Environmental Appeal Board

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DECISION NOS. 2013-EMA-017(a), 019(b), 020(a) and 021(a)

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

BETWEEN:	Cobble Hill Holdings Ltd.	**APPLICANT (THIRD PARTY)**
AND:	Ronald Witherspoon Cowichan Valley Regional District John and Lois Hayes Richard Sanders	**APPELLANTS**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Shawnigan Residents Association	**THIRD PARTY (APPELLANT)**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on January 13, 2014	

APPEARING:	For the Applicant:	L. John Alexander, Counsel Aurora Faulkner-Killam, Counsel
	For the Appellants:	
	Ronald Witherspoon	Ronald Witherspoon
	Cowichan Valley Regional District	Alyssa Bradley, Counsel
	John and Lois Hayes	John and Lois Hayes
	Richard Sanders	Richard Sanders
	For the Respondent:	Stephen King, Counsel Cory Bargen, Counsel
	For the Third Party:	Sean Hern, Counsel

PRELIMINARY APPLICATIONS

APPLICATIONS

[1] On December 11, 2013, Cobble Hill Holdings Ltd. ("Cobble Hill") applied to dismiss the appeal filed by Ronald Witherspoon, and applied to strike certain

grounds for appeal from the Notices of Appeal filed by the Cowichan Valley Regional District (the "CVRD"), John and Lois Hayes and Richard Sanders. Cobble Hill argues that the subject matter of Mr. Witherspoon's appeal, and the specified grounds for appeal set out in the other Notices of Appeal, are beyond the jurisdiction of the Board.

[2] In the alternative, Cobble Hill applies to strike certain paragraphs of the CVRD's Notice of Appeal on the grounds of abuse of process. In the further alternative, Cobble Hill asks the Board to order the CVRD to post "security for costs" pursuant to section 95(1) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*").

[3] The applications were conducted by way of written submissions.

BACKGROUND

[4] All of the subject appeals were filed against permit PR-105809 (the "Permit"), which was issued to Cobble Hill on August 21, 2013. The Permit was issued by Hubert Bunce, delegate of the Director, Ministry of Environment (the "Director"), pursuant to section 14 of the *Act*.

The Permit

[5] The Permit authorizes Cobble Hill "to discharge refuse to ground" from a contaminated soil treatment facility and a landfill facility. Specifically, the Permit authorizes Cobble Hill to deposit and bury up to 100,000 tonnes of contaminated soil per year. The Permit also authorizes the discharge of storm water and treated effluent to an ephemeral stream which eventually flows into Shawinigan Creek, which flows into Shawnigan Lake.

[6] The soil treatment facility, landfill facility, and the points of discharge are located on property (Lot 23) located approximately five kilometres south of, and upslope from, Shawnigan Lake.

[7] Lot 23 is adjacent to Lot 21, which is the site of a rock quarry. Lot 23 is owned by Cobble Hill. Lot 21 is owned by 0782484 B.C. Ltd. The quarry is operated by South Island Aggregates Ltd. ("South Island Aggregates").

[8] Cobble Hill, South Island Aggregates and 0782484 B.C. Ltd. have some corporate directors in common.

[9] A more detailed background on the Permit may be found in the Board's decision on two applications for a stay (*Shawnigan Residents Association and Cowichan Valley Regional District v. Director*, Decision Nos. 2013-EMA-015(a) and 019(a), November 15, 2013).

The Appeals

[10] Five appeals were filed against the decision to issue the Permit. The Board received appeals from:

- the Shawnigan Residents Association (Appeal No. 2013-EMA-015);

- Ronald Witherspoon (Appeal No. 2013-EMA-017);
- the CVRD (Appeal No. 2013-EMA-019);
- John and Lois Hayes (Appeal No. 2013-EMA-020); and
- Richard Sanders (Appeal No. 2013-EMA-021).

[11] On November 19, 2013, the Board advised the Appellants that it was joining the appeals for the purposes of a hearing. The Board also invited each Appellant to participate as a Third Party in the others' appeals.

[12] A four-week oral hearing has been scheduled to hear the appeals. The hearing is set to commence on March 3, 2014.

The Applications by Cobble Hill

[13] Cobble Hill applies to strike Mr. Witherspoon's appeal in its entirety, and to strike specified grounds for appeal set out in the appeals by the CVRD, Mr. and Mrs. Hayes, and Mr. Sanders. It does not challenge any of the grounds for appeal set out in the appeal by the Shawnigan Residents Association (the "Residents Association").

[14] Cobble Hill submits that the appeals by Mr. Witherspoon, the CVRD, the Hayes', and Mr. Sanders, raise the following issues which are beyond the scope of the *Act* and, therefore, the jurisdiction of both the Director and the Board to consider:

- impact on property/business values;
- economic impact or loss;
- land use regulation (zoning);
- transportation of soil on the Malahat;
- enforcement of covenants;
- intergovernmental comity;
- weight given to public/political opinion; and
- reliability of operator/compliance history of non-parties.

[15] Based upon this alleged lack of jurisdiction over the above-noted matters, Cobble Hill asks the Board for an order to strike:

a) the entire appeal of Mr. Witherspoon;
b) paragraphs 3, 4, 5 and 6 of the CVRD's Notice of Appeal;
c) paragraph 1 of the Notice of Appeal by John and Lois Hayes; and
d) paragraphs c, g, h, i, l-o and q of the Notice of Appeal by Mr. Sanders.

[16] As stated above, Cobble Hill submits that the above noted appeals and grounds for appeal raise issues that are beyond the jurisdiction of the Director and the Board. It further submits that, if these issues are allowed to proceed, they will increase the length of the hearing, the cost to all parties and will prejudice Cobble

Hill. The specific wording of the Appellants' grounds for appeal at issue will be set out later in this decision.

Parties' Positions on the Applications

[17] Each of the Appellants opposes the orders sought.

[18] The Director consents to some of the applications; specifically, he agrees that issues of zoning, property/business values, and transportation are beyond the jurisdiction of the Director and the Board to consider under the *Act*, and he expressly consents to Cobble Hill's applications as they pertain to those matters. However, in relation to the other issues, the Director is concerned that Cobble Hill's applications reduce broadly framed grounds for appeal to a few insufficiently defined words. Consequently, the Director is not able to determine whether all of the disputed grounds for appeal are clearly within, or beyond, the Director's and/or the Board's jurisdiction to consider. For instance, while the Director agrees that "public opinion" is not an independent ground for appeal, it is not sufficiently clear from the Appellants' wording that this is the sole – or only - interpretation of that ground for appeal.

[19] The Residents Association provided submissions on the applications. It submits that it has a significant interest in some of the interpretive issues, and provided detailed submissions on the nature of the test to be applied to these applications. It also made submissions opposing the specific orders sought against the other Appellants. Cobble Hill objected to these latter submissions. Regarding that objection, the Board finds that the Residents Association is a Third Party in the individual Appellants' appeals, and the Board accepts the submissions on that basis. However, in doing so, the Board recognizes that the Residents Association cannot speak for those individual Appellants.

ISSUES

[20] In this decision, the Board has considered the following issues:

1. What test should the Board apply to Cobble Hill's applications to strike?
2. What is the Board's jurisdiction in relation to the appeals? In particular, what matters may the Board consider in the context of these appeals?
3. Should the application to strike Mr. Witherspoon's appeal be granted?
4. Should the application to strike the CVRD's grounds for appeal in paragraphs 3, 4, 5 and 6 be granted?
5. Should the application to strike John and Lois Hayes' ground for appeal in paragraph 1 be granted?
6. Should the application to strike Richard Sanders' grounds for appeal in paragraphs c, g, h, i, l-o and q be granted?
7. Should the Board order the CVRD to post security for costs in the circumstances of this case?

