

DECISION NO. 2006-EMA-007(a)

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

BETWEEN:	Darvonda Nurseries Ltd.	APPELLANT
AND:	District Director of the Greater Vancouver Regional District	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	February 27, 2007	
PLACE:	Vancouver, BC	
APPEARING:	For the Appellant: Jonathan Baker, Counsel Nathalie J. Baker, Counsel	
	For the Respondent: M. Kevin Woodall	

APPEAL

Darvonda Nurseries Ltd. ("Darvonda") appealed the May 3, 2006, decision of R.H. Robb, Air Quality District Director (the "District Director") of the Greater Vancouver Regional District ("GVRD"), to issue air quality permit GVA 1000 (the "Permit") to Darvonda. The Permit was issued pursuant to both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*") and GVRD Air Quality Bylaw No. 937, 1999 (the "Air Quality Bylaw"), and authorizes the discharge of air emissions from Darvonda's greenhouse facilities located in Langley, British Columbia.

The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 100(1) of the *Act*, which provides that a person aggrieved by a decision of a director or a district director may appeal the decision to the Board. Section 103 of the *Act* gives the Board the power to confirm, reverse or vary the decision being appealed, send the matter back to the person who made the decision, or make any decision the person whose decision is appealed could have made and that the Board considers appropriate in the circumstances.

Darvonda requests that the Board rescind the Permit on the basis that the District Director had no authority to require Darvonda to obtain a permit.

BACKGROUND

Darvonda operates a greenhouse in Langley, British Columbia, where it grows a variety of plants. The greenhouse is heated, and the burning of fuels to heat the greenhouse produces air emissions.

Under section 31 of the *Act*, the District Director and the GVRD have certain powers to regulate air emissions within the GVRD. In particular, the GVRD has the authority to create bylaws that regulate the discharge of air contaminants in the GVRD. In this case, the applicable bylaw is the *Air Quality Bylaw*. Section 4.1 of the *Air Quality Bylaw* provides that the District Director may issue a permit that allows the discharge of air contaminants, subject to certain conditions. In addition, under section 31(2)(b) of the *Act*, the District Director "may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a director under this Act", and under section 14 of the *Act*, a director may issue a permit authorizing the introduction of "waste" into the environment, subject to certain conditions. Under the *Act*, "waste" includes "air contaminants".

In 2001, Darvonda applied to the GVRD for a permit to discharge contaminants into the air. Darvonda intended to burn wood waste as well as natural gas to heat its greenhouse.

By a letter dated January 15, 2002, a former District Director advised Darvonda that its permit application would be held in abeyance pending the development of a GVRD policy on fuel switching.

On May 3, 2006, the District Director issued the Permit. The Permit authorizes Darvonda to discharge air emissions from two natural gas fired boilers, and one wood fired hot water boiler, seven days per week, twenty-four hours per day. Schedule "C" of the Permit sets out air emission monitoring, sampling and reporting requirements. Schedule "F" of the Permit sets out maximum air emissions discharge criteria for each of the three boilers. In particular, for the wood fired boiler, the Permit:

- restricts particulate emissions to a maximum of 40 milligrams per cubic metre ("mg/m³") until September 30, 2007, and 20 mg per cubic metre effective October 1, 2007;
- restricts the opacity of emissions to a maximum of 10%, based on a six minute average; and
- prohibits odour beyond the plant boundary "such that the District Director determines that pollution has occurred."

On May 26, 2006, Darvonda appealed the issuance of the Permit.

Darvonda submits that it is not required to obtain a permit from the District Director because it is an "agricultural operation" as defined in the *Agricultural Waste Control Regulation*, B.C. Reg. 131/92 (the "*Regulation*"), and is exempt from the requirement to obtain a permit as long as Darvonda complies with the "Code of Agricultural Practice for Waste Management" (the "*Code of Practice*") set out in the

Regulation. Sections 18 and 19 of the Code of Practice specify less stringent standards for air emissions from wood fired boilers than those set out in the Permit.

It should be noted that the Code of Practice is set out in the *Regulation*, immediately after section 2 of the *Regulation*. The relevant sections of the *Regulation*, including the Code of Practice, are reproduced below for convenience:

Interpretation

1 In this regulation:

“agricultural operation” means any agricultural operation or activity carried out on a farm including

- (a) an operation or activity devoted to the production or keeping of livestock, poultry, farmed game, fur bearing animals, crops, grain, vegetables, milk, eggs, honey, mushrooms, horticultural products, tree fruits, berries, and...

