



Environmental Appeal Board

APPEAL NO. 95/56 - HEALTH

In the matter of an appeal under section 5 of the *Health Act*, R.S.B.C. 1979, c.161.

BETWEEN: Michael O'Leary **APPELLANT**

AND: Environmental Health Officer **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
David Perry, Panel Chair

DATE OF HEARING: January 25, and June 5, 1996

PLACE OF HEARING: Vancouver, BC

APPEARING: For the Appellant: Greg Bull

For the Respondent: Paul Markey

APPEAL

This is an appeal brought by Michael O'Leary against the decision of Environmental Health Officer, Paul Markey, to reject an application for sewage disposal made on February 7, 1996. The application is comprised of a septic tank, intermittent sand filter and a marine outfall.

Mr. O'Leary made application following an earlier hearing of the Environmental Appeal Board which considered an appeal against a rejection by Mr. Markey dated August 1995. During the course of a January 25, 1996 hearing before this Board, the appeal against the August 1995 rejection was dismissed. The dismissal was based on the fact that the land based system of effluent disposal breached section 18(e) of Schedule 2 of the Sewage Disposal Regulation or, in other words, insufficient setback from a creek which traverses the O'Leary property.

During the course of that January 25, 1996 hearing, Mr. O'Leary presented an alternative disposal system comprising the marine outfall system. Because the Ministry had insufficient time to react to this proposal, the Board hearing was adjourned in order to allow proper evaluation.

Subsequent to the hearing on January 25, 1996, Mr. O'Leary submitted a formal application which was received by the Ministry of Health on February 7, 1996. This application was supported by an engineering proposal from NovaTec Consultants Inc. for the subject property at Lot 13, Block 1, District Lot 1009, Group 1, New Westminster District, Plan 5549, which is in the Cascade area adjoining Indian Arm. The proposal for sewage disposal consists of a septic tank, dosing pump station, intermittent sand filter and, finally, a marine outfall which discharges the treated

effluent into Indian Arm. The outfall is located at a maximum depth of 18 metres weighted down with a steel cable and is 60 metres in length.

The Board was provided with an analysis of the marine outfall flow pattern by Mr. Ivo Van Bastelaere, an engineer employed by NovaTec. Indian Arm contains a mixture of both salt and fresh water. Fresh water travels over the surface and tends to remain there because of its lower density. According to Mr. Van Bastelaere's analysis, the effluent plume will never reach the surface of the water and will be held at a trapping depth significantly beneath the surface. At the trapping depth, any surviving fecal coliforms or other bacteria will be killed in the hostile saline environment and will be gradually diluted by the surrounding salt water.

The operation of the intermittent sand filter is estimated to reduce the biological oxygen demand of the effluent to less than 10 milligrams per litre and fecal coliforms of less than 500/100 ml. Given the initial dilution of effluent which will occur at the end of the outfall, the estimate is that water will meet Ministry of Environment, Lands and Parks water quality standards for shellfish harvesting.

MINISTRY OF HEALTH POSITION

The Ministry of Health rejected the application for two reasons. First, they said that the use of the marine outfall did not satisfy its policy regulating innovative technology which has been adopted to consider alternative systems under section 7 of the Sewage Disposal Regulation. Second, the Ministry of Health has adopted an embargo on applications for marine outfalls along Indian Arm for environmental reasons. The basis for each of these reasons for rejection will be considered in turn.

LEGISLATION

The Ministry of Health considered the O'Leary application under section 7 of the Sewage Disposal Regulation which deals with alternate methods. However, use of a marine outfall means that there is no absorption field and accordingly the system as proposed is neither a conventional septic tank system nor a conventional package treatment system. As section 7 only deals with alterations to conventional systems, it does not apply to this application.

Given that the proposed treatment does not fall within one of the schedules nor within section 7 of the regulation, consideration of this application should be under section 3 of the regulation. The applicable section is 3(3)(a) which provides that

3 (3) No permit shall be issued under this section

- (a) in the case of construction or installation, until site investigation tests set out in or required by Schedule 1 have been carried out to the satisfaction of the medical health officer or public health inspector, and either of them is satisfied that, having regard to the provisions of that schedule, the construction, installation and ultimate use of the system will not contravene the *Act* or this regulation...

The test that the Environmental Health Officer must apply is consideration of whether the "construction, installation and ultimate use of the system will not contravene the Act or this regulation." [emphasis added]

A contravention of the *Act* or regulation would occur when domestic sewage reaches the surface of land or is discharged into a surface body of fresh water (section 4(3) and 2(2) of the regulation) or, more generally, the system results, or is likely to result, in a 'health hazard' (sections 66 and 68 of the *Act*) or a 'menace to public health'. Section 25 of the *Act* states

Health Act

25. No common sewer or system of sewerage shall be established or continued unless there is maintained with it a system of sewage purification and disposal which removes any menace to public health, and the minister may call for, and any municipal council, person or corporation shall, when requested, furnish as soon as possible, the information and data in relation to the matters under their control as the minister may deem necessary.

