# Environmental Appeal Board

**APPEAL NO. 96/11 - HEALTH**

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

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| **BETWEEN**: | James Cain | **APPELLANT** |
| **AND**: | The Environmental Health Officer | **RESPONDENT** |
| **BEFORE**: | A Panel of the Environmental Appeal Board<br>Carol Martin, Panel Chair | |
| **DATE OF HEARING**: | 30 September 1996 | |
| **PLACE OF HEARING**: | Victoria, B.C. | |
| **APPEARING**: | For Appellant: Ron Cain<br>Witness: James Cain | |
| | For Respondent: David Coombe<br>Witness: Ron Cook | |

**APPEAL**

This was an appeal against the May 9, 1996 decision of the Environmental Health Officer to refuse to issue a permit for an on-site sewage disposal system for Lot 34, D.L. 25, Cowichan Lake District, Plan 14776 (the "Property").

The Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 5 of the *Health Act*. The Environmental Appeal Board, or a Panel of it, may, after hearing all evidence, decide to vary, rescind or confirm the decision of the Environmental Health Officer.

The order sought by the Appellant in this case is that a permit be issued for a sewage disposal system for his lot near Cowichan Lake.

**BACKGROUND**

Messrs. James and Ron Cain have owned the Property for many years and have used it for recreational purposes. A mobile holding tank/outhouse facility has been used for sewage disposal purposes.

The approximately one-half acre lot was created in 1961 as part of a subdivision along Cowichan Lake. At the time of subdivision no regulations existed which required proof of the percolation rate of the soil or provision of a sewage system by the developer. Some of the other lots in the subdivision have older sewage disposal

systems which may or may not have been approved under earlier regulations. Other lots have no approved systems. There are one or two recently approved systems in the area.

The Cains applied for a 'Permit to Construct a Sewage Disposal System' in August 1993. That application proposed an "aerobic sewage treatment plant" discharging into a disposal field with 100-150 feet of distribution pipe. After a site visit with Mr. Jim Cain in late August, the Environmental Health Officer (EHO), Mr. Ron Cook, deferred his decision on whether to issue a permit until after a wet weather inspection could be conducted. He was concerned that there may be a high groundwater table and surface water collection at or near the proposed site.

These concerns were confirmed during a site inspection in December of 1993, when Mr. Cook observed water at the ground surface and within 10 inches of the ground surface in test holes at the proposed field site. He also observed water flooding the ground surface immediately to the south of the proposed field area.

The construction, installation and approval of sewage disposal systems is governed by the *Sewage Disposal Regulation*. The regulation in, more or less, its present form has been in effect since 1985 (the "*Regulation*"). According to schedules 2 and 3 to this Regulation, the ground water table must be "greater than four feet below the ground before it has been artificially disturbed by placement of fill, excavation or otherwise" before a permit can be issued. As the Cains' Property did not meet this requirement, Mr. Cook refused to issue a permit for the proposed system.

A relaxation of this requirement is authorized in certain circumstances. Section 7(1) relates to "alternate methods" and provides that an EHO may approve a system with less than four feet of undisturbed native soil if other methods are available to make up for the lack of soil and still safeguard the public health. Section 7(1) states:

> 7. (1) Where a medical health officer or public health inspector is satisfied that it is impossible for a person to comply with
>
> (a) in the case of a conventional septic tank system, sections 1 [lack of four feet of soil] … of Schedule 2, or
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> (b) in the case of a conventional package treatment plant system, sections 11 lack of four feet of soil] … of Schedule 3,
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> but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under section 3, containing conditions that he considers appropriate to meet the omitted standards *having regard to safeguarding public health.* [emphasis added]

On April 24, 1996, the Cains applied for a permit under section 7(1) proposing an "alternate system" in an attempt to overcome the lack of four feet of soil. They proposed a 600 gallon septic tank discharging into a raised mound disposal field (fill) with 210 feet of pressure distribution pipe. The site tests performed by the Cains' contractor, Mr. Sandhu, show that the average slowest percolation rates

measured in the two test holes within the proposed field was 10 minutes/inch. He measured the depth to water table in two test holes at 16 inches and 8 inches. The fill (raised mound) is proposed to overcome this high water table.