Exemptions

2 A person who carries out an agricultural operation in accordance with the Code is, for the purposes of carrying out that agricultural operation, exempt from section 6 (2) and (3) of the *Environmental Management Act*.

Code of Agricultural Practice for Waste Management, April 1, 1992

...

Wood fired boilers

18 Emissions from a wood fired boiler must not exceed 180 mg per cubic metre of particulate matter and 20% opacity, except that

- (a) for a permanent wood fired boiler installed before April 1, 1992 and not operating under a waste management permit, emissions must not exceed 230 mg per cubic metre of particulate matter and 20% opacity, and
- (b) for a permanent wood fired boiler installed before April 1, 1992 and operating under a waste management permit, the emission levels under that permit apply unless those levels are higher than the levels specified in (a).

Odours not prohibited

19 Nothing in this Code is intended to prohibit various odours from agricultural operations or activities on a farm, providing such operations or activities are carried out in accordance with this Code.

Alternatively, Darvonda submits that, if the District Director has the authority to require Darvonda to obtain a permit, he is not authorized to impose conditions that

restrict the use of wood fired boilers (or other activities) where the use of such boilers is governed by a regulation and/or a code of practice.

In the further alternative, Darvonda submits that the District Director has no authority to require a permit regulating emissions of air contaminants produced by "comfort heating", because those emissions are exempt from the prohibitions in section 6(2) and (3) of the *Act* by virtue of section 6(5)(k) of the *Act*.

The District Director submits that he has the jurisdiction to regulate Darvonda's air emissions, pursuant to the *Air Quality Bylaw* and the *Act*.

ISSUES

1. Whether the District Director has the jurisdiction to require Darvonda to obtain a permit in relation to air emissions from its greenhouse operation, and to impose emissions standards in the Permit that are more restrictive than those in the *Regulation*.
2. Whether the District Director is without jurisdiction to require Darvonda to obtain a permit because Darvonda's wood fired boiler is used for "comfort heating" and is, therefore, exempt under section 6(5)(k) of the *Act*.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to this appeal. Other relevant legislation is reproduced in the body of this decision, as needed.

Waste disposal

- 6 (2) Subject to subsection (5), a person must not introduce or cause or allow waste to be introduced into the environment in the course of conducting a prescribed industry, trade or business.
- (3) Subject to subsection (5), a person must not introduce or cause or allow to be introduced into the environment, waste produced by a prescribed activity or operation.
- ...
- (5) Nothing in this section or in a regulation made under subsection (2) or (3) prohibits any of the following:
 - (a) the disposition of waste in compliance with this Act and with all of the following that are required or apply in respect of the disposition:
 - ...
 - (iv) a regulation;
 - ...
 - (d) the discharge of air contaminants authorized by a bylaw made under section 31 (3)(d) [*control of air contaminants in Greater Vancouver*];

...

- (k) emission of an air contaminant from combustion of wood or fossil fuels used solely for the purpose of comfort heating of domestic, institutional or commercial buildings;

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

...

- (3) Despite subsection (1), a director may not issue or, subject to subsection (4), amend, a permit authorizing the introduction of waste into the environment if the introduction is governed by
 - (a) a code of practice that is established in the regulations in relation to the industry, trade or business that applies for the permit or amendment,
 - (b) a code of practice that is established in the regulations in relation to the activity or operation in respect of which the permit or amendment is applied for, or
 - (c) a regulation, unless the regulation requires that a permit be obtained in relation to the discharge of the industry, trade, or business, activity or operation.

Control of air contaminants in Greater Vancouver

- 31** (1) Despite anything in its letters patent or supplementary letters patent, the Greater Vancouver Regional District may provide the service of air pollution control and air quality management and, for that purpose, the board of the regional district may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants.

- (2) The board of the Greater Vancouver Regional District must appoint

...

- (b) a district director and one or more assistant district directors who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a director under this Act.
- (3) Without limiting subsection (1), a bylaw under this section may do one or more of the following:

...

- (d) exempt from the application of section 6 (2) and (3), in relation to the discharge of air contaminants, any operation, activity, industry, trade, business, air contaminant or works that complies with the bylaw, if it also complies with any further restrictions or conditions imposed by this Act or a regulation, permit, order or approved waste management plan under this Act;

...

- (4) A district director may, by order, impose on a person further restrictions or conditions in relation to an operation, activity, industry, trade, business, air contaminant or works covered by a bylaw under subsection (3) (d) in order that the person may qualify for an exemption under that subsection, including a condition that the person obtain a permit.

