Environmental Appeal Board

APPEAL NO. 94/22 WASTE

In the matter of appeal under section 28 of the *Waste Management Act*, S.B.C. 1982, c.41

BETWEEN:	7437 Holdings Ltd.	**APPELLANT**
AND:	Deputy Director of Waste Management	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Ms. J. Lee, Chair Ms. C. Mayall, Member Dr. E. Keay, Member	
DATE OF HEARING:	June 14-15, 1994 and July 13, 1994 Concluded by written submissions April 7, 1995	
PLACE OF HEARING:	Delta, BC	
APPEARING:	**For Appellant**: Witness Expert Witness	Mr. G. Bell, Counsel Mr. G. Wild Mr. R.A. Dakin
	For Respondent: Witness	Mr. S. Manning, Counsel Mr. A. Chor

This is an appeal of the March 24, 1994 decision of the Deputy Director of Waste Management to refuse to grant Waste Permit PR-10603 to the Appellant, 7437 Holdings Ltd.

APPEAL

The authority for the Environmental Appeal Board to hear this appeal is found in the *Environment Management Act* and section 26(1)(b) of the *Waste Management Act*.

FACTS

The Appellant is a wholly owned subsidiary of North Shore Disposal Services Ltd. ("NSDS"), a company which also owns R & G Recycling Ltd. The latter removes the inert components from demolition waste and deposits them as a soil stabilization product onto lots on River Road, in the Municipality of Delta, British Columbia.

On January 29, 1991, the Appellant applied to the Regional Waste Manager for a permit under section 8 of the *Waste Management Act* to allow the Appellant to

deposit waste onto the peat and silt of a property described as Lot 7, 9322 River Road in Delta (the "Site"). The Appellant wants authorization to landfill 100,000 cubic metres per year of solid waste onto the Site for 2.5 years.

The Site is owned by Aerial Finance. It is 125-feet wide, running from the Fraser River on the north to the edge of Burns Bog on the south. NSDS owns two lots adjacent to the Site; Lot 27, or 9356 River Road, and Lot 10, or 9376 River Road. A Waste Management Permit (PR7709) was issued for these two lots in 1987 which allowed the development of these two landfills. As these lots are now full, the Appellant wants to expand its waste deposits to the Site. The Appellant's long-term goal is that if the Site can be filled, it could eventually be sold, together with the adjacent filled lots, as a warehouse site.

On May 7, 1991, the Respondent raised concerns about the Site in relation to leachate, the permeability of the site, the need for an engineering consultant for the leachate problem and costs. The Respondent wanted to ensure that waste leachate does not contaminate the groundwater flowing beneath the Site to the Fraser River. This was of particular concern because the NSDS landfills adjacent to the Site, particularly on Lot 27, resulted in leachate problems. The Appellant hired BC Research to look into these matters.

BC Research completed a design of a leachate treatment system on March 4, 1992, which responded to the Respondent's concerns. Following this report, the Appellant hired Piteau Associates Engineering Ltd. to perform a hydrogeological assessment. Their engineer, R.A. Dakin, submitted a proposal dated March 31, 1992, which included protective berms.

Mr. Dakin's report prompted technical questions from both the Respondent and the Municipality of Delta. They had concerns regarding monitoring, berm design, the treatment plant, water quality and other items. There were also issues raised regarding whose name should be on the Permit (7437 Holdings' or the owner). In addition, the Respondent brought up questions about the Municipality bearing any future costs.

On August 30, 1992, the Greater Vancouver Regional District (GVRD) wrote to the Respondent that the GVRD had no official status in the permit process because it had not completed its Waste Management Plan. However, it wanted a list of acceptable material for the landfill, and a solution to the problem of lift height (the thickness of the debris layers).

On May 11, 1993, the Respondent gave the Appellant a copy of draft permit PR-10603 for comment. Discussions occurred between the Respondent and the Appellant through the Spring and Summer of 1993 regarding specific draft permit provisions.

In June 1993, the Ministry of Environment, Lands and Parks issued a policy document, *Landfill Criteria for Municipal Solid Waste Management* ("Landfill Criteria"). The Appellant and Respondent had no discussions regarding this new policy.