RELEVANT LEGISLATION

[21] The Permit was issued pursuant to section 14 of the *Act* which provides as follows:

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:

(a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;

(b) require the permittee to give security in the amount and form and subject to conditions the director specifies;

(c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

(d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

(f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy potential from wastes.

(2) A permit does not authorize the introduction of hazardous waste into the environment unless it specifies the characteristics and quantity of hazardous waste that may be introduced.

(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.

(4) A director, on receipt of an application or on his or her own initiative, may amend a permit authorizing an introduction of waste described in subsection (3) (a), (b) or (c), if

(a) in the opinion of the director, the amendment is necessary for the protection of the environment, or

(b) the amendment is for one or more or the following purposes:

(i) a change of ownership or name;

(ii) a change of address;

(iii) a decrease in the authorized quantity of the discharge, emission or stored material;

(iv) an increase of not more than 10% in the authorized quantity of the discharge, emission or stored material;

(v) a change in the authorized quality of the discharge, emission or stored material such that, in the opinion of the director, the change has resulted in or will result in an equal or lesser impact on the environment;

(vi) a change in a monitoring program;

(vii) a change to the works, method of treatment or any other condition of a permit or an approval such that, in the opinion of the director, the change has resulted in or will result in an equal or lesser impact on the environment.

[22] The Board's jurisdiction and powers in relation to appeals under the *Act* are set out in Part 8 of the *Act*. Of relevance to these applications are the following sections:

Appeals to Environmental Appeal Board

100(1) A person aggrieved by a decision of a director … may appeal the decision to the appeal board in accordance with this Division.

…

Procedure on appeals

102(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[23] The Board's power to award costs and security for costs is set out in section 95(1) of the *Act*, which states:

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

[24] The Board notes that some of the parties referenced section 31(1)(a) of the *Administrative Tribunals Act*. This section does not apply to the Board (see section 93(11) of the *Act*).

DISCUSSION AND ANALYSIS

1. What test should the Board apply to Cobble Hill's applications to strike?

[25] The submissions received by the Board in relation to this issue are as follows.

Cobble Hill's Submissions

[26] Cobble Hill submits that the disputed grounds for appeal are not within the jurisdiction of the Director; therefore, they cannot be raised in the appeals and should be struck from the respective appeals. To determine jurisdiction, Cobble Hill submits that the Board should look no further than the words of the statute. It argues as follows.

[27] The Board's powers, and the appeal process generally, are created by statute.

[28] Unlike superior courts, the Board does not have inherent jurisdiction and cannot, in the course of an appeal, exercise a greater or broader inquiry than would have been open to the decision-maker - in this case, the Director. Cobble Hill submits that the Board has previously recognized this limitation in *Beckei v. British Columbia (Ministry of Health)*, [1995] B.C.E.A. No. 40 (QL). In that case, the Board found as follows regarding its jurisdiction:

> The Environmental Appeal Board is a statutory body, established under section 11 of the *Environment Management Act* [now section 93 of the *Environmental Management Act*]. As an "inferior tribunal", an administrative agency such as the Board "only possesses the powers given to it either

> expressly or by necessary implication or through some general statute" [such as the *Statutory Powers Procedure Act* in Ontario). (R.W. Macaulay and J. Sprague, Practice and Procedure before Administrative Tribunals (Carswell, 1995) at page 29-1.]
>
> Unlike a superior court, it has no inherent jurisdiction. (page 5)

[29] Cobble Hill states that this finding is reinforced by a decision of the Supreme Court of Canada in *Bell v. Ontario Human Rights Commission*, [1971] SCR 756 [*Bell*]. In *Bell*, the Court considered the jurisdiction of a statutory board of inquiry. It states at paragraph 775, as follows:

> ... The powers given to a board of inquiry are to enable it to determine whether or not there has been discrimination in respect of matters within the scope of the Act. It has no power to deal with alleged discrimination in matters not within the purview of the Act or to make recommendations with respect thereto.

[30] Accordingly, Cobble Hill submits that the matters that the Board may properly consider as a ground for appeal must come within the "four corners" of its statutory powers.

The Residents Association's Submissions

[31] When deciding whether or not to grant Cobble Hill's applications, the Residents Association advocates the adoption of a similar test used by Canadian courts to strike claims; that is, claims should be struck only when it is "plain and obvious that the claim at issue cannot succeed". It refers to the Supreme Court of Canada's description of the test in *Hunt v. Carey*, [1990] 2 S.C.R. 959. In *Hunt v. Carey*, the Court states as follows:

> 33. Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: <u>assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action?</u> As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". <u>Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case</u>. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a). [Emphasis by the Residents Association]

[32] The Residents Association notes that the Court also emphasized the importance of allowing novel claims to proceed in paragraph 52:

> 52. The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that

> where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[33] The Residents Association also argues that the Board should allow a defective pleading to be remedied by an amendment for the reasons adopted by the BC Supreme Court in *Speckling v. Communications, Energy and Paperworkers' Union of Canada, Local 76*, 2012 BCSC 1395. In *Speckling*, the Court quoted with approval from *Ross v. British Columbia (Minister of Public Safety and Solicitor General)*, 2009 BCSC 1811, as follows:

> 14. As long as the pleadings disclose a triable issue, either as it exists or as it may be amended, the issue should go to trial: *Citizens for Foreign Aid Reform Inc v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) 34.
>
> A court is obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies *Operation Dismantle*: at page 451. <u>This is particularly important in the case of a self-represented plaintiff</u>. [Emphasis in *Speckling*]

[34] In that case, Mr. Speckling was ordered to redraft his pleading so that it conformed with the applicable court rules.

[35] In the context of the present applications, the Residents Association submits that the Board should endeavour to clarify and understand what the unrepresented Appellants are concerned about, and ascribe to their Notices of Appeal a "broad and liberal reading that ensures that the process fairly addresses their concerns and that legitimate grounds of appeal are not excluded just because they are novel or because they may not be expressed entirely clearly."

Mr. Sanders' Submissions

[36] Mr. Sanders submits that striking pleadings deprives a party of the right to be heard. Therefore, it should only be done where "it is clear that the matters raised are outside of the Board's mandate." He submits that where there are questions as to the relevant facts or law, it is important for the Board to hear full arguments before dismissing issues "out of hand".

The Director's Submissions

[37] The Director agrees with Cobble Hill that the Board's jurisdiction is limited to the question of whether the Permit was properly issued in accordance with the governing legislation.

Cobble Hill's reply

[38] In response to the Residents Association, Cobble Hill submits that the Residents Association has misinterpreted and misapplied the "no reasonable cause of action" test from *Hunt v. Carey*. It submits that the applicable rule considered in *Hunt v. Carey* was Supreme Court Rule 19(24), which is now Rule 9-5(1) of the

current Supreme Court Civil Rules. Section 19(24), as considered by the Supreme Court of Canada, states:

> **19**(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be, or
>
> (b) it is unnecessary, scandalous, frivolous, or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client. [Cobble Hill's emphasis]

[39] Cobble Hill submits that this provision preserves the inherent jurisdiction of superior courts to entertain claims, even if they seek to expand the law or permit the development of the law by allowing new and novel claims to proceed. It submits that superior courts have original jurisdiction in law and in equity which is different from the jurisdiction of the Director and the Board. In the present case, it submits that the jurisdiction of the Director and the Board is limited to the powers granted by section 14 and 100 of the *Act*, "all of which revolve around the issuance of permits subject to requirements for the protection of the environment, and the appeal/review of those permit decisions."

[40] Cobble Hill submits that the Board should apply a straightforward process of determining jurisdiction. It submits that the Board does not need to determine the scope of section 14 of the *Act* to determine these issues. While the scope of section 14 and section 100 of the *Act* will be the focus of the appeals, the applications simply seek to strike those matters wholly outside of the jurisdiction of "an expert decision maker under an environmental statute expected to bring environmental expertise to bear."