Conflicts between this Act and bylaws, permits, etc. issued by a municipality

- 37** (2) A bylaw under section 30, 31, 32 or 33 that conflicts with this Act, the regulations, an approved waste management plan or a permit, approval or order, other than one issued by a district director, is without effect to the extent of the conflict.
- (3) A permit, approval or order issued by a district director that conflicts with this Act, the regulations, an approved waste management plan or a bylaw under section 30, 31, 32 or 33, is without effect to the extent of the conflict.

...

- (5) For the purposes of subsections (1) to (4), a conflict does not exist solely because further restrictions or conditions are imposed by the bylaw, permit, licence, approval, order or other document, unless the minister by order declares that a conflict exists.

Transitional

- 140**(1) If under this Act a regulation making authority that under the *Waste Management Act* was provided to the Lieutenant Governor in Council has been provided exclusively to the minister, regulations made by the Lieutenant Governor in Council made under that previous authority that are in force on the date this Act comes into force are deemed to have been made by the minister.

DISCUSSION AND ANALYSIS

- 1. Whether the District Director has the jurisdiction to require Darvonda to obtain a permit in relation to air emissions from its greenhouse operation, and to impose emissions standards in the Permit that are more restrictive than those in the *Regulation*.**

Darvonda's submissions

Darvonda argues that, based on the wording in the relevant provisions of the *Act* and the *Regulation*, the District Director has no power to require a permit for Darvonda's greenhouse operation, or to issue a permit which imposes stricter air emissions standards than those in the Code of Practice.

Specifically, Darvonda submits that section 1 of the *Act* defines "permit" as follows:

"permit" means a permit issued under section 14 or under the regulations;

Based on that definition, and section 31 of the *Act*, Darvonda maintains that the District Director's power to require a permit is found in either section 14 of the *Act* or a regulation. Darvonda notes that, under section 31(2) of the *Act*, a District Director has the powers of a director under the *Act* with respect to the discharge of air contaminants in the GVRD. Darvonda argues that, in respect of permits, the District Director can have no greater powers than a director under section 14 of the *Act*. Darvonda maintains that a director, and therefore a District Director, is not authorized to issue a permit under the following circumstances as set out under section 14(3) of the *Act*:

- 14 (3)** Despite subsection (1), a director may not issue or, subject to subsection (4), amend, a permit authorizing the introduction of waste into the environment if the introduction is governed by
 - (a) a code of practice that is established in the regulations in relation to the industry, trade or business that applies for the permit or amendment,
 - (b) a code of practice that is established in the regulations in relation to the activity or operation in respect of which the permit or amendment is applied for, or
 - (c) a regulation, unless the regulation requires that a permit be obtained in relation to the discharge of the industry, trade, or business, activity or operation.

[underlining added]

Darvonda submits that the legislature's intention in enacting section 14(3) was to prohibit the requirement for a permit where the activity is regulated by a code of practice or a regulation, unless the regulation expressly requires that a permit be obtained. Darvonda notes that section 22 of the *Act* empowers the Minister of Environment to make regulations establishing codes of practice, and the *Regulation* contains the Code of Practice.

Darvonda also notes that the *Regulation* was originally made under the former *Waste Management Act*, but it submits that the *Regulation* is deemed to have been made by the Minister by virtue of the transitional provisions in section 140(1) of the *Act*. Darvonda further submits that, in any event, section 14(3)(c) applies because the *Regulation* is "a regulation", and the *Regulation* does not require that a permit be obtained.

Darvonda submits that the *Regulation* exempts a person, who carries out an agricultural operation in accordance with the Code of Practice, from sections 6(2) and (3) of the *Act*, which prohibit the introduction of waste into the environment. Darvonda also submits that section 6(5)(iv) of the *Act* contemplates that regulations may exempt operators from the prohibitions in sections 6(2) and (3) of the *Act*. Darvonda notes that the *Regulation* sets emission standards for wood fired boilers, and it argues that the *Regulation* is a complete scheme for regulating air emissions from wood fired boilers used in agricultural operations.

Darvonda submits that the effect of the *Regulation* is to allow agricultural operations to introduce waste, including air emissions, into the environment as long as those operations comply with the Code of Practice. Darvonda maintains that its greenhouse operation is an "agricultural operation" within the meaning of the *Regulation*, and the air emissions from its wood fired boiler complies with the criteria in the Code of Practice. Darvonda submits, therefore, that the District Director has no power to regulate emissions from the wood fired boiler at its greenhouse operation.