Mr. Cain asked for another EHO to review this application and stated in his evidence that he was led to believe this would happen. However, on May 8th, 1996, Mr. Cook performed another site inspection and went on to make a decision on the application.

In a letter dated May 9, 1996, Mr. Cook refused to issue a permit to construct a sewage disposal system on the Property. He states:

> During my May 8, 1996 inspection I noted water in the field test holes at the 10 to 12 inch level. Water was ponding on the surface to the south of the field site. During my past involvement with your August 10, 1993 application and rejection, there was even higher groundwater levels noted. During my site investigation in the winter, December 15, 1993, I observed water at surface to 10 inches in test holes at the same field site.

Mr. Cook went on to say that the disposal site does not meet the Ministry's policy requiring at least 18 inches of suitable native soil above the highest seasonal groundwater level. Under the policy, at least 18 inches of natural soil must be present before a system may be approved under section 7(1). In the circumstances, Mr. Cook found that the addition of fill or a "raised mound" would not be appropriate to compensate for the lack of soil and protect the public health.

On May 21, 1996, James Cain appealed Mr. Cook's decision to the Environmental Appeal Board. At the request of the Appellant and with the consent of the Respondent, the Panel conducted a site visit with all parties present.

As a preliminary matter, the Appellant pointed out that he had not been given the opportunity to respond to the Respondent's Statement of Points prior to the hearing. In addition, the Appellant objected to the late submission of documents to which he had not had an opportunity to prepare a response.

As a matter of policy, the Board requests that the parties submit, on the same date, a Statement of Points outlining the main issues and arguments they will address further at the hearing. The purpose of this exercise is simply to provide the parties, and the Panel, with an opportunity to identify the issues raised and prepare for the hearing. The actual hearing is the forum in which the parties can present their respective cases and respond to any issues or information outlined in the Statement of Points. As the Appellant had an opportunity to respond to any matters in relation to the Statement of Points at the hearing, no unfairness has resulted.

On the matter of the late documents, again, the Panel notes that the early exchange of relevant documents is requested as a matter of policy to allow the parties to organize and prepare their cases. It is also in place to avoid "surprises" which can result in adjournments and delays in the proceedings. In this case, there

has been no request for an adjournment. The Panel has decided to receive all information which may be relevant to the case but will consider the late release of the documents and the Appellant's comments when weighing the evidence.

## ISSUES

The Appellant made a variety of arguments regarding the applicability of the current legislation and Ministry policies to his Property as well as the procedure and analysis used by the EHO when he made his decision. The arguments can generally be characterized as follows:

1. Neither the current Regulation (1985) nor the current Ministry policies should have been applied to his Property as his subdivision was approved prior to the prevailing legislation and policies. His Property should be "grandfathered".

2. The Respondent violated the principles of natural justice because he was biased when he considered the application before the Board.

3. Even if the current Regulation and Ministry policies are applicable to his Property, the EHO employed improper procedures to determine whether the Property met those requirements and improperly exercised his discretion.

In his Statement of Points, the Appellant also stated that the legislation and the actions of the EHO violated his rights under section 15(1) of the *Canadian Charter of Rights and Freedoms*. As this argument was not pursued at the hearing, the Panel will not consider this argument further.

## EVIDENCE AND DISCUSSION

### *Does the current legislation and Ministry policy apply to the Property?*

The Appellant argued that because no regulations existed at the time the lot was created, at least none that would have prevented him from installing a sewage disposal system on his lot, then no regulations should apply to his lot now.

The Respondent's spokesperson, Mr. David Coombe, Chief Environmental Health Officer for the Central Vancouver Island Health, explained that regulations are changed over the years because of increased knowledge gained from problems such as contamination of ground water by sewage, and that all applications must be reviewed under current legislation. He pointed out that the owners had the opportunity to build a system under the old regulations but had chosen not to do so. Now, while the EHO does have some discretion, he cannot issue a permit which would be contrary to the requirements of the present day regulations.

The Panel agrees with the Respondent. The legislation in effect at the time the Appellant made his application is the law which applies to the application. While there is a "grandfathering" clause contained in section 7(2) of the Regulation, this only applies to *systems* in existence at the time the Regulation was brought into force and only applies to "repairs or alterations" of the old systems. It does not

apply to *property* in existence prior to the Regulation. As the appeal before the Board is not an application for a repair or alteration of an existing system, this provision clearly does not apply in the circumstances.