[41] Regarding the test to be applied to unrepresented litigants, Cobble Hill submits that the Board's jurisdiction cannot change depending on whether an appellant is, or is not, represented.

The Panel's Findings

[42] As a starting point, even though the summary dismissal powers set out in section 31(1) of the *Administrative Tribunals Act* do not apply to the Board, the Panel finds that it has the jurisdiction to decide whether, as a preliminary matter, the issues raised by the appeal are within its jurisdiction. This is supported by the provisions in part 8 of the *Act* establishing the Board and its processes. Section 94 states in part:

94 (2) A person or body, including the appellant, that has full party status in an appeal may

(a) be represented by counsel,

(b) present evidence,

(c) if there is an oral hearing, ask questions, and

(d) <u>make submissions as to facts, law and jurisdiction</u>.

[43] If a party may make submissions on facts, law and jurisdiction, the Board must have the corresponding power to make decisions on those same matters.

[44] In terms of the test to be applied, the Panel notes that the Board is a creation of statute and its jurisdiction is derived from, and governed by, statute. The Panel further finds that the Board does not have inherent jurisdiction; i.e., it does not have the inherent powers invested in a court to hear any matter that comes before it. Therefore, to determine whether a ground for appeal is within its jurisdiction, the Board must first consider the relevant statutory provisions. This will be discussed further in the second issue.

[45] However, despite the arguments by Cobble Hill, when there is an application to strike an appeal or a ground of appeal for lack of jurisdiction prior to a hearing on the merits, the Panel finds that there is a role for the "plain and obvious" test, even though this test was developed for courts with inherent jurisdiction. It is true that the courts are dealing with common law claims and defences, and have the jurisdiction to consider novel claims. However, they also consider causes of action derived from statute and statutory defences. The cases appear to apply the test to all applications, regardless of the source of the cause of action or defence.

[46] In addition, statutory interpretation – particularly interpreting the limits of one's jurisdiction – is, unfortunately, not as simple as Cobble Hill appears to suggest. The language used in legislation is not always amendable to "black and white", "yes and no" answers. There are often many grey areas. In these circumstances, a proper interpretation may benefit from a factual context, evidence, and additional argument. In the context of an application to strike, it would be careless - and could result in significant unfairness - to strike a claim or a ground for appeal unless it is "plain and obvious" that such a claim or ground for appeal is not within the tribunal's jurisdiction.

[47] Although the "plain and obvious" test establishes a high threshold to meet in order to succeed on an application, the Panel is of the view that the threshold should be high. In addition to the reasons provided above, during a preliminary application, neither the parties, nor the Board, have had time to fully comprehend the legislative framework and the implications of different interpretations of the legislation. There are occasions when evidence can be helpful to interpreting the "mischief" intended to be prevented by the legislation, the consequences of certain interpretations, as well as any technical meanings of words within a specialized area or context.

[48] In addition, one of the reasons for the existence of administrative tribunals is to make the process more accessible to parties who are not represented by legal counsel. The threshold must be high to ensure that they have a chance to be heard on matters that are, arguably, within the tribunal's jurisdiction.

[49] With this latter point in mind, the Panel agrees with the philosophy adopted by the courts that a claim, in this case a Notice of Appeal, should be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies" (per *Speckling*).

[50] Accordingly, the test to be applied on these applications will be whether, based upon a generous reading, it is plain and obvious that the appeal, or the ground for appeal, is beyond the statutory jurisdiction of the Board.

2. What is the Board's jurisdiction in relation to the appeals? In particular, what matters may the Board consider in the context of these appeals?

Cobble Hill's Submissions

[51] In this case, Cobble Hill submits that the "four corners" of the Board's jurisdiction are found in section 14 of the *Act*, which establishes the Director's authority to issue the Permit. It submits that this section gives the Director the jurisdiction to issue a permit, and also establishes the factors that he could have taken into account when exercising that discretion. Cobble Hill submits that the Board's jurisdiction is similarly circumscribed by this section. In support, Cobble Hill relies upon the Board's previous decision in *Harris v. British Columbia (Ministry of Environment)*, [2010] B.C.E.A. No. 4 (QL) [*Harris*].

[52] In *Harris*, the decision under appeal was made under section 16 of the *Act* which authorizes amendments to permits. In that case, the Board determined that its jurisdiction on the appeal was informed by the director's jurisdiction as found within section 16. At paragraph 66, the Board states:

> 66. Regarding the Appellants' submissions concerning alternative sites and other matters beyond the Amended Permit's conditions, the Panel notes that the *Act* strictly limits the Board's review powers to the Director's decision to issue the Amended Permit, and the question of whether it protects the environment. This appeal is not about Catalyst's decisions or any options that Catalyst did or did not consider - an appeal to this Board is not an open ended public inquiry into choices made by Catalyst. [Cobble Hill's emphasis]

[53] Later, under "further issues" the Board states:

> 159. The Panel finds that section 16 of the *Act*, together with the definition of environment in section 1, establish the criteria for a Director's decision. [Cobble Hill's emphasis]

[54] The opening words of section 16 are similar to those in section 14. Section 16(1) states:

Amendment of permits and approvals

16 (1) A director may, subject to section 14(3) [permits], this section and the regulations, for the protection of the environment,

(a) on the director's own initiative if he or she considers it necessary, or

(b) on application by a holder of a permit or an approval,

amend the requirements of the permit or approval. [Emphasis added]

[55] This is the same type of language found in the opening paragraph of section 14 which states that "A director may issue a permit ... subject to requirements for the protection of the environment that the director considers advisable". Cobble Hill argues that, under both section 14 and section 16, the ultimate constraint on the Director's jurisdiction to impose terms and conditions in a permit or amendment is that they be "for the protection of the environment."

[56] Cobble Hill then notes that "environment" is defined in section 1 of the *Act* as:

"**environment"** means air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed.

[57] Many of the words in the definition of "environment" are also defined in section 1 as follows:

"air" means the atmosphere but does not include the atmosphere inside

(a) a human made enclosure that is not open to the weather,

(b) an underground mine, or

(c) a place designated by order of the Lieutenant Governor in Council

"land" means the solid part of the earth's surface including the foreshore and land covered by water.

"water" includes ground water, as defined in the *Water Act*, and ice.

[58] Cobble Hill notes that the phrase "all other external conditions or influences under which humans, animals and plants live or are developed" is not defined. Based upon the accepted principles of statutory interpretation, it submits that this phrase should be read in harmony with the statutory scheme, the object of the *Act* and legislative intent. When this is done, the reference to "humans, animals and plants" indicates that "external conditions" does not encompass social, economic, business or market conditions; rather, these words relate to the bio-geophysical conditions and influences applicable to biological life of plants, of animals and of humans. Cobble Hill refers to other legislative provisions and other enactments in support of its contention that,

> ... where the provincial legislature intends to assign a specific scope of inquiry or discretionary power to include broad issues such as 'economic, social, heritage or health effect', public protection, 'the public interest' or 'contravention of permits' it does so by way of express language.

[59] In summary, Cobble Hill argues that, while the Director may consider "protection of the environment" to include protecting human health and public safety, it must be with reference to the scope of the *Act*. It submits that the scope of review of the Board in the present case is limited to assessing whether there are

risks to the environment that are within the scope of section 14 of the *Act*. Based upon this analysis, Cobble Hill argues that the disputed grounds for appeal are not within the express grant of statutory power, nor are they a logical or rationally connected extension to the statutory grant of power: none of them relate to the inquiry into the protection of land, air, water, or external conditions or influences under which humans, animals and plants live or are developed. Accordingly, Cobble Hill submits that it is not correct to properly construe them as "grounds of appeal."