Darvonda argues that this is consistent with section 14(3) of the *Act*, which not only dispenses with the requirement to obtain a permit under section 14, but also dispenses with the permitting requirements under section 31(2), where the activity is governed by a regulation and/or a code of practice, as in this case. Darvonda maintains that section 14(3) applies to all permits issued pursuant to the *Act*. Darvonda argues that it would be absurd if the legislature granted the District Director two different powers to require permits: a limited one under section 14 of the *Act*; and, an unlimited one under section 31 of the *Act*. Darvonda argues that the legislature would not intend a District Director to be able to exercise authority under section 31 in order to avoid the limiting words in section 14(3). That would result in situations where one statutory authority could issue a permit and another could nullify it.

Darvonda acknowledges that, under section 31(1)(d) of the *Act*, the GVRD may, by bylaw, exempt operations "from the application of section 6(2) and (3) in relation to air contaminants", but it submits that bylaw exemptions are in addition to the exemptions in regulations. Moreover, section 31(3)(d) states that such a bylaw may be made "if it also complies with any further restrictions or conditions imposed by this Act or a regulation... under this Act." Darvonda submits that a District Director cannot require permits or impose further restrictions under section 31(4) of the *Act* on matters that are exempted under section 6(5) by a regulation of the Lieutenant Governor in Council or the Minister. Rather, section 31(4) states that a District Director "may, by order, impose on a person further restrictions or conditions in relation to an operation... covered by a bylaw under subsection (3)(d) in order that the person may qualify for an exemption under that subsection,

including a condition that a person obtain a permit" [underlining added]. In other words, Darvonda submits that section 31 does not authorize the GVRD to create a bylaw imposing further restrictions on operations that are already exempted by a regulation or a code of conduct; rather, the GVRD can only create further exemptions for otherwise prohibited activities.

Darvonda argues that nothing in the *Act* suggests that the legislature intended to give the GVRD or a District Director the power to supersede a regulation of the Lieutenant Governor in Council or the Minister. In that regard, Darvonda notes that the opening words in section 31 are "Despite anything in its letters patent or supplementary letters patent", and not "despite anything in this Act". Darvonda argues that the express wording in sections 6 and 14 of the *Act*, along with the *Act's* definition of "permit", also support this conclusion. Moreover, Darvonda submits that section 6 is the cornerstone of the *Act*, and once an operation is exempted by regulation from sections 6(2) and (3), there is no room to further regulate that activity under section 31.

Moreover, Darvonda argues that the *Act* uses the word "bylaw" differently from the word "regulation", thereby indicating that the legislature intended "bylaw" to mean something different from "regulation" in the context of the *Act*.

Regarding section 37 of the *Act*, which addresses conflicts between the *Act* and bylaws or permits of a municipality, Darvonda submits that section 37 is inapplicable in this case because the GVRD has no power to require a permit for Darvonda's greenhouse operation.

Alternatively, if the District Director is authorized to require a permit in relation to agricultural operations, Darvonda submits that he has no power to require a permit with conditions that set standards for emissions from wood fired boilers, because those standards are addressed in the *Regulation*, whether it is deemed to be a regulation or a code of practice.

District Director's submissions

The District Director submits that the powers in section 31 of the *Act* are an independent jurisdiction that exists in addition to any restrictions or exemptions that may be imposed or granted under other sections of the *Act* or the regulations. He submits that it is evident from the language in section 31, and the fact that the GVRD is the largest urban centre in the province, that the purpose of section 31 is to allow the GVRD to tailor air quality regulations to the urban circumstances of the GVRD, including imposing more restrictive emissions limits.

The District Director maintains that the *Regulation* does not grant agricultural operations an affirmative right to emit air contaminants; rather, it exempts such operations from sections 6(2) and (3) of the *Act* as long as they meet certain air emissions standards. The District Director further submits that the *Regulation* does not exempt agricultural operations from GVRD bylaws adopted pursuant to section 31 of the *Act*. In that regard, the District Director notes that section 2 of the *Regulation*, which states as follows, does not mention section 31:

- 2 A person who carries out an agricultural operation in accordance with the Code is, for the purposes of carrying out that agricultural operation, exempt from section 6 (2) and (3) of the *Environmental Management Act*.

Regarding the application of section 14(3) of the *Act*, the District Director submits that the *Regulation* is not a "code of practice" within the meaning of the *Act*, based on the definition of that term in section 1 of the *Act*. However, the District Director submits that the *Regulation* is a "regulation" in the context of the *Act*. He further submits that, when considering the application of section 14(3)(c), the Panel must consider that section 1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, defines "regulation" to include a "bylaw... enacted... in execution of a power conferred under an Act". The District Director submits, therefore, that the *Air Quality Bylaw* is a "regulation" within the meaning of section 14(3)(c) that requires agricultural operations to have a permit in order to emit air contaminants.