On November 25, 1993, the permit was refused by the Assistant Regional Waste Manager, Mr. Robb, on the grounds that the proposed landfill did not comply with sections 4.1, 5.1, 5.6 and 6.2 of the Landfill Criteria, that the proposed landfill would cause leachate to break through a peat buffer zone and enter the environment within 10 to 50 years, that the Appellant did not agree to apply landfill coverage at least once a month nor to carry out an acceptable environmental monitoring program, and that the Appellant did not agree to post a $250,000 irrevocable letter of credit.

This decision was appealed under section 26(1)(a) of the *Waste Management Act* to a Deputy Director of Waste Management. Mr. R. Driedger was appointed as the Deputy Director to hear the appeal.

On March 24, 1994, the Deputy Director issued a *pro forma* decision denying the permit with the explicit comment that all new applications or permits were required to comply with the Landfill Criteria sections 4.1, 5.1, 5.6 and 6.2, and receive the consent of the Greater Vancouver Regional District and the Municipality of Delta Council**.**

The Deputy Director's decision was appealed to the Environmental Appeal Board. The main grounds of appeal are as follows:

- The material to be deposited is not a "waste" within the meaning of the *Waste Management Act*; therefore the Deputy Director of Waste Management was without jurisdiction to require the Appellant to obtain a permit.

- The Deputy Director of Waste Management acted unreasonably in supporting a decision of the Assistant Regional Waste Manager to refuse to issue a permit, since his refusal is based on non-compliance with the Landfill Criteria.

- Blind adherence to the Landfill Criteria represents inappropriate fettering of the Deputy Director's discretionary powers under section 8 of the *Waste Management Act*.

- The Deputy Director committed a breach of duty to act fairly when he failed to give the Appellant an opportunity to address these concerns.

- The Deputy Director acted without jurisdiction and delegated his decision making power under section 8 of the *Waste Management Act* by requiring the agreement of both the GVRD and Delta Council (until the Waste Management Plan for the GVRD, required by section 16 of the *Waste Management Act*, is approved by the Ministry of Environment, Lands and Parks).

The Appellant is seeking an order that either a permit not be required, or that the draft permit, PR-10603, be granted with amendments.

The Respondent's position is that the Site is part of an environmentally sensitive area, Burns Bog. The Respondent argues that there are concerns with monitoring

and security of the Site as well as potential impacts of the new section (section 16) of the *Waste Management Act*.

THE HEARING

During the first two days of the Hearing the Board heard evidence presented by the Appellant. The Board then made an on-site visit. Two more days of Hearing were scheduled to hear the Respondent's evidence and final arguments. However, very little evidence was heard as the parties were attempting to resolve the matter.

Prior to the conclusion of the Hearing, the Appellant advised the Board that the parties had reached an agreement as to the wording of a draft permit. Included with the draft permit dated September 27, 1994, was an insurance policy proposed to deal with the Respondent's request for a security package. The Board was asked to approve the September 27, 1994, permit in the form submitted in order to resolve the issues in the appeal.

On October 7, 1994, the Board was advised by the parties that the Municipality of Delta and the GVRD had no objections to the draft permit. However, the Respondent later reported that Delta had some concerns regarding the passive leachate system, permit language and enforceability, Delta's lack of access to the security deposit, the non-payment of insurance, closure of the landfill, the letter of credit, the source of two $50,000 payments and release of funds.

They also had concerns about the Appellant's responsibility to meet Delta's requirements for fire safety, emergency response planning, road issues, dust control, elevations at closure, landfill gas and soil deposition. Delta is concerned that references have been made in the draft permit without addressing Delta's authority to specify, approve and enforce the requirements and recover costs.

The Respondent later informed the Board by letter that it would not agree to the provisions of the draft permit unless Delta was agreeable as well.

To complete the Hearing, the parties agreed to proceed by way of written submissions. In its final submission dated April 6, 1995, the Respondent noted that the new regulatory scheme of the *Waste Management Act* requires the approval of the municipality and submitted that the permit be denied or, if not, the Hearing be reconvened so that the Ministry could present its evidence on the various issues associated with the permit. However, the Respondent failed to cite any reasons, nor provide any evidence, in support of withdrawing its previous agreement and support for the draft permit filed on September 27, 1994. Nor did the Respondent provide a *prima facie* case as to what relevant evidence witnesses from the Municipality of Delta could add.