[60] Cobble Hill also analyzes the Board's jurisdiction in the context of a party's standing to appeal. It states that the question of "standing" to appeal, and jurisdiction are, in some respects, related arguments. In this regard, Cobble Hill refers to the broad right of appeal given to "persons aggrieved" in section 100(1) of the *Act*. It then notes that the Board has interpreted these words to mean "a person who has genuine grievances because an order has been made which prejudicially affects his interests" (see for example *Arrowsmith Watersheds Coalition Society v. British Columbia (Ministry of Water, Land and Air Protection)*, [2002] B.C.E.A. No. 68 (QL)). Accordingly, Cobble Hill submits that a party cannot have standing to appeal if that person is aggrieved in relation to an issue that is not within the jurisdiction of the Director, and now the Board, to adjudicate on the types of interests that the aggrieved person complains of.

[61] Cobble Hill also relies upon cases regarding standard of review in support of its position that the Board cannot exceed the jurisdiction of the original decision maker.

The CVRD's Submissions

[62] The CVRD refers to the Board's power to conduct an appeal by way of a new hearing under section 102(2) of the *Act*, and its remedial powers under section 103 of the *Act*. It submits that the legislation provides for a hybrid appeal process that empowers the Board to hear new evidence that was not before the Director, and make findings of fact based on the evidence before it.

[63] The CVRD agrees with Cobble Hill that the Director's discretion to issue the Permit derives from section 14 of the *Act*. However, the CVRD submits that the scope of this power is much broader than asserted by Cobble Hill, and the Board should consider the interpretation of this section with the benefit of all of the evidence and full submissions from all parties, rather than considering the scope of the section in the context of these applications.

[64] In the alternative, if the Board decides to interpret section 14 at this time, the CVRD submits that this section ought to be construed broadly and in the context of the purpose of the *Act* as a whole.

[65] As a starting point, the CVRD points out that the opening words of section 14 are permissive: the Director "may" issue a permit. No one is entitled to a permit. It also argues that *Harris* does not support the proposition that the definition of "environment" in section 1 establishes the criteria for a director's decision under section 14. It submits that the Director's discretion to issue a permit under section 14 is arguably broader – in that the Director may consider a wider scope of issues than he otherwise would when considering an amendment under section 16. It also

submits that section 14 is, arguably, a more significant decision since it deals with the granting of a permit to deposit waste on "un-fouled land", whereas the amending section address land already fouled by waste.

[66] In any event, the CVRD points out that, in *Harris*, the Board acknowledged that the Director can take into account "social and economic factors through consultation and through amendments". The Board stated at paragraphs 156-157:

> 156. The Harris/Bremner Appellants argue that the Panel should consider a broad and expansive definition of "environment" in its review of this decision, and specifically should include social and economic impacts in the definition. They cite *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 ("*Oldman River*") to support their position. However, the Panel is satisfied that the Director has taken social and economic factors into consideration both through the consultation process and through the amendments to the Permit. Therefore, the Panel is satisfied that the principles cited in *Oldman River* have been met even though the facts and the statutory scheme are substantially different than those that are found in *Oldman River*.
>
> 157. Ms. Picken is concerned about the taint of living in a "polluted community" and worried that her property values would diminish. The Panel finds that no supportable evidence of such impacts was provided in this appeal. There were no real estate appraisals or other similar economic impacts put into evidence. Assuming that such a consideration is even relevant to this decision-making process, the Panel rejects the submission that real estate values will be negatively impacted by the expansion to the landfill. [Emphasis added]

[67] Further, the CVRD submits that the *Oldman River* case cited in *Harris* also supports a generous interpretation of "environment". In that case, the Court commented as follows:

> 39. I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter: .....
>
> ...
>
> Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, ... [CVRD's emphasis]

[68] The CVRD also refers to the following Board decisions in support of a broad or expansive view of the scope of section 14.

[69] In *Haida Gwaii Marine Resources Group Assn. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2006] B.C.E.A. No. 8 (QL) [*Haida Gwaii*], the Board commented as follows regarding the scope of section 14:

65. … To determine whether the Director properly exercised his discretion, the starting point in the enquiry is to determine the objectives of the empowering statutory provisions, and whether his exercise of discretion was consistent with those objectives, and not solely whether he followed Ministry policies. ….

66. The Panel has carefully considered the plain language in section 14 of the *Act*, in the context of the statutory scheme discussed above. Section 14 states that a director "may issue a permit authorizing the introduction of waste into the environment subject to requirements for protecting the environment that the director considers advisable …" [Underlining in original]. That language gives directors broad discretion in deciding whether to issue a permit, and to include requirements for the protection of the environment. The language indicates that the inclusion of requirements in a permit involves a subjective assessment. Thus, a director may issue a permit subject to the requirements for protecting the environment that he or she concludes, based on all of the relevant information as well as his or her professional knowledge and experience, are advisable. Consequently, the Panel finds that a director may utilize personal knowledge and expertise in assessing a permit application and in deciding on requirements that he or she considers advisable.

67. In the present appeal, the Panel was provided with little information regarding the Director's personal knowledge and expertise, or that of other Ministry staff that may be relevant to the decision to issue the Permit. However, the Panel acknowledges that a director exercising discretion under section 14 of the *Act* is presumed to do so in good faith and for the purposes that are contemplated in the legislation.

…

69. The parties do not dispute that a director exercising discretion under section 14 of the *Act* must assess the potential risk of harm to human health and the environment associated with the proposed discharge of waste, and weigh those risks against the potential benefits of the activity and other societal interests. The information needed to properly assess a given permit application will depend on the circumstances of each case. …. [CVRD's emphasis]

70. In the present appeal, the Appellant does not allege that Husby failed to provide that information, or that the Director failed to consider it. Rather, the Appellant submits that the Director should have required Husby to submit more technical analyses to support its application, and the Director should have conducted more consultation both within the Ministry and with other agencies regarding the potential effects of the burning.

71. It is logical that activities that pose relatively high potential risks of harm to human health or the environment, or that involve a high

> degree of uncertainty regarding potential risks, will require a greater degree of technical analysis and caution when assessing a permit application. It is also logical that activities that pose relatively low risks of harm to human health or the environment, and that involve a high degree of certainty regarding potential risks, will require a less rigorous analysis and a lower degree of caution when assessing applications. [CVRD's emphasis]

[70] In *Taylor Environmentally Concerned Citizens v. British Columbia (Ministry of Environment, Lands and Parks)*, [1995] B.C.E.A. No. 18 (QL) [*Taylor*], the section at issue was section 8 of the *Waste Management Act*, the predecessor to section 14 of the Act. In that case, the Manager issued a permit to Bennett Remediation Services allowing Bennett to incinerate special waste. The Appellants argued that the words "subject to requirements for the protection of the environment that [the manager] considers advisable" in section 8 should include things such as increased vehicular traffic, slope stability, health effects, public input, and treatment alternatives. Regarding the allegations that the manager failed to properly consider health effects, the Board found:

> 67. The Panel notes that section 8 of the *Waste Management Act* does not require the manager to look at health issues specifically. Nevertheless, the definition of "environment" in the *Act* is defined as "including the air, land and water and all other external conditions or influence under which man, animals and plants live or are developed." This broad definition includes health effects. On the other hand, given the Panel's interpretation that section 8 does not require the waste manager to do a full environmental impact assessment, the Panel concluded that it is not the manager's task to do a thorough evaluation of health effects of the proposed facility. That is up to the Ministry of Health. Further, the Panel finds that closure of the beehive burner in Taylor will so significantly reduce emissions of all combustion-based particulates in the Taylor area that the minor emissions expected from the Bennett project will have no health impacts. Thus, the Panel dismisses the ground of appeal that the Deputy Director failed to consider the adequacy of the information presented by the Ministry of Health.