Additionally, the District Director submits that section 37 of the *Act* governs apparent conflicts between a permit issued by the District Director and the provisions of the *Act* or its regulations. In particular, sections 37(3) and (5) state as follows:

- (3) A permit, approval or order issued by a district director that conflicts with this Act, the regulations, an approved waste management plan or a bylaw under section 30, 31, 32 or 33, is without effect to the extent of the conflict.

...

- (5) For the purposes of subsections (1) to (4), a conflict does not exist solely because further restrictions or conditions are imposed by the bylaw, permit, licence, approval, order or other document, unless the minister by order declares that a conflict exists.

[underlining added]

The District Director submits that, in this case, there is no conflict because the Permit simply imposes "further restrictions or conditions" beyond those imposed by the *Regulation*. The District Director maintains that the Permit does not conflict with the *Regulation*, because the Permit does not require agricultural operations to do something that the *Regulation* forbids, in that compliance with the Permit's emissions standards means compliance with the *Regulation's* emission standards. In particular, the District Director submits that the Permit does not forbid Darvonda from using wood fired boilers; rather, it imposes additional conditions on the use of such boilers. Compliance with both the Permit and the *Regulation* is possible. Moreover, the Minister has not declared that a conflict exists.

In support of those submissions, the District Director cites a number of judicial decisions regarding conflicts between laws.

Panel's findings

The initial part of this discussion is a review of the principles of statutory interpretation, and the relevant statutory provisions and case law. Specific findings

regarding the Permit, and the emissions standards it contains, follow the general discussion of the law.

In statutory interpretation, it is presumed that legislative provisions which apply to the same set of facts are intended to work together to form an internally consistent and rational framework. Applying that presumption to the present case, it is assumed that the legislature intended the relevant provisions of the *Act*, the *Regulation*, and any GVRD bylaw created pursuant to section 31 of the *Act*, to work together in regulating emissions of air contaminants in the GVRD. The laws applicable to this subject matter may overlap, but they should not contradict or conflict with one another. If two or more provisions cannot both apply without conflict, conflict avoidance or resolution techniques may be applied, such as the paramountcy of one type of legislation over another.

However, as stated at page 265 of *Sullivan and Driedger on the Construction of Statutes* (4th ed., 2002):

The courts do not resort to the conflict avoidance strategies at their disposal unless there is a genuine conflict. For this purpose, conflict is narrowly defined.

In *114957 Canada Ltée. (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. 42 (Q.L.) (hereinafter *Spraytech*), the Supreme Court of Canada discussed the test for conflicts between municipal bylaws and provincial legislation. It held that, when considering whether a bylaw created pursuant to provincial legislation conflicts with the provincial legislation, the "impossibility of dual compliance" test set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, applies. That test is an operational one: conflict exists where compliance with one law would require breach of another. That test, as applied in various lower court decisions, is discussed by the majority of the Court in paragraph 38 of *Spraytech*:

The [BC Court of Appeal] summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." See also *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620 (S.C.J.), at pp. 629-30: "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible"; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052 (Sup. Ct.), at p. 19: [TRANSLATION] "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

[underlining added]

Additionally, the Panel notes that, in section 37 of the *Act*, the legislature contemplated the possibility of conflicts between bylaws or actions of the GVRD or the District Director, on the one hand, and the provisions of the *Act* and regulations, on the other hand. It is notable that section 37(5) states that, "For the purposes of subsections (1) through (4), a conflict does not exist solely because further restrictions or conditions are imposed by the bylaw, permit, licence, approval, order or other document, unless the minister by order declares that a

conflict exists." It is also notable that, in the present case, the Minister has not exercised his power under section 37(5).

With those principles of statutory interpretation in mind, the Panel has considered the possible source(s) of legal jurisdiction for the District Director to require Darvonda to hold a permit regulating the discharge of air contaminants from its greenhouse operation, and whether all of the applicable laws in this case can stand together without conflict.

Section 1 of the *Act* defines "permit" as "a permit issued under section 14 or under the regulations". That definition points to two possible sources of authority for a district director of the GVRD to issue permits: (1) section 14 of the *Act*; and, (2) "regulations" under the *Act*. Those sources of authority must be considered together with the powers of the GVRD and district directors under section 31 of the *Act*.

Before considering section 14 of the *Act*, it is important to identify the relevant "regulations" in this case, because section 14(3) creates limitations on the power to issue permits under section 14(1), depending on whether a waste emission is regulated by a regulation.

There is no question that the *Regulation* is a relevant regulation in this case, because it addresses certain air contaminant emissions from agricultural operations. There is also no question that the *Air Quality Bylaw* is relevant, but the parties dispute whether it is a "regulation" under the *Act*.