Mr. Don Miller, an engineer employed by the Ministry of Health, was of the view that the system, as designed, would not have any negative health effect. In fact Mr. Miller was of the view that even if there was no secondary treatment whatsoever, it is unlikely that this discharge would have any negative health effect.

Nevertheless, the Environmental Health Officer was of the view, in consultation with senior members of the health branch, that it was necessary to have an alternative system in the event that the innovative intermittent sand filter and marine outfall failed to function. The alternative system could only be a holding tank in that there is insufficient depth of soil or distance from a creek running through the O'Leary property to allow any form of land based disposal.

The Board finds that, given that both the engineers retained by Mr. O'Leary and the engineer retained by the Ministry of Health agree that there will unlikely be a negative health effect from this proposed disposal system, the Environmental Health Officer has wrongly exercised his discretion pursuant to section 3 of the regulation. There was no evidence presented to the Board that either the construction or the ultimate use of this system will contravene the *Act* or the regulation. In fact, were there to be a total failure of the intermittent sand filter which provides for secondary treatment in this system, the evidence before this Board is that the plume from the marine outfall would be trapped at sufficient depth so that there would be no negative effect on health. The innovative technology policy deals with situations where, should a new form of sewage disposal system fail, then there would likely be a threat to health. That is not the case with the application before the Board and, accordingly, this ground for refusing issuance of the permit is overruled.

ENVIRONMENTAL CONSIDERATIONS

Indian Arm is within the Burrard Inlet Environmental Action Program ("BIEAP"), a joint committee of concerned departments of the federal and provincial governments. Any marine outfall, such as is proposed with this application, is

subject to issuance of a permit by the Vancouver Port Corporation because these are navigable waters.

The O'Leary application was distributed to members of the BIEAP for review. The chair of that review committee, Mr. Adrian Duncan, expressed a potential objection that "concerns had been raised that, while the impact on water quality from a single discharge of this nature may be minimal, the proliferation of a number of similar discharges could give rise to significant cumulative environmental impacts." This is contained in a letter dated March 6, 1996 from Mr. Duncan.

These same concerns about cumulative impact were expressed by Mr. Miller in his review of this application in a letter dated April 10, 1995. Mr. Miller says that

a direct discharge to Indian Arm as proposed would in itself not have any appreciable health or environmental impact. The discharge would be readily disbursed into the submarine waters. The affect of allowing this discharge to Indian Arm would set a precedent that would have far reaching implications on this sensitive inlet...The result will be a proliferation of discharges to Indian Arm all of which pass through secondary treatment plants most of which are not working because there is no compulsion for them to be maintained regularly.

Mr. Miller was completely frank in his evaluation of this proposal. In his view, the O'Leary proposal would not pose a health or environmental risk. However, Mr. Miller has imposed an embargo on applications of this type because of the danger of a future cumulative impact.

Although this concern may well be valid, the Board finds that, given the test in section 3 of the Sewage Disposal Regulation, the Ministry of Health has overstepped its authority. The Sewage Disposal Regulation provides for a consideration of each application on its own merits. The *Health Act* and the Sewage Disposal Regulation do not contain any authority for consideration of cumulative impacts such as are described by Mr. Miller. The present structure of the *Act* is such that an application can only be rejected once there has been sufficient accumulated impact so that further issuance of a permit would have a health effect that would contravene the *Act* or the Sewage Disposal Regulation. In other words, only when there is sufficient damage to Indian Arm that any additional effluent will constitute a threat to health can the Ministry validly refuse to issue a permit.

Mr. O'Leary cited to the Board the Board's decision in Rustad Bros. v. Deputy Director of Waste Management (Appeal No. 94/39, September 27, 1995). This decision deals with fettering of discretion by a policy maker. The Board agrees that in this case, the discretion of the Environmental Health Officer has been fettered by a policy to not issue sewage disposal permits with a marine outfall on Indian Arm. This policy has, as its basis, a reasonable and perhaps even commendable concern for long term cumulative impacts of human development on Indian Arm. Regrettably, the Health Officer does not have any statutory power to make such a policy which would bind the exercise of discretion pursuant to section 3 of the Sewage Disposal Regulation.

The Board finds that the Environmental Health Officer has not freely exercised his discretion but has allowed himself to be bound by a policy: a policy which is outside the statutory powers of the Environmental Health Officer.

Accordingly, this ground of rejection for the application is also overturned.

CONCLUSION

The appeal is upheld and the Board orders that a permit be issued to Mr. O'Leary for construction of a sewage disposal regulation system in accordance with the proposal made on February 7, 1996 by NovaTec Consultants.

Given that the intermittent sand filter as proposed is a new type of technology, the Environmental Health Officer may require, should he or she see fit, that a restrictive covenant pursuant to section 215 of the *Land Title Act* be registered against Mr. O'Leary's property requiring a reasonable maintenance schedule for this system.

David Perry, Panel Chair
Environmental Appeal Board

February 12, 1997