[71] Thus, the CVRD submits that, when considering the relevant statutory provisions and previous Board decisions, the definition of "environment" in the *Act* ought to be construed broadly to include, at the very least, health and other social interests in the definition: not the narrow definition proposed by Cobble Hill.

[72] Finally, regarding Cobble Hill's reference to the standing provision in section 100(1) of the *Act*. It submits that it is a "person aggrieved" by the decision of the Director and therefore has standing to appeal and to raise the grounds set out in its Notice of Appeal on behalf of its residents.

The Residents Association's Submissions

[73] The Residents Association makes the following points regarding the Director's jurisdiction under section 14 of the *Act*:

1. Section 14(1) provides that the Director "may" issue a permit subject to requirements for the protection of the environment. The section does not state that the Director *must* issue a permit if the environmental considerations are satisfied.
2. Section 14(1) does not stipulate what factors are relevant to the Director's consideration of whether to issue a permit.
3. Section 14(1) does not specify what threshold of certainty is required before the Director can be satisfied that the environment will be protected such that a permit can be issued.

[74] Further, the Residents Association submits that the breadth of the Director's discretion under section 14(1) of the *Act* should not be decided on a summary or preliminary basis. It submits that this section is "at the heart" of the legal issues to be decided on the appeals. Consequently, it submits that the interpretation of section 14(1) needs to be made carefully, with the benefit of a full evidentiary matrix, and full submissions from the parties about what factors may appropriately be considered by the Director in exercising his discretion to issue a permit, and what threshold should be applied.

[75] The Residents Association also submits that, when considering these applications, Cobble Hill's arguments regarding standing and standard of review are incorrect and/or irrelevant, and should be disregarded. It submits that standing and jurisdiction are different issues. Under section 100(1) of the *Act*, a person who is aggrieved by the issuance of a permit has standing to appeal. However, if that party raises an issue that is potentially outside of the jurisdiction of the Board, then, it argues, the Board can consider whether, as a jurisdictional matter, it should be dismissed on a preliminary basis, subject to appropriate clarifications or potential amendments.

[76] In terms of standard of review, the Residents Association points out that this is the first decision on this matter. This is an application to strike certain grounds of appeal, not a review or appeal of any decision made by the Director. As such, the standards of review discussed are not relevant.

The Director's Submissions

[77] The Director agrees with Cobble Hill that the Board's jurisdiction is limited to the question of whether the Permit was properly issued in accordance with the governing legislation; in this case, section 14 of the *Act*. Under section 14, the Director also agrees with Cobble Hill that the Board's powers are limited to considering whether the Permit protects the environment, i.e., protects the "air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed" (per the definition of "environment").

[78] The Director submits that this is the test even though the Board may also hear new evidence and argument that was not before the Director pursuant to its ability to hold a "new hearing" under section 102(2) of the *Act*. He submits that any new evidence must still be evidence that would properly be taken into consideration by the decision-maker when determining whether a permit would meet the requirement of "protection of the environment" (per *Beckei*; and *Bell*).

Mr. Sanders' Submissions

[79] Mr. Sanders submits that Cobble Hill takes an overly narrow interpretation of what can be considered by the Director under section 14 of the *Act*. He submits that the words "may issue a permit" indicates a broad public interest discretion, constrained only by the purposes of the *Act*. Mr. Sanders submits that one of those purposes can be gleaned from section 6(4) of the *Act* which states:

Waste disposal

6 (1) For the purposes of this section, "the conduct of a prescribed industry, trade or business" includes the operation by any person of facilities or vehicles for the collection, storage, treatment, handling, transportation, discharge, destruction or other disposal of waste in relation to the prescribed industry, trade or business.

...

(4) Subject to subsection (5), a person must not introduce waste into the environment <u>in such a manner or quantity as to cause pollution</u>. [Emphasis added]

...

Mr. Sanders notes that section 1 of the *Act* defines "pollution" to mean "the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment". Although "usefulness" is not defined in the *Act*, he submits that usefulness would include human use, and cannot be separated from the social, economic and other human uses that are made of the environment. He submits that the Board should not adopt Cobble Hill's contention that the *Act* is only focused on physical impacts to the environment.

Cobble Hill's reply

[80] In response to the CVRD's submissions, Cobble Hill submits that it is unhelpful to characterize the Director's jurisdiction under section 14 as either wide or narrow. Instead, the focus should be on the words "subject to requirements for the protection of the environment that the director considers advisable", and what factors may be taken into account in exercising the power. It submits that there is nothing in the *Act* that suggests that social and economic factors may be taken into consideration.

[81] Cobble Hill reviews the cases cited by the CVRD and submits that, contrary to the CVRD's assertion, these cases actually support Cobble Hill's position. In addition, it submits that the *Oldman River* case is distinguishable because the word "environment" was not defined in the legislation, whereas it is defined in the *Act*. In *Oldman River*, the Court found that the definition of environment in policy documents (ministerial guidelines) could not fetter or restrict the statutory decision-maker. In the present case, the decision-maker is bound by the statutory definition.

The Panel's Findings

[82] Although Cobble Hill tries to link the common law test that the Board has adopted in relation to standing to the question of jurisdiction that is raised by its applications, the Panel finds that it is not necessary to determine the limits or extent of standing, or how standing applies to the Board's jurisdiction to consider certain issues and order certain remedies.

[83] For the reasons given by the Residents Association, the Panel also finds that the submissions in relation to the standard of review are not relevant to this preliminary decision.

[84] The Panel finds that Cobble Hill's applications must be decided on the basis of the statutory parameters of the Director's discretion under section 14 of the *Act*. In addition to the case law provided, this is supported by section 103 of the *Act* which sets out the powers of the Board. Section 103 states, "On an appeal the Board may send the matter back to the Director, confirm, reverse or vary the Permit, or "make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances" [Emphasis added]. This language confirms that the Board's jurisdiction is constrained by the Director's decision-making jurisdiction under section 14.

[85] In general, the parties agree that the questions or issues to be decided on appeal are limited to those that could have been addressed by the Director. The Board's ability to hold a "new hearing" under section 102 of the *Act* does not expand its jurisdiction.

[86] Where the parties appear to disagree is on the extent to which factors other than purely environmental ones may be considered by the Director under section 14. Cobble Hill and the Respondent take the position that the decision is informed by the words "protection of the environment"; specifically, protection of the "air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed." The other parties focus on the words "external conditions or influences under which humans live or are developed" to argue that the Director's jurisdiction covers social and economic factors. They also argue that the Board's previous decisions suggest that these are considerations that, while not specifically authorized under the legislation, are not specifically prohibited either.

[87] The Panel is guided by the principles of statutory interpretation stated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, citing with approval Elmer Driedger in *The Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[88] The Panel is also guided by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which states:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[89] The Courts and this Board have had the opportunity to consider the objects and purposes of the *Act* – or its predecessor *Waste Management Act* – on a number of occasions. Of note, in *Swamy v. Tham Demolition Ltd.*, [2000] B.C.J. No. 1734 (QL), the Court states:

> 36. Applying these factors to the case at bar, <u>the purpose of the *Waste Management Act* is to prevent, and remedy, environmental problems caused by waste</u>. This is evident in the broad powers which the Act confers on those persons designated as directors and managers under the Act. Examples of the powers conferred under the Act include the power to issue permits for storage and treatment of waste, to identify a site as contaminated and to require remediation. The fact that the Act gives the directors and managers these powers, as was stated in *Consolidated Maybrun* by L'Heureux-Dubé J. at para.54:
>
>> ... is a clear indication <u>that the purpose of the Act is not just to remedy environmental contamination, but also to prevent it</u>. This purpose must, therefore, be borne in mind in interpreting the scheme and procedures established by the Act ....
>>
>> [Emphasis added]