Section 1 of the *Interpretation Act* defines "regulation" as including a "bylaw or other instrument enacted... in execution of a power conferred under an Act". The *Air Quality Bylaw* was created under the *Act's* predecessor legislation (the former *Waste Management Act*), and the parties have not submitted that the *Air Quality Bylaw* is not a bylaw for the purposes of section 31 of the *Act*. The *Act* contains no definition of "regulation", nor does it state that a bylaw made pursuant to section 31 is not a regulation for the purposes of the *Act*. In the absence of a clear contrary intention in the *Act*, the Panel finds that the definition of "regulation" in the *Interpretation Act* applies to the *Act*, and the *Air Quality Bylaw* is a regulation under the *Act*. As such, the *Air Quality Bylaw* is on an equal footing with the *Regulation*.

Alternatively, if the Panel is wrong and the *Air Quality Bylaw* is a form of subordinate legislation over which the *Regulation* has paramountcy, the Panel finds that the principles of statutory interpretation indicate that the question of paramountcy need only be considered if the *Air Quality Bylaw* is found to conflict with the *Regulation* or the *Act*.

Turning to section 14 of the *Act*, district directors have authority to issue permits by virtue of section 14(1) together with section 31(2)(b) of the *Act*. Section 14(1) says that a director "may issue a permit authorizing the introduction of waste into the environment...." Section 31(2)(b) of the *Act* authorizes the GVRD board to appoint a district director "who may, with respect to the discharge of air contaminants in the Greater Vancouver Regional District, exercise all the powers of a director under this Act". Thus, with respect to the discharge of air contaminants

in the GVRD, the District Director has the powers of a director under section 14 of the *Act*.

The authority granted under section 14(1) of the *Act* is subject to sections 14(3) and (4), with section 14(3) being the focus in this case because it addresses the issuance of permits. Section 14(3) prohibits a director from issuing a permit if the introduction of waste is governed by a code of practice in a regulation, or a regulation unless the regulation “requires” that a permit be obtained. It is important to note that the limitation in section 14(3) focuses on the waste being discharged to the environment, and not on the operation, activity or industry in question. Section 14(3) states that “a director may not issue... a permit authorizing the introduction of waste into the environment if the introduction is governed by... a code of practice... or... a regulation, unless the regulation requires that a permit be obtained in relation to the discharge...” [underlining added].

The Panel agrees with Darvonda that the *Regulation* either contains a code of practice or is a regulation within the meaning of section 14(3) of the *Act* that regulates certain waste emissions; namely, the amount of particulate matter, the opacity, and the odour emitted from wood fired boilers used in agricultural operations. As such, section 14(3) and the *Regulation* together generally prohibit the issuance of a permit under section 14(1) that purports to regulate the amount of particulate matter, the opacity, or the odour emitted from wood fired boilers used in agricultural operations.

The *Air Quality Bylaw* is also a regulation, and it also regulates certain waste discharges; namely, the emission of air contaminants within the GVRD. Thus, it is also a regulation within the meaning of section 14(3) of the *Act*. Insofar as the *Air Quality Bylaw* purports to regulate, in the general sense, air contaminant emissions from wood fired boilers used by agricultural operations in the GVRD, it overlaps with the *Regulation*. However, the *Air Quality Bylaw*, along with section 31(4) of the *Act*, differs from the *Regulation* in that it grants discretion to issue permits in relation to air contaminant emissions in the GVRD. The question is whether the *Regulation*, which does not require a permit for certain emissions from agricultural operations, can apply without conflicting with the *Air Quality Bylaw*, which grants district directors discretion to issue permits regulating emissions in the GVRD. In other words, can the relevant provisions of both be applied such that obeying one does not necessarily result in disobeying the other.

To answer that question, the Panel has examined the source of the GVRD’s and the District Director’s powers under the *Act*, and to clarify exactly what powers are bestowed on the GVRD and the District Director.

Section 31(1) of the *Act* states that the GVRD “... may, by bylaw, prohibit, regulate and otherwise control and prevent the discharge of air contaminants” in the GVRD [underlining added]. Section 31(3) provides further direction regarding the GVRD’s power to make such bylaws. Section 31(3)(d) is particularly relevant in this case, because it is cross-referenced in section 31(4), which addresses the District Director’s powers. Section 31(3)(d) states:

Without limiting subsection (1), a bylaw under this section may do one or more of the following:

...