In a similar vein, the Appellant also argues that the Property should not be subject to the current Ministry policy for alternate disposal systems because it was created when no such policy existed. In particular, he objects to the application of the Ministry policy that requires at least 18 inches of permeable, undisturbed natural soil above the water table. He asserts that from 1961 on into the 1980s, the Ministry practice was to truck in fill regardless of the depth of native soil, and did not require wet weather inspections. The Appellant argues that the Ministry should not be able to impose new and unreasonable standards which place his Property at a disadvantage. Rather, they should relax the requirements for old properties as is done by the Capital Regional District (CRD).

The Appellant provided a copy of the CRD policy which allows CRD health inspectors to approve a system for older subdivisions where there is only 12 inches of porous natural soil above the water table (as opposed to 18 inches), provided that all relevant set backs and conditions can be met. This policy applies to applications for an alternate method under section 7(1) of the Regulation - the same section that was considered by the EHO in this case.

The Respondent argued that, like legislation, the policies and procedures of the Health Units change as a result of experience and increased knowledge, presumably in the areas of soil science, hydrology and technology. Further, the policies applied by Health Units, although standardized in many respects, are adapted to reflect the particular characteristics of the area in relation to such things as precipitation, drainage conditions, soil types and makeup, and groundwater conditions and concerns.

The Respondent argued that, although the Central Vancouver Island Health Unit (which is responsible for approvals in the area) could adopt a policy like the CRD, it would not be appropriate to do so, given the differences in the characteristics of the districts. Mr. Coombe explained that the average annual rainfall measurements in the area of the Property (Cowichan Lake area) is twice that of nearby Duncan and more than twice that of the Saanich Peninsula where the CRD policy is applied. Precipitation data collected by Environment Canada and published by the B.C. Ministry of Agriculture was provided to the Panel.

Mr. Coombe stated that his Health Unit is also concerned about the groundwater quality in the area of the Property as most people obtain their domestic water from wells. He noted that no public water system would be provided in the foreseeable future and all wells are relatively shallow (~30 feet).

As stated by the Respondent, policies evolve and change over time as knowledge and experience is gained. There is no guarantee that the internal standards in place at one time will be in place at a later date. In this Panel's view, to accept the Appellant's arguments and apply the standards and procedures in place in 1961 would be to ignore this knowledge and experience. This would set the protection of

public health and the environment back over 30 years. Clearly, this would pose an unacceptable risk to the public health and would, therefore, be contrary to the object and purpose of the *Health Act* and the Regulation. As such, the Panel finds that the relevant policy in this case is the current policy.

Having said that, the Panel also notes that, when authorized by statute to make a decision, the decision must be based upon the particular facts in the case, not simply on the policy. If, in the circumstances of the case, a reduction in the amount of soil similar to that set out in the CRD policy is appropriate, an exception from the 18 inch policy should be considered. The question is, therefore, whether the EHO applied the Ministry policy in a "blind" or rigid fashion. This will be discussed further under the section dealing with the final issue (exercise of discretion).

***Was there actual or a reasonable apprehension of bias on the part of the EHO?***

The Appellant maintained that the EHO was biased in his decision not to approve the second application because he had formed an opinion on the Property when reviewing, and refusing, his earlier application. Further, the Appellant believes that he was not treated fairly by the Ministry when he requested that another health inspector be assigned to handle the application, was given to believe that this would happen and then found out that the same EHO ultimately made the decision.

The Respondent replied that the Appellant had not provided any evidence to support this allegation of bias. On the matter of fairness, Mr. Coombe explained that he did involve the EHO's superior, Mr. Glen Smith, who determined that the EHO had assessed the Appellant's first application in a professional and unfettered manner. He was satisfied that the EHO would review the second application in a similar fashion.

The Panel can find no evidence that the EHO was actually biased towards the Appellant. The question is whether there was a reasonable apprehension of bias.

Decision-makers at this level and performing the functions of the EHO as prescribed by the legislation are not subject to the stringent test for reasonable apprehension of bias that is applied to the courts and adjudicative bodies, such as this Board. Rather, the test is akin to that of investigative bodies which is the "closed mind" test (*Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 89 D.L.R. (4th) 289 (SCC)). That is, was the EHO's mind already made up.