[90] In *Cominco Ltd. v. British Columbia (Assessor of Area No. 21 - Nelson-Trail)*, [1988] B.C.J. No. 167 (QL), the Court considered the purpose of the *Waste Management Act* and found as follows:

> ... I find, however, that the predominant purpose of the *Waste Management Act* is to control or and abate pollution, the very same ends as s. 398(q) [of the Municipal Act] is designed to encourage. <u>I based my views on the *Waste Management Act* as a whole and, in particular, s. 3(1.1) which bans the introduction of wastes into the environment without a permit, s. 8(1) which makes permits expressly subject to requirements needed for the protection of the environment, and s. 22 which authorizes pollution abatement orders.</u>
>
> <u>Where improvements are required under s. 8(1) of the *Waste Management Act*, they must be for "the protection of the environment" as that is the fundamental prerequisite of requirements under that section</u>. In my view, where such improvements are made as required under s. 8(1), that is strong evidence that they are for the control or abatement of pollution. Why else would they be made? ....
>
> [Emphasis added]

[91] A recent analysis of the objects of the *Act* was performed by the Board in *Lynda Gagne et al. v. Director, Environmental Management Act*, (Decision Nos. 2013-EMA-005() and 2013-EMA-007(a)012(a), October 31, 2013) (unreported). The Board states:

> [28] The Appellants also summarize the Legislative history of the *Act* and refer to quotations from Hansard for assistance in determining the purpose of the *Act*. They submit that the Hansard evidence reinforces their submission that environmental protection is the object of the *Act*, although the Appellants cite a finding from the Supreme Court of Canada that Hansard evidence is "of limited weight": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at paragraph 57
>
> ...
>
> [54] Turning to the objects of the *Act*, the Panel finds that many sections of the *Act* provide mechanisms for the protection of the environment, including the sections that prohibit unauthorized waste discharges, address the remediation of contaminated sites, address pollution prevention and abatement, and create penalties for contraventions of the *Act*. <u>Thus, the Panel finds that environmental protection is one of the objects of the *Act*. However, the Panel finds that this is not the only object of the *Act*</u>. The *Act* also contains a scheme for authorizing the discharge of waste into the environment by various human activities, including industries that produce goods, services, employment, and other benefits to society. In particular, sections 14 and 15 of the *Act* provide the Director with the discretion to issue permits and approvals authorizing "the introduction of waste into the environment", subject to the requirements in the legislation and any requirements that a director may impose "for the protection of the environment." In addition, section 22 of the *Act* empowers the responsible Minister to make regulations establishing Codes of Practice, which may exempt industries or activities from the provisions of the *Act* or its regulations in certain circumstances. Codes of Practice contain enforceable standards for waste discharges, and have been established for several industries or activities. <u>Although waste discharges may cause harm to the environment, the Legislature has recognized that waste is produced by certain human activities, and the *Act* provides a scheme for regulating waste discharges</u>.
>
> [Emphasis added]

[92] These authorities indicate that, when the entire *Act* – or its predecessor enactment - is considered, "protection of the environment", and its logical extension, preventing pollution of the environment, are the underlying objectives. These are the objectives that are relevant to consideration of an application to discharge waste under section 14.

[93] Unlike the *Oldman River* case, the *Act* defines "environment". The definition in the *Act* does not does not include the broad topics accepted by the Court in *Oldman River* such as "consequences to a community's livelihood", and "social matters". Rather, environment "means air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed." In accordance with the principles of statutory interpretation, the latter phrase takes its meaning from the preceding list. This suggests that environmental

factors are those of the natural world. They are also "external" conditions or influences.

[94] This is the statutory scheme within which these applications will be assessed. The Panel will decide whether the grounds for appeal should be struck on the basis that it is plain and obvious that it is not within the Board's jurisdiction, or whether it should be decided with the benefit of all of the evidence and full submissions from all parties.

[95] To the extent that the Board has previously considered social or other matters, this will be discussed in the context of the specific applications, below.

3. Should the application to strike Ronald Witherspoon's appeal be granted?

[96] Mr. Witherspoon's Notice of Appeal lists the following as his grounds for appeal.

> *Our research has shown that the introduction of contaminants to the watershed has and will continue to destroy property values. We will present evidence that shows all property owners in the watershed have already experienced financial losses due to the potential for an approved permit, and now the permit has been approved by the Ministry of Environment, the level of losses has increased. Our research has shown that:*
>
> - *The leading real estate agent in this area has stated she would not buy property in the watershed, and it is normal business practice for real estate agents to be required to officially notify potential buyers of the contamination. Thus, we will present evidence showing the real estate industry will discourage investment in our watershed.*
> - *A commercial property owner has had two potential investors back out once their due diligence determined there was a risk of this contamination. We will present evidence to show how the introduction of contaminants will negatively affect the economic activity in the area.*
> - *Community leaders, once of whom is [sic] heads an appraisal firm, have indicated the feedback they are getting is that the real estate market has ceased to function properly, at a time when sales in the Victoria area are up 18% over last year.*
>
> *I am in discussions with legal firms who are interested in commending a class-action lawsuit, and this lawsuit will include the Ministry of the Environment for their negligence in allowing contamination to be brought into the watershed, and their lack of action to deal with existing contaminators.*
>
> *....*
>
> *This is not about proving what is or is not an acceptable level of carcinogen in the watershed, it is because the majority of the marketplace has zero tolerance for any carcinogens. The appeal is also part of the process of being able to provide a court with evidence during our class-action lawsuit that the*

> *government was warned in advance of carrying out an activity creating liability, they then ignored this warning and proceeded to create a liability.*

[97] Under "description of the relief requested", Mr. Witherspoon states, "It is requested that no level of new contamination be permitted to enter the Shawnigan Lake watershed, as this is the only action which will restore the property values in the watershed."

Cobble Hill's Submissions

[98] Cobble Hill applies to have Mr. Witherspoon's entire appeal dismissed on the grounds of lack of jurisdiction over the issues raised. It submits that the impact of the Permit on property values is not concerned with human, plant or animal life or development, and is not specifically tied to preservation of air, land or water. Nor is economic impact or loss related to the core expertise and jurisdiction of the Director, or the Board.

[99] Cobble Hill further submits that gathering evidence for class actions is not only an improper collateral purpose, but it is outside of the scope of the Board's jurisdiction.

[100] Cobble Hill argues that Mr. Witherspoon's concerns are not tied to the mandate of the Board and will not enhance the hearing of the issues that pertain to protection of the environment. It points out that even Mr. Witherspoon states: "This is not about proving what is or is not an acceptable level of carcinogen in the watershed".

Mr. Witherspoon's Submissions

[101] Mr. Witherspoon submits that he is not using the appeal to gather evidence for an unrelated proceeding. He states that since the appeal is public, any documents will be readily accessible by the public, regardless of whether he participates or not. He also advises that he will not be commencing a class action lawsuit until after contamination has been proven.

[102] Regarding property valuation, Mr. Witherspoon submits that his background qualifies him as an expert witness in the areas of portfolio risk management, financial lending practices, and commercial due diligence. He also has extensive experience in assessing the financial risks associated with environmental issues. He submits that he has appealed to prevent "economic losses" caused by the impact of introducing contaminants to a watershed.

[103] .Referring to the Board's previous decision in *Harris,* Mr. Witherspoon cites the following at paragraph at 157:

> 157 Ms. Picken is concerned about <u>the taint of living in a "polluted community" and worried that her property values would diminish</u>. The Panel finds that <u>no supportable evidence of such impacts was provided in this appeal</u>. There were no real estate appraisals or other similar economic impacts put into evidence. Assuming that such a consideration is even relevant to this decision-making process, the Panel rejects the submission that real estate values will be negatively

> impacted by the expansion to the landfill. [Mr. Witherspoon's emphasis]

[104] Mr. Witherspoon submits that this statement indicates that "a previous panel has entertained an appeal on this basis and considered the validity of the data and evidence presented. This precedent would establish a basis for future considerations of economic damages to property."

