.

(14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

(14.3) An order under subsection (14.2) may include directions respecting the disposition of money deposited under subsection (14.1).

DISCUSSION

Whether the hearing should be conducted in writing.

The Permit Holder submits that the hearing should be conducted in writing for a number of reasons. First, it submits that its engineer will not be in the province during the time scheduled for the oral hearing.

Second, the Permit Holder submits that the issues raised by the Appellants can easily be decided on the basis of written materials. It summarizes the issues in the appeal as pertaining to: lot size, responsibility for operation and maintenance of the system, whether there are changes to the original development, whether the EHO failed to consider the impact of the sewage disposal system on the surrounding water supply or in the calculation of the sewage flow, whether the total sewage exceeds 5,000 gallons per day, and the depth to the ground water table. The Permit Holder submits that many of the issues raised have been dealt with in the previous appeal where the Board upheld the issuance of that permit. It further states:

> In reviewing the Appellants' reasons for the appeal, it is very clear that only a few issues fall under the only relevant regulation, B.C. Reg.

> 411/85 "Sewage Disposal Regulation." Being that the Appeal Board does not make a ruling on most of the submissions by the Appellants and the items that can be ruled on are minor technicalities, the process should be in written form, if at all.

Finally, the Permit Holder submits that the subject permit is for a package treatment plant only. The rest of the system was installed in 1995-6, while the previous permit was in effect. The Permit Holder states: "[t]he discharge of the effluent to the ground by way of the field has been installed, inspected and approved by the Health inspector", and that, to date, no issues have been raised that warrant any form of an appeal. It submits that it has already incurred significant expense and because of the fact that no new information has come from the Appellants, the appeal should proceed in writing.

The Respondent supports the Permit Holder's request for a written hearing. He submits that an oral hearing will be confusing and time consuming with four different appellants, and their respective witnesses and experts all giving evidence. He also submits that the evidence will be repetitive as it appears from the Appellants' notices of appeal that they intend to address many of the same issues. Moreover, the Respondent contends that those issues have either been dealt with in the earlier appeal, are not relevant to the sewage disposal permit, are based on unsupported opinions or are not agreed upon by all parties involved.

The Respondent states that a written hearing will reduce the amount of time required for a hearing. Whereas a minimum of two days will be required for an oral hearing, he believes that less time would be required to respond in writing. Further, conducting the hearing in writing would eliminate the difficulty in scheduling. Expert testimony could be presented without the problems associated with having these people attend on specific dates.

Finally, the Respondent believes that it is more efficient and effective if his office has a chance to review and comment, in writing, on the information that is to be delivered by the Appellants, rather than trying to do so at a hearing. If the Appellants provide a written statement of their issues, including background information and expert reports, he could then address each issue as clearly and concisely as possible in writing. If his written response is unsatisfactory to the Board or the Appellants, he submits that those unresolved issues could be dealt with at an oral hearing.

The Respondent states that his experience in other hearings, both written and oral, is that the only difference between the written statement of points submitted before an oral hearing, and the evidence at an oral hearing, is the amount of detail provided. He says these details could easily be submitted in a written format.

He further contends that cross-examination of each party's written presentation could be completed in a written appeal and that the parties would then have more time to give an accurate response to the questions about their presentations.

The Respondent submits a written appeal can eliminate many irrelevant issues, prevent a long and potentially confusing oral appeal, and would give each party a fair opportunity to present their case.

The Appellants all oppose this application. In response to the Permit Holder's submissions they make the following points:

An oral hearing can be scheduled for a time convenient to the Permit Holder's engineer – thus, this is not a bar to a full and fair hearing by oral testimony.

The Permit Holder's characterization of the issues is incorrect. Similarly, its statements that the Board does not have to rule on most of the Appellants' submissions and that the items within the Board's jurisdiction are "mere technicalities," are incorrect. The Appellants argue that the main issues in the appeals are in relation to the impact of the system on the environment and whether it was approved in compliance with the requirements imposed by law, which are substantive issues.

The Appellants also argue that:

The chair has already decided, in accordance with section 4(2) of the Regulation, that the appeal would be conducted by way of oral hearing. Consequently, there is no jurisdiction to change the oral hearing to a written hearing as the 60 days have passed.