In this case, the nature and location of the field proposed in the first application had not changed, only the design of the system was different. On the evidence, there is no indication that the EHO's mind was "closed" when he considered the design as proposed in the second application. Clearly, the same problems with the Property that were evident during the review of the first application were also evident when the EHO considered the second application. The fact that he had the same concerns in relation to these problems does not support a finding that there was a reasonable apprehension of bias.

However, even if the facts of this case could support a finding that there was a reasonable apprehension of bias, any error or defect in the proceeding below is not determinative of this appeal. Any defects below are cured by the independent hearing before this Board.

***Did the EHO employ improper procedures when he considered the application and did he improperly exercise his discretion under section 7(1) of the Regulation?***

The Appellant alleges that the EHO made a number of errors when he considered the Property. First, the EHO is said to have measured the soil depth in depressions in the forest floor where there was less soil depth or distance to the water table. The Appellant argues that, in doing so, the EHO failed to take into account the undulating nature of the forest floor on the proposed field site which created variations in the height of land and, the Appellant maintained, probable variations in the depth of soil as measured by the EHO. While not disputing the fact that less than one foot of native soil was measured above the water table, the Appellant argues that the EHO should have allowed the land to be cleared and the soil leveled out to achieve perhaps a greater average depth of native soil.

Of the soil that was available, the Appellant states that the two percolation tests both showed an ideal perc rate of 10 minutes/inch. He maintains that this is a strong indication that the soil is ideal for a field. He also notes that there was no need for measurements to the ground water table to be taken in the wettest months if the percolation rates were satisfactory, which he maintains they were.

Further, the Appellant argues that the EHO should have allowed him to introduce fill to the proposed field area in order to provide sufficient soil to compensate for the lack of native soil. The Appellant believes that the EHO's refusal to allow sufficient fill to be brought in to level the area is illogical in that he believes that "perc fill designed to meet provincial standards is much better" for constructing disposal fields than is native soil.

In support of his position, the Appellant points out that the Property is bounded by septic fields on all sides - all within 7 inches of the elevation of the proposed field. He notes in particular that his neighbours recently had a system approved and the field is only 150 feet from the Appellant's proposed field. He states that their lot has been cleared and leveled. The Appellant submits that with proper leveling of the proposed site and a built-up field, the Property would support a system like the neighbour's.

The Appellant believes that, as there is no evidence that there has been harm from nearby fields at close to the same elevation, it is illogical to conclude that the proposed field will have a negative effect. He argues that, in the absence of an environmental impact study, the Ministry cannot know that there will be any affect on the quality of the ground water over time. The Appellant contends that other fields in the area must work as their well water is not contaminated, therefore the proposed field should work as well.

The EHO explained to the Panel that the Ministry has found from experience over the years that native, *undisturbed* soils provide the best medium for processing and purifying effluent introduced into the ground from a sewage disposal system. This is why the Regulation requires four feet of soil "before it has been artificially disturbed by placement of fill, excavation or otherwise". The Respondent referred to literature discussing the advisability of using undisturbed soils. Although a reduction of soil may be considered under section 7, the Ministry has determined that at least 18 inches of native, undisturbed soil is needed for a field to effectively treat sewage effluent. This is reflected in the policy.

In his evidence, the EHO explained that the reason for the policy requiring measurements in the wettest months is to ensure that no effluent ever comes in contact with the water table before it has been adequately treated in the soil. This is of special concern to the Ministry when all residents in the area are using groundwater from shallow wells for drinking water. Potential high lake water or surface water from high rainfall is also of concern to the EHO because of the potential for contamination of local water bodies. There was evidence at the hearing that Cowichan Lake water rises almost to the subject lot and that people downstream still use lake water for drinking water.

Regarding the percolation rate of the soil, it is noted that section 16 of Schedule 2 of the Regulation states that the rate of percolation cannot exceed (take longer than) 30 minutes per inch. However, a percolation rate should not be too fast either or the effluent will pass through the soil without being properly treated. Contrary to the Appellant's assertion that the 10 minute per inch rate was "ideal", it is the Panel's view that it is, in fact, on the "quick" side.