- (d) exempt from the application of section 6(2) and (3), in relation to the discharge of air contaminants, any operation, activity, industry, trade, business, air contaminant or works that complies with the bylaw, if it also complies with any further restrictions or conditions imposed by this Act or a regulation, permit, order or approved waste management plan under this Act;

Thus, the GVRD may create bylaws that exempt an operation from the prohibitions in section 6(2) and (3) of the *Act* if the operation complies with the bylaw and any further restrictions or conditions imposed by the *Act*, regulations, or certain administrative instruments issued under the *Act*. The language in section 31(3)(d) indicates that the function of such a bylaw is consistent with the function of the *Regulation*, as stated in section 2 of the *Regulation*: both exempt a person from sections 6(2) and (3) of the *Act*, as long as the person complies with other applicable requirements. This language reinforces that the legislature contemplated a coherent scheme consisting of the *Act*, its regulations (including GVRD bylaws), and administrative instruments issued under the *Act*, all working together to regulate air contaminant emissions in the GVRD.

Next, the Panel has considered whether the relevant provisions in the *Air Quality Bylaw* are consistent with the applicable provisions of the *Act* and the *Regulation*, as was contemplated by the legislature. Section 4.1 of the *Air Quality Bylaw* provides district directors with the discretion to issue permits regulating the discharge of an air contaminant in the GVRD. Section 4.1 of the *Air Quality Bylaw* states, in part, as follows:

- 4.1 The District Director may issue a Permit to allow the discharge of an Air Contaminant subject to requirements for the protection of the Environment that on reasonable grounds the District Director considers advisable and without limiting the generality of the foregoing the District Director may in the Permit
- (a) place limits and restrictions on the quantity, frequency and nature of an Air Contaminant permitted to be discharged and the term for which discharge may occur;

...

The Panel finds that section 4.1 of the *Air Quality Bylaw* is consistent with section 31(3)(d) of the *Act*, in that it contemplates permits that exempt operations within the GVRD from the prohibitions in section 6(2) and (3) of the *Act*. Section 4.1 does not, on its face, conflict with the *Regulation*: it does not purport to regulate the levels of particulate matter, opacity, or odour emitted by wood-fired boilers used in agricultural operations. In fact, section 4.1 of the *Air Quality Bylaw* provides a broad discretion to issue permits which is similar to the discretion granted in section 14(1) of the *Act*. However, the *Air Quality Bylaw* lacks the limiting language found in sections 14(3) and (4) of the *Act*. The absence of such provisions in the *Air*

Quality Bylaw does not, on its face, mean that the *Air Quality Bylaw* conflicts with the *Act*: it is possible to comply with both the *Air Quality Bylaw* and the *Regulation*. The Panel's finding that there is no conflict between the *Air Quality Bylaw* and the other applicable laws in this case is strengthened by the fact that, under section 31(5) of the *Act*, the Minister may require the GVRD "to amend, suspend or cancel any bylaw or part of a bylaw made under this section if the minister considers it necessary in the public interest", and the Minister has not done so. If the Minister considered section 4.1 of the *Air Quality Bylaw* to be contrary to the public interest because it conflicts with the statutory scheme created by the legislature, he could have asked the GVRD to amend, suspend or cancel that section.

Nevertheless, the absence of a provision like section 14(3) of the *Act* in the *Air Quality Bylaw* does result in a "gap" in the *Air Quality Bylaw*. That gap creates the potential for district directors to exercise their discretion to issue permits in a way that conflicts with the section 14(3) of *Act* and the *Regulation*. In order to understand the scope of a district director's discretion to issue permits under the *Air Quality Bylaw*, it is important to examine section 31(4) of the *Act*, which provides district directors with certain powers related to bylaws made under section 31(3)(d), including the *Air Quality Bylaw*.

Section 31(4) states that a district director "may, by order, impose on a person further restrictions or conditions in relation to an operation... covered by a bylaw under subsection (3)(d) in order that the person may qualify for an exemption under that subsection, including a condition that the person obtain a permit." Thus, section 31(4) authorizes a district director to require a person to obtain a permit in relation to an operation covered by the *Air Quality Bylaw* so that the person may qualify for an exemption under section 31(3)(d); namely, an exemption from sections 6(2) and (3) of the *Act*. However, section 31(4) does not empower district directors to require a person to obtain a permit in relation to waste emissions already covered by another regulation under the *Act*, or to require a person to obtain a permit despite a regulation governing the waste emission or despite section 14(3) of the *Act*. If the legislature had intended that to be so, section 31(4) could have been worded differently, such as to exempt district directors from section 14(3) of the *Act*, or section 31 could have made GVRD bylaws paramount within the GVRD over other regulations under the *Act*. Rather, in section 37(3) of the *Act*, the legislature addressed conflicts resulting from a district director's exercise of discretion to issue a permit, as follows:

- (3) A permit, approval or order issued by a district director that conflicts with this Act, the regulations... or a bylaw under section 30, 31... is without effect to the extent of the conflict.