The Appellant replied on April 7, 1995, stating that section 8 of the *Waste Management Act* is still in effect and that the delay is unacceptable.

The Board notes:

- It is not appropriate for the Respondent, as a neutral quasi-judicial decision maker, to advocate for Delta.
- The Respondent has not withdrawn its support for the permit terms, only for issuing a permit at this time without the support of Delta.
- Delta has changed its mind about supporting the draft permit.

Given the above, the Board feels it can reasonably conclude that the terms and provisions of the draft permit represent a summary of the Respondent's conclusions on the information in its possession.

Midway through the Hearing there was a request for intervenor status by Mr. Don DeMill, a private citizen, which was turned down by the Board.

ISSUES IN THIS APPEAL

1. Was the material to be deposited "waste" within the meaning of the *Waste Management Act*?
2. Did the Deputy Director err when he applied the Landfill Criteria to the permit application?
3. Did the Deputy Director err when he required the agreement of the GVRD and the Delta Council before issuing a permit under the *Waste Management Act*?

1. Was the material to be deposited "waste" within the meaning of the *Waste Management Act*?

The Appellant's evidence was that the "waste" to be deposited is non-recyclable and includes glass, plastic, plywood, particle board, small amounts of metal and gypsum board (<2%) and other material which is not prohibited by the *Act*. The waste for the landfill is sorted at another site and trucked to the landfill area.

It was agreed by all parties at the hearing that the "waste" in question is waste pursuant to the regulations. The Board finds that the material in questions is "waste".

2. Did the Deputy Director err when he applied the Landfill Criteria to the permit application?

The Appellant argues that it had a right, or an accruing right, to a permit before the Landfill Criteria were issued in June, 1993.

The Appellant further argues that the Deputy Director's decision to deny a permit was illegal and contrary to the rules of natural justice and fairness because the permit was denied on grounds that the Appellant was never advised about, namely

the 1993 Landfill Criteria. The Appellant also argues that the Deputy Director fettered his discretion by adhering to the Landfill Criteria and he acted unfairly by applying the criteria without providing the Appellant with an opportunity to respond to them.

Since the Appellant was not made aware of how the Landfill Criteria could apply to its permit application nor given an opportunity to respond, the Board finds that, in the circumstances, it was unfair to deny the permit.

However, the Board also finds that this breach of fairness and natural justice to the Appellant was cured by the full hearing before this Board. The Board has jurisdiction under section 28 of the *Waste Management Act* to make any decision that could have been made by the Deputy Director. The Landfill Criteria were fully argued before the Board and therefore any procedural unfairness has been cured by this hearing.

3. Did the Deputy Director err when he required the agreement of the GVRD and the Delta Council before issuing a permit under the *Waste Management Act*?

Under the waste management law in effect at the date of the Appellant's permit application, local governments such as the Municipality of Delta and the GVRD had no right of consultation. This changed with the enactment of the *Waste Management Amendment Act* (June, 1992).

Section 16(2) of the *Waste Management Amendment Act*, 1992 requires that Regional Districts, such as the GVRD, submit Waste Management Plans before December 31, 1995 for approval by the Minister. Then, permits will be replaced by operational certificates which will be issued in accordance with, and form a part of, the region's Waste Management Plan.

The section 16 amendments come into effect only *after* a GVRD Waste Management Plan is approved by the Minister. Until then, granting waste permits is governed solely by sections 8 and 20 of the *Waste Management Act.*

The evidence of the Respondent establishes that Delta initially approved the draft permit dated September 27, 1994. On October 7, 1994, counsel for the Respondent wrote to advise that "… Waste Management Branch has contacted both the Municipality of Delta and the GVRD … and they both had no objections".

In its written submission dated April 6, 1995, counsel for the Respondent argues that a permit should not be issued without the approval of the Municipality of Delta. To grant a permit without Delta's approval would be "contrary to the tenor" of the *Act* and would mean that the permit would be "superseded".

The Board notes that the GVRD admitted it had "no official status in the permitting process" until the Waste Management Plan was adopted.

While it was not necessary for the Respondent to consult the Municipality of Delta and obtain its consent, on the evidence presented, the Board finds that Delta was, in fact, fully consulted and its concerns regarding reporting, monitoring and language were settled to the satisfaction of the Respondent.