[105] Finally, Mr. Witherspoon submits that he has evidence of the loss of value in commercial property and a witness who will testify. He also has a significant amount of global evidence showing loss of property value in similar situations.

[106] Mr. Witherspoon submits that his appeal should not be struck because the Board "should look at the hundreds of millions of dollars of potential financial losses that could be associated with the stigma of a watershed receiving contaminated soil."

The Director's Submissions

[107] The Director consents to the granting of Cobble Hill's application with respect to this appeal. He agrees that potential economic impacts or losses, including potential reduction in property values, are not issues properly within the Board's jurisdiction pursuant to the *Act*, as they are not concerned with an assessment of whether the Permit meets the requirements for the protection of the environment.

[108] He also submits that a hearing before the Board is not the appropriate forum to pursue relief arising from potential adverse effects on property and/or business values due to permitted activities occurring. The appropriate forum for claims of that nature is in the courts, as the courts routinely deal with those issues. In contrast, the Board's expertise is in determining issues pertaining to the protection of the environment.

The Residents Association's Submissions

[109] The Residents Association submits that Mr. Witherspoon's appeal raises arguable and potentially important points that will not adversely impact the hearing. It submits that diminished property values can be one type of "yardstick" that the Director can use to assess what kinds of impact a project will have on neighbouring lands if a permit is granted. Therefore, it is not necessarily or obviously outside of the jurisdiction of the Director or the Board.

[110] The Residents Association also submits that the Board is not being asked to ascertain the exact diminution of property values in the area; therefore, the presentation of evidence on this matter, including expert evidence, is "unlikely to occupy a lengthy period of time within the hearing.

The CVRD's Submissions

[111] The CVRD takes no position on the granting of this application.

Mr. Sander's Submissions

[112] Mr. Sanders did not make a submission in relation to Mr. Witherspoon's appeal, but given that he raises a similar ground for appeal, for completeness, the Panel will refer to his comment here.

[113] Mr. Sanders submits that property values are arguably one important indication as to whether a project has impaired the "usefulness" of land – part of the definition of "pollution".

Cobble Hill's reply

[114] Cobble Hill submits that the location of Mr. Witherspoon's residence (13 kilometers away from the site, to the north of Shawnigan Lake), makes his standing to allege diminished property values questionable. He has no involvement with the neighbouring lands that he maintains will suffer from diminished value.

The Panel's Findings

[115] The Panel has carefully reviewed Mr. Witherspoon's Notice of Appeal and submissions. Even giving his Notice of Appeal and submissions the most generous of interpretations, the Panel finds that the issues he raises are not within the jurisdiction of either the Director of the Board.

[116] The *Act*, and particularly section 14, is focused on environmental concerns and protections. No reasonable interpretation of this section would allow property values – or the impact of a proposed project on property values - to be considered as part of the decision-making process. These are matters related to the protection of personal or corporate wealth or finances, not to the protection of the environment.

[117] Regarding the Board's decision in *Harris*, unlike the present case, Ms. Picken's concerns regarding diminished property values were not the subject of a jurisdictional challenge. Therefore, the Board did not have a full opportunity to make a finding on the matter, although it was clearly alert to the possibility that property values may be beyond the scope of section 14 when it questioned whether this consideration "is even relevant to this decision-making process". Therefore, the Panel finds that *Harris* is not authority for the proposition that property values are a relevant consideration under section 14, or the *Act*.

[118] Although Mr. Sanders has suggested a link between property values and "usefulness" of land, that word is found in the definition of "pollution" – not "environment". Further, in the context of the *Act*, the word "usefulness" would reasonably have some connection to the "use" of the land, air or water – not whether they lose monetary value.

[119] In his Notice of Appeal, Mr. Witherspoon also refers to his intention to file a class action proceeding in relation to diminished property values. He then states that the appeal is "part of the process of being able to provide a court with evidence during our class-action lawsuit that the government was warned in advance of carrying out an activity creating liability, they then ignored this warning and proceeded to create a liability." In his submissions to the Panel, Mr. Witherspoon correctly notes that the evidence provided at a hearing is public, and documents may be obtained by the public, regardless of whether he participates or not. Therefore, even if his appeal is dismissed, he may still attend the hearings, and he may still obtain the information and evidence as a member of the public.

[120] Unlike the other Appellants, it is clear that Mr. Witherspoon's concerns and interests lie in economic impacts which may flow from the issuance of the Permit, regardless of whether there is a "real" risk of contamination. This is evident throughout the Notice of Appeal, but is particularly noteworthy in his opening paragraph where he states that property values were impacted even before the Permit was issued. He states that "all property owners in the watershed have already experienced financial losses due to the potential for an approved permit" and that this will only get worse with the Permit approval [Emphasis added].

[121] The Panel finds that the focus of Mr. Witherspoon's appeal is not on whether there are, or will be, environmental problems resulting from the Permit; rather, the public perception of such an operation occurring within the watershed is sufficient to impact property values and that this is a ground for rescinding the Permit. The Panel finds that impact, real or perceived, to property values is not a relevant consideration for a Director under section 14 of the *Act*; therefore, it is not within the jurisdiction of either the Director or the Board.

[122] The Panel finds that it is plain and obvious that neither property values, nor evidence gathering for a class action, are matters relevant to a consideration of a section 14 permit. Since there is nothing in Mr. Witherspoon's appeal that is within the Board's jurisdiction to consider, or order, Cobble Hill's application to strike his appeal in its entirety is granted. This appeal is dismissed as being beyond the Board's jurisdiction. In addition, since Mr. Witherspoon is no longer an Appellant in these proceedings, he is also no longer a Third Party in the others' appeals that were previously joined with his appeal.

4. Should the application to strike the CVRD's grounds for appeal in paragraphs 3, 4, 5 and 6 be granted?

[123] The paragraphs at issue in this application to strike are as follows:

> *3. The Director erred in failing to consider or give sufficient weight in issuing the Permit that a contaminated soil treatment facility and a landfill facility are not permitted uses on the Property under the Regional District's Zoning Bylaw No. 985.*
>
> *4. The Director erred in failing to consider or give sufficient weight in issuing the Permit to the public interest and the concerns expressed by the public and the Regional District including the suitability of the Property for a contaminated soil treatment facility and landfill facility, the impact the facilities will have on the surrounding community and compliance and enforcement Issues.*
>
> *5. The Director erred in not requiring that a report certified by a professional geotechnical engineer be provided before issuance of the Permit confirming that the Property may be used safely for a contaminated soil treatment facility and a landfill facility given that the Property may be subject to flooding and the covenants registered on title to the Property.*
>
> *6. The Director erred in failing to consider or give sufficient weight in issuing the Permit to South Island Aggregates' compliance history under the*

> *Environmental Management Act, in particular an outstanding remediation order with respect to contaminated soil on the adjacent quarry site which remains unresolved after almost three years.*

Paragraph 3

> *3. The Director erred in failing to consider or give sufficient weight in issuing the Permit that a contaminated soil treatment facility and a landfill facility are not permitted uses on the Property under the Regional District's Zoning Bylaw No. 985.*

[124] In its submissions on the applications, the CVRD acknowledged that the Board does not have the jurisdiction to determine whether the proposed facilities are permitted by the CVRD's Zoning Bylaw. It has filed a Petition in the BC Supreme Court for determination of this issue. Although it submits that provincial decision-makers have the discretion to consider land use issues in arriving at their decision, or may defer a decision until land use issues have been addressed, the CVRD agreed not to pursue the grounds in paragraph 3 at the hearing of the appeal in order to reduce the cost and duration of the hearing. Thus, it has consented to "strike" this ground from its Notice of Appeal.