The Permit Holder did not make its request for a written hearing within a reasonable time after receipt of the complete notice of appeal (June 20, 1998) or the Board's first notice of an oral hearing (July 29, 1998).

A substantial amount of new evidence will be introduced at the hearing and new arguments will be made. Due to the technical complexity of the matter, they submit that it is essential that the evidence and arguments advanced by the parties be subject to clarification and testing through questioning by the Board and cross-examination by the other parties.

There are certain factual elements of this case that are in dispute among the parties and there will likely be conflicting evidence before the Board, including expert evidence. The most efficient and effective way of dealing with the conflict is through an oral dialogue where questions can be raised and answered promptly. FOCI states that the nature of the appeal is such that "it will be necessary for witnesses to give evidence under oath and be subject to questioning by all parties in order that the full facts of the case are before the Board."

It is unlikely that significant savings in costs or time would be achieved by restricting the submissions to writing. There would be likely be a lengthy period of time taken up with the exchange of correspondence, which could be avoided by consolidating the interaction between the Board and the parties into a two-day hearing.

In the circumstances, the Appellants argue that the issues cannot be properly addressed through written submissions. The Regional District submits that it is not reasonable for the Board to depart from its ordinary practice of conducting a full oral hearing. It argues that an oral hearing is necessary and appropriate and is the only practical form of hearing in order to have a full and fair opportunity for all parties to submit evidence, and for the Board to be able to evaluate that evidence in the most efficient time frame.

The purpose of a hearing is to give the parties an opportunity to be heard on the merits of the decision being appealed and to ensure the Board has the information needed to make a reasoned decision on the appeal. Although an oral hearing was scheduled within the 60 days set out in the *Regulation*, the Board is of the view that it is not precluded from changing the form of hearing, after 60 days, in an appropriate case. The main consideration for the Board in deciding whether a hearing should be conducted orally or in writing is whether the procedure is fair to the parties affected, i.e., whether they will have an adequate opportunity to present their cases.

As a matter of general policy, the Board has decided that written hearings will normally be appropriate (result in a fair hearing) only in cases where credibility is *not* a significant factor to be addressed in a hearing, where material facts are *not* in dispute, and/or where the issues to be decided have been dealt with in previous appeals, are not complex or involve purely legal questions.

In the appeals before the Board, there appear to be different views of the issues to be addressed and the relevance of the evidence that will be presented in relation to those issues. In addition, both the Permit Holder and the Appellants have indicated that they will be calling witnesses to give technical evidence regarding that part of the system covered by the permit. There is a strong possibility that these technical witnesses will provide conflicting opinions, which are difficult to assess without an opportunity to observe the witnesses and ask questions. To attempt to cross-examine these witnesses through written questions and answers, would likely result in a longer hearing process and may raise even more questions.

Contrary to the Respondent's assertions, except in fairly simple, straightforward cases, a written hearing is not a quick and efficient method of hearing. In a written hearing, appellants will make their submissions first, then the other parties are given an opportunity to respond. The appellants are also given a right of reply. This process generally takes *at least* one month to complete. All the written materials must then be reviewed by the Panel. If there are conflicts in the evidence or questions that need to be answered, the Panel may need to ask for further submissions by the parties. This can further extend the hearing for a number of weeks.

In this case, there are six parties involved and there appears to be such disagreement as to the issues, the facts and the jurisdiction of the Board to consider the issues, that it is unlikely that the appeals can be dealt with in a fair, efficient manner in writing.

Having said that, the Permit Holder and Respondent's concerns about repetition and inefficient use of oral hearing time are also of concern to the Board. However, the Board is in a much better position to control the amount of repetition and presentation of irrelevant information at an oral hearing than if the hearing is conducted in writing. In the latter case, all the information is included in the submissions and the Respondent and Permit Holder are forced to spend time responding to all of the submissions.

To assist the parties in preparing for the hearing, the Board requires all parties to submit a statement of points prior to the hearing. The parties are also encouraged to discuss their cases before hand in an attempt to streamline the presentations and to share experts. It appears that there is some sharing of experts already proposed by the Appellants

Although the Board can deviate from its general policy in appropriate cases, the Board finds this is not one of them. While the Board agrees that there are certain downsides to oral hearings, for example, one may not have much time to provide thorough responses to questions, in this case, the downsides of holding a written hearing outweigh those of an oral hearing. For reasons of fairness and efficiency, the appeals will be conducted by way of oral hearing.