The evidence establishes that, after an agreement was reached between the Appellant and Respondent on the September 27, 1994 draft permit, Delta changed its mind.

The Board notes that neither Delta nor the GVRD had status as parties at the appeal before the Deputy Director. Nor did they make any applications for intervenor status in the appeals before the Deputy Director or this Board.

In both his capacity as a quasi-judicial decision maker, and as an administrator, the Deputy Director is bound by the law to be neutral and unbiased. While he can consider the position of the Municipality of Delta as it relates to "protection of the environment", it is not appropriate for the Deputy Director to be an advocate for Delta. Certainly, neither the Deputy Director, nor his counsel, indicated they also represented Delta.

The Board had no evidence as to the proposed GVRD Waste Management Plan. The Board concludes that it would be unreasonable to hold this permit application in "limbo" especially since section 16(5) of the *Act* permits deadline extensions to Waste Management Plans and because Delta's concerns can be addressed through future discussions with the parties.

DECISION

The Board has considered all the evidence before it, whether or not specifically mentioned.

The Board finds that the Appellant has met many of the Respondent's concerns in the mutually agreed upon draft permit of September 27, 1994, which was presented to the Board for its consideration. This Board has reconsidered the case in light of the new evidence (September 27, 1994 draft permit) and finds that, upon consideration of all the evidence, the permit application should be granted.

The Board orders the Regional Manager to issue a permit in the form of the September 27, 1994 draft permit and directs the Regional Manager to incorporate the following findings of the Board, regarding permit issues raised by the Respondent, into the permit that he issues:

1. Who should be the permit holder?

Lot 7 is not owned by 7437 Holdings but is owned by Aerial Finance. The Respondent sought to have both 7437 Holdings' name and the owner's name on the permit. The issue of who should be the permit holder arises because 7437 Holdings expects to fill this lot in 2-3 years and would not be an active permittee thereafter. The landowners intend to sell lot 7. However, as waste compacts, there is a

possibility of contamination into the local groundwater. The Respondent stated that it wished to be able to realize on the security deposit and to ensure the Municipality of Delta would not carry the burden of repairing any deficiencies when the permit holder is gone.

The Board believes these are reasonable requests which relate to the protection of the environment. However, since the owner, Aerial Finance, did not participate in the appeal process, the Board has no jurisdiction to make it a co-permittee. The Board finds that the Respondent's concerns should be addressed under section 2.2.5, titled "Security".

The permit holder should be identified as 7437 Holdings Ltd. "or its successor" at each part where 7437 Holdings is mentioned. The Board directs that the permit be amended accordingly.

2. The Cover

In his refusal of November 28, 1993, the Regional Waste Manager noted that the Appellant did not agree to cover the lifts of waste at least once a month. This statement is based on the draft of August 26, 1993, section 2.9.3, where the landfill is described as a "level 'D' operation" which requires that cover be applied once every 20 days of operation and at least once per month. The September 27, 1994, draft permit side steps this issue by stating in section 2.2.16, titled "Litter Control", that cover be applied at "appropriate frequencies".

The Board finds that the lifts of waste should be covered a minimum of once a month. This Board directs that section 2.2.16 be amended accordingly.

3. Monitoring

The Respondent's only concern about monitoring was about the "trigger point" at which passive leachate treatment becomes active. Mr. Dakin responded to this question by stating:

> If it is clearly evident that the landfill is causing contamination of the local surface and/or groundwater beyond the property boundaries, or has a potential to exceed the contaminated sites level C criteria, then 7437 Holdings should have an *obligation* (emphasis added) to rectify the situation.

The Board finds that this obligation is appropriate and directs that a provision be included under section 2.2.6, titled "Leachate", specifying that, where toxic leachate is causing, or is found to have caused, contamination of the local surface and/or groundwater beyond the property boundaries, or has a potential to exceed the contaminated sites level C criteria, the Permittee or its successor must rectify this by an active leachate treatment or other system acceptable to the Regional Waste Manager.

4. Berm

The Board directs that detailed plans for the berms be included in the permit as an appendix to section 2.2.19 of the permit, titled “Landfill Construction”.

5. Greater Vancouver Regional District’s Concerns

On August 30, 1992, the GVRD wrote to the Respondent requesting that the list of acceptable ingredients for landfill be specified, noting that it would be useful in preparation of operational certificates.