[underlining added]

Based on the analysis above, the Panel finds that a district director's discretion to issue permits under section 31(4) of the *Act* and section 4.1 of the *Air Quality Bylaw* cannot be exercised in a manner that conflicts with, or is inconsistent with, section 14(3) of the *Act* or with the applicable provisions in the *Regulation*. In order for the *Act*, the *Regulation*, and the *Air Quality Bylaw* to work together in a coherent manner, a district director's discretion to issue permits must respect section 14(3) of the *Act* and the *Regulation*. This means that, with respect to

particulate matter, opacity, and odours emitted from wood fired boilers used in agricultural operations within the GVRD, district directors have no authority to require a permit that imposes further requirements beyond those set out in the *Regulation*. However, district directors may, for agricultural operations in the GVRD, issue permits that set out standards for air contaminant emissions that are not addressed in the *Regulation*. In other words, where there are gaps in the *Regulation*, district directors may issue permits that fill those gaps, but district directors may not attempt to regulate emissions that the *Regulation* already regulates.

In the present case, the District Director issued the Permit pursuant to section 14(1) of the *Act* and section 4.1 of the *Air Quality Bylaw*. However, regardless of whether the District Director issued the Permit under section 14(1) of the *Act*, section 4.1 of the *Air Quality Bylaw*, or both, the Panel finds his discretion must be exercised in a manner that is consistent with section 14(3) of the *Act* and the relevant sections of the *Regulation*. For the reasons provided above, the Panel finds that the District Director had no authority to require the Permit insofar as it purports to impose requirements beyond those set out in the *Regulation* with respect to levels of particulate matter, opacity, and odours emitted from the wood fired boiler used in Darvonda's greenhouse operation.

Given those findings, the Panel notes that the conflict resolution provisions in section 37 of the *Act* are not engaged in this case. This is not a case where the Panel must consider whether there is a conflict between the *Regulation* and properly made conditions in a permit, because the impugned conditions in the Permit are the result of an improper exercise of discretion. The District Director exceeded his authority under the *Act* in imposing those conditions, and therefore, they are of no force.

2. Whether the District Director is without jurisdiction to require Darvonda to obtain a permit because Darvonda's wood fired boiler is used for "comfort heating" and is, therefore, exempt under section 6(5)(k) of the Act.

Section 6(5)(k) of the *Act* exempts the "emission of an air contaminant from combustion of wood or fossil fuels used solely for the purpose of comfort heating of domestic, institutional or commercial buildings" from the prohibitions in sections 6(2) and (3) of the *Act*.

Darvonda submits that its greenhouses are "commercial buildings" that are heated to temperatures that are comfortable for people who work in the buildings and plants that grow in the buildings. Darvonda argues, therefore, that its greenhouse operation consists of "commercial buildings" that are heated for "comfort heating" within the meaning of section 6(5)(k) of the *Act*. On that basis, Darvonda maintains that the District Director has no jurisdiction to regulate or impose restrictions on emissions from its wood fired heaters by requiring Darvonda to obtain a permit.

The District Director submits that, even if section 6(5)(k) could exempt a facility from a GVRD bylaw, it does not apply in this case because it applies only when the heat is used "solely" for comfort heating. The District Director submits that

Darvonda's greenhouses are heated primarily to encourage the growth and propagation of plants. Even if the temperature is comfortable for workers, it cannot be said that the greenhouse is heated solely for the workers' comfort. In addition, the District Director submits that thermal comfort is a state of mind involving satisfaction with the thermal environment, which excludes plants. Moreover, the District Director submits that section 6(5)(k) applies only to comfort heating in domestic, institutional or commercial buildings, whereas Darvonda's greenhouse is an agricultural operation, an industrial operation, or both.

The Panel agrees with the District Director that Darvonda's greenhouses are heated primarily to encourage the growth and propagation of plants. The wood fired boilers used at Darvonda's greenhouse operation are not used "solely for the purpose of comfort", and therefore, the Panel finds that section 6(5)(k) does not apply. In addition, the Panel is not persuaded that "comfort" is a quality or state of being that can be attributed or applied to plants.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons provided above, the Panel finds that the Permit is without effect to the extent that it imposes emissions standards that exceed those set out in the *Regulation*.

Accordingly, the appeal is allowed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

July 27, 2007