2. Whether the Appellants should be ordered to post a bond.

The Permit Holder submits that there are few or no grounds to require an appeal and that, in its view, the Appellants appeals are vexatious, frivolous and abusive. It submits that the appeals are simply an attempt to prevent the development from proceeding. If the appeal is to proceed, the Permit Holder asks that the Appellants be required to deposit an amount of money with the Board, sufficient to cover the costs of the Respondent, the anticipated expenses of the Board, and the costs of the Permit Holder.

The Permit Holder submits that $20,000 should cover its costs, which is equal to the expenses it incurred in the 1995 appeal.

The Respondent declined to ask for his costs to be covered at this time and declined to make submissions on the Permit Holder's request.

The Board has adopted a general policy that security for costs should only be ordered in special circumstances, including: where an appeal is pursued for improper reasons or is frivolous or vexatious in nature; where a participant fails to attend a hearing without providing adequate notice to the Board; and where a party unreasonably delays the proceeding.

The Appellants all argue that none of the above-mentioned circumstances apply in this case. FOCI states that it does not oppose the development, provided it is constructed with proper consideration of the environmentally sensitive nature of the site, and due regard for the potential impacts on the surrounding marine waters. It submits that its role in the appeal is to provide evidence to assist the Board in reaching a fully informed decision on the issues.

Further, FOCI states that it is a non-profit society and much of its work is done by volunteer local residents. It states that its participation in the appeal process to date has required a great financial commitment as, together with some of the other Appellants, it has retained an expert consultant to advise it on the appeal. It is also attempting to raise funds in the hope of retaining legal counsel to represent it at the hearing.

BCSGA states that it is also a non-profit organization representing the majority of shellfish growers in the province and also has a "tight" administrative budget. It states: "While we believe that regional water quality issues are critically important to our Association and members, we are not in a position to make a financial commitment to these endeavours. Involvement of staff and volunteer Director's time is already a significant level of contribution."

BCSGA states further that a deposit at this time would be punitive and would effectively preclude some of the Appellants from continued involvement with the appeals. Rather than a deposit at this time, BCSGA states that the Board can address the issue of costs at the conclusion of the hearing when the Board will be in a much better position to judge the merits of the conduct and contribution of the parties.

Mr. Cohen says that he is simply exercising his right of appeal to ensure that the proposed development will not cause a health hazard to the environment in which he lives. Further, he submits that the additional costs of these proceedings to the Permit Holder are the logical consequence of the Permit Holder's actions – it let its first permit lapse which resulted in a new application and permit and these appeals.

The Regional District argues that there is no rationale for requiring a local government to post security. It states that it has the ability to satisfy any award of costs that may be made at the conclusion of the appeal.

The Board agrees with the Appellants and finds that there are no compelling reasons to order security for costs for any party, or for the Board, at this stage of the proceedings. There is no indication that the appeals in this case are frivolous or vexatious, or is there any evidence that the Appellants are unnecessarily delaying the proceedings. The Appellants have expressed health-related concerns and have placed their limited resources towards their respective appeals. There is not sufficient evidence to support the Permit Holder's contention that the Appellant's are pursuing their appeals for improper purposes. If, however, it becomes apparent during the hearing on the merits that the Permit Holder's concerns are supported, the Board can make an order for costs at that time.

The Board also notes that any money ordered to be deposited at this time would not benefit the Permit Holder – it would only be deposited with the Board. Thus, there would be little advantage to the Permit Holder. Conversely, ordering a deposit would limit or, in some cases, prevent the Appellants from presenting their cases or carrying through with their appeals. This is clearly not an appropriate use of this section of the *Act.*

DECISION

After consideration of all the submissions provided, the Board has decided not to grant either of the Permit Holder's applications. The appeals will be conducted by way of a full oral hearing and no security for costs will be ordered.

Toby Vigod, Chair
Environmental Appeal Board

September 23, 1998