It is this Board’s view that such a list should be compiled with the help of the GVRD. This Board directs the Regional Waste Manager to add a list of acceptable ingredients for landfill to the permit and to clarify the acceptable height of the fill and lifts**.**

The Board stresses, however, that undue time should not be spent on this matter as it is not writing an operational certificate. Such details would allow for monitoring of permit compliance.

6. The Municipality of Delta’s Concerns

The Municipality of Delta stated that its concerns about the September 27, 1994, draft permit were the cumulative effect of minor wording changes on enforceability, the security required and Delta’s implied responsibility. The Board’s directions are limited to its findings on security and Delta’s implied responsibility.

(a) Security

The Regional Waste Manager has the power to require the Permittee to give security and has the power to amend the security required under the *Waste Management Act*. The Board notes that section 2.2.5 of the draft permit, titled “security”, includes a letter of credit, levy, insurance and the waiting period of the permit. Such an amendment must be for the “protection of the environment”.

The Board finds it would be desirable for the Municipality of Delta to have access to this security if and when it becomes involved in enforcing the requirements of the permit.

When the September 27, 1994 draft permit was tendered to the Board, the Appellant proposed the additional security of an environmental impairment liability insurance policy. The Board finds that the permit should contain a section requiring the Appellant to obtain environmental impairment liability which would be realized to correct conditions and contamination at the request of an officer pursuant to the *Waste Management Act* and its regulations, both during the life of the fill period and the permit, and afterwards.

Section 2.2.5.2.3(a)(ii) of the September 27, 1994 draft permit, under the general heading "Insurance", currently states:

> "3. This insurance shall be occurrence based."

While the Board agrees that an "occurrence" policy will normally have the desired effect, the Board wants to emphasize that, regardless of what the policy is called, the wording of the policy must cover environmental damage caused by the landfill which occurs, or is discovered, after the expiry of the fill period and the permit. What the insurance is called is less important that its wording. As noted by the Supreme Court of

Canada in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.* [1993] 1 S.C.R. 252:

> Generally speaking "occurrence" policies cover liability inducing events occurring during the policy term, irrespective of when an actual claim is presented. Conversely, "claims made" (or "discovery") policies cover liability inducing events if and when a claim is made during the policy term, irrespective of when the events occurred … At the same time, it is important to note that "claims-made" and "occurrence" are not legal labels which dictate a certain legal result once a policy is characterized as one or the other. ***The issue is always what the particular policy dictates, regardless of what it is called… The essential is not the label one places on the policy, but what the policy says.*** [emphasis added].

(b) Implied Responsibility

Another concern of the Municipality was its implied responsibilities in relation to fire safety, roads, dust, final elevation, gas and soil quality deposition. The Board notes that the costs of extinguishing fires will be borne by the Permittee (2.2.7 - "Fire"). The air quality issues, dust and gas, are covered by both the *Waste Management Act* (section 19) and the amendment to section 19, where the GVRD sets standards in this area. This latter issue is between the GVRD and Delta.

COMMENTS

1. The Board has, again, noted some confusion about the role of policy such as the 1993 Landfill Criteria. We make the following comments in this regard:

i) The permit applicant is entitled to know what policy and legal rules apply to his/her application before a formal decision is made. This is required by fairness.

ii) Policy should not be applied as if it were law. A good summary of how policy works was written by Connie Munro, Chief Appeals Commissioner of the WCB

Appeal Division. In an article which appeared in the Worker's Compensation Reporter ((1995) 11 W.C.R. 295 @ p. 298.), Ms. Munro states:

> "... where a policy puts a limitation, the limitation does not constitute an absolute bar since policies are essentially guidelines - not binding rules. There must always be willingness to depart from a policy in a deserving case. On the other hand, policies are meant to ensure consistency and predictability with reference to carefully thought-out standards. This means that a departure from a policy is only warranted in exceptional circumstances."

The Board believes it would be helpful for all Ministry officials to review this quotation prior to applying policy considerations to a particular situation.

Judith Lee, Panel Chair
Environmental Appeal Board

Christie Mayall, Panel Member
Environmental Appeal Board

Dr. Elizabeth Keay, Panel Member
Environmental Appeal Board

February 20, 1996