The Respondent, however, maintained that the rate of percolation was not the primary concern in this case. The primary concern of the EHO was the "limited depth of undisturbed, native, porous soil to the groundwater table", and that "the site conditions were such that the Appellant's proposal did not provide sufficient safeguards to protect public health." The Respondent maintains that the EHO gave due consideration to the Appellant's proposal to construct an alternate sewage disposal system. However, they assert that the depth of natural, undisturbed, porous soil above the groundwater table is insufficient to attenuate the effluent and thus prevent contamination of adjacent wells and environment.

The Respondent stated that on the basis of site investigations, the EHO was not satisfied that "the construction, installation and ultimate use of the system will not contravene the Act or the Regulation" as is required by section 3(3)(a) of the Regulation.

In order to attain the objects and purposes of the *Health Act* and the Regulation the EHO, and in this appeal, the Board, must be satisfied that untreated effluent will not reach the ground surface nor enter a body of water and will otherwise safeguard the public's health.

Although the Appellant has raised a number of concerns regarding the procedure used by the EHO such as wet weather testing, failing to permit leveling of the

ground before measuring soil depth and failing to allow fill to be added, this Panel finds that each of the procedures is either required by the Regulation or is entirely appropriate given the objects and purposes of the legislation identified above. For instance, when measuring the depth of soil to the ground water table, as stated above, the EHO is to measure the soil "*before* it has been *artificially disturbed by placement of fill, excavation or otherwise*" [emphasis added].

Regarding wet weather testing, the Panel finds that this practice is entirely appropriate in the circumstances. Section 2 of Schedule 1 of the Regulation gives the EHO discretion in relation to determining the ground water table. When the mandate is to protect public health, it is entirely appropriate, if not essential, that the EHO gather and consider the more conservative estimates of the depth to the water table, not the most optimistic. Conventional sewage disposal systems rely on dry, permeable soil in the field to cleanse the raw sewage. If measurements are taken in the driest season when the water table is low, this would completely ignore the fact that the field may be completely saturated for a significant portion of the year allowing untreated effluent to rise to the surface or travel underground to the nearest breakout point. This would result in a clear contravention of the *Act* and the Regulation.

In this case, there is evidence that the proposed field is completely saturated at certain times. The EHO observed water at the surface of the test holes to within 10 inches of the ground surface. Even the Appellant's contractor found water at 8 inches and 16 inches of the ground surface. To provide sufficient soil, up to approximately the four foot mark, the Appellant would require a large quantity of fill. The Panel accepts the Respondent's evidence that fill is not as good for treating effluent as native, undisturbed soil. The Panel also finds that the percolation rate, evidence of high precipitation in the area, seasonal flooding and surface water flow across the proposed site combined with the influence of the nearby lake are additional factors that would negatively impact the effectiveness of a system in the proposed location.

Although the Appellant argues that other systems approved in the area are not creating a health risk and are located on lots with similar conditions, there is insufficient evidence about the specific conditions of the other field sites for the Panel to place any weight on this evidence. In any event, each site must be considered on its own merits. Given the particular conditions of the Appellant's site, the Panel finds that the proposed system could not be installed in a manner that would safeguard the public health.

The Panel finds that the EHO did not fetter his discretion by applying the Ministry policy rigidly or improperly. Further, even if the EHO, or this Panel considered the Property under the CRD guidelines requiring only 12 inches of natural soil for older properties, it would not assist the Appellant as the proposed field site has far less than this amount. This is not a border line case. The Panel finds that the water problem on this lot is significant.

Pursuant to the *Health Act* and the Regulation, no approval should be issued for anything which would potentially be detrimental to public health or to the

environment. While the onus falls on the owner of land not to allow effluent to reach the surface of land or a water body, it would be beyond the jurisdiction of the EHO, and this Board, to issue a permit where one cannot be reasonably certain that the proposed system will safeguard public health. In this case, the Panel is not reasonably certain that the ultimate use of the proposed system would do so.

## DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the relevant evidence and comments made during the hearing, whether or not they have been specifically reiterated here.

After reviewing all of the evidence presented by the parties prior to and at the hearing as well as all relevant legislation, the Panel finds that proposed sewage disposal permit for the Property should be refused. This Panel of the Environmental Appeal Board, therefore, confirms the EHO's refusal to issue a permit and dismisses the appeal.

Carol Martin, Panel Chair
Environmental Appeal Board

December 17, 1996