[125] Since Cobble Hill's abuse of process argument appears to be based on the zoning issue (its only specific reference to abuse of process relates to "seeking identical relief in multiple forums"), the Panel finds that the abuse of process issue no longer requires consideration and is hereby rejected.

[126] The Board will now consider Cobble Hill's applications in relation to the grounds alleged in paragraphs 4-6 of the CVRD's Notice of Appeal.

[127] The Director takes no position on Cobble Hill's application to strike these paragraphs.

Paragraph 4

> *4. The Director erred in failing to consider or give sufficient weight in issuing the Permit to the public interest and the concerns expressed by the public and the Regional District including the suitability of the Property for a contaminated soil treatment facility and landfill facility, the impact the facilities will have on the surrounding community and compliance and enforcement issues.*

Cobble Hill's Submissions

[128] Cobble Hill submits that the weight given by the Director to public opinion is not an independent ground of appeal. It states that the Board has no power to vary the Director's decision on the basis of the popularity of the project as a standalone factor.

[129] Cobble Hill also refers to the Board's decision in *Harris* whereby the Board expressly acknowledged at paragraph 49 that "public opposition is not a consideration for permit amendments under section 16 of the *Act*".

The CVRD's Submissions

[130] The CVRD submits that this ground for appeal is not about public opposition: it is about "potential consequences for a community's health and other social matters from environmental change resulting from the issuance of the Permit". In this regard, the CVRD submits that the suitability of the property for a contaminated soil treatment facility and landfill facility, the impact that the facilities will have on the surrounding community, and compliance and enforcement issues, are important considerations in whether to issue the Permit.

[131] The CVRD also submits that the question of whether the issuance of the Permit is in the public interest, or adequately protects the environment, cannot be considered in a vacuum. The CVRD relies upon *Harris*, *Haida Gwaii* and *Taylor* as examples of the Board considering social factors in an appeal of a waste permit. As noted earlier, at paragraph 69 in the *Haida Gwaii* decision the Board states:

> The parties do not dispute that a director exercising discretion under section 14 of the *Act* must assess the potential risk of harm to human health and the environment associated with the proposed discharge of waste, and weigh those risks against the potential benefits of the activity and other societal interests. The information needed to properly assess a given permit application will depend on the circumstances of each case. [the CVRD's emphasis]

[132] In *Taylor*, the CVRD submits that the Board found that while the decision-maker was not *obligated* to consider public input, it did not say that he was not *permitted* to consider them. The Board stated:

> 86. The Panel notes that section 8 does not obligate the manager to amend specifications due to public concerns. The Panel found that the Ministry and other officials nevertheless went to some lengths to keep the Residents informed. The Panel dismisses the ground of lack of response to public concerns as a basis for this appeal.

[133] Accordingly, the CVRD submits that paragraph 4 is within the Board's jurisdiction. In the alternative, it submits that the Board should not make a determination regarding this issue in the context of a preliminary application.

The Residents Association's Submissions

[134] Although the Residents Association made submissions on this matter in response to the application to strike a paragraph from Mr. Sanders' appeal, the comments are relevant to this application also.

[135] The Residents Association submits the amount of weight to be given to public opinion is not, on its face, an irrelevant consideration or outside of the jurisdiction of the Director. It submits that the views of people who live in the region in which the landfill is proposed to be located are relevant considerations for the Director, and now the Board.

[136] The Residents Association further submits that, whether the Director can consider broader public interest factors in the context of a permit application, and/or whether those public interest factors can only be addressed at a higher level

within the Ministry of Environment, are "vitally important" questions to be addressed by the Board.

[137] The Residents Association submits that these matters should not be dismissed in a preliminary application; rather, they should be the subject of evidence and argument at the hearing. The Board can then decide how much weight ought to be given to public concerns and opinions.

Cobble Hill's reply

[138] Cobble Hill submits that the CVRD repeatedly attempts to expand the Director's (and the Board's) jurisdiction by interpreting "requirements for the protection of the environment" in a way that goes beyond the definition in the statute. It submits that there is no jurisdiction to consider "other social matters", "impact on surrounding communities" the "public interest" or "social factors". Cobble Hill submits that none of the Appellants have pointed to any statutory authority for public interest, community or social assessment powers.

The Panel's Findings

[139] The Panel agrees with Cobble Hill, and the Board's statement in *Harris*, that "public opposition is not a consideration" for permitting decisions under either section 14 or section 16 of the Act. However, the CVRD's wording of paragraph 4 is not limited to public opposition. This ground is much broader. For instance, "the suitability of the Property for a contaminated soil treatment facility and landfill facility" is framed broad enough to include environmental matters. Similarly, "the impact the facilities will have on the surrounding community" is also broad enough to cover environmental issues. "Compliance and enforcement issues", while unspecified, could relate to the enforceability of certain terms and conditions in the Permit.

[140] In its submissions, the CVRD indicates that this ground for appeal relates to "the potential consequences for a community's health and other social matters from environmental change resulting from the issuance of the Permit." The Panel finds that human health is covered by the definition of "environment". This is supported by previous Board decisions as well as this Panel's findings under Issue 2.

[141] However, despite the Board's statement in *Harris* about "potential benefits of the activity and other societal interests", the Panel finds that "social matters" were not the subject of specific jurisdictional scrutiny in that case. Moreover, it is unclear what the CVRD means by those words, except that they may result from "environmental change".

[142] Although it is unclear what the CVRD means by "social matters" and, therefore, it is unclear whether any of those matters may be considered under the *Act*, the CVRD has indicated that health issues are contemplated as part of this ground for appeal, and the paragraph is worded in a manner that it could also contemplate issues that are clearly captured by the definition of "environment". Therefore, it is not "plain and obvious" that paragraph 4 should be struck as beyond the jurisdiction of the Director and the Board.

[143] Cobble Hill's application to strike paragraph 4 is denied.

Paragraph 5

> *5. The Director erred in not requiring that a report certified by a professional geotechnical engineer be provided before issuance of the Permit confirming that the Property may be used safely for a contaminated soil treatment facility and a landfill facility given that the Property may be subject to flooding and the covenants registered on title to the Property.*

Cobble Hill's Submissions

[144] At its core, Cobble Hill submits that the "enforcement of covenants" is an issue of private property rights and the enforcement of such rights is clearly outside of the scope of the Board's jurisdiction. In any event, the Permit expressly does not override, or contradict the covenants, which remain enforceable in a court of law.

The CVRD's Submissions

[145] The CVRD submits that this ground for appeal is not about the enforcement of covenants registered on title to the property; rather, it raises the CVRD's concern that covenants registered on title indicate that there are potential geotechnical and flooding concerns in respect of the property. Specifically, the CVRD submits that one covenant registered on title to the property indicates that the property may be subject to flooding. A further covenant prohibits a building or structure from being constructed or located on the property unless a report certified by a geological engineer confirms that the property may be used safely for the use intended. In addition, the CVRD argues that the Technical Assessment Report considered by the Director "erroneously indicates that the covenants only relate to a specified covenant area surrounding Shawnigan Creek when in fact they relate to the entire property".

[146] The CVRD submits that flooding is relevant to whether the Permit "protects the environment and human health."

Cobble Hill's reply

[147] Regarding geotechnical and flooding concerns, Cobble Hill appears to agree that flooding and geotechnical issues are relevant considerations. However, it submits that covenants addressing these particular issues are not. Further, the covenants referenced by the CVRD do not indicate that geotechnical and flooding concerns exist on the land in question. Cobble Hill states:

> It is precisely this kind of dispute about the meaning and interpretation of the legal changes registered against the land that should form no part of the Director's decision, or this appeal. If the covenants act as restrictions as alleged by the CVRD, they are enforceable by the CVRD as a beneficiary of the covenants and that beneficiary will enforce in the appropriate forum.

[148] Regardless of these covenants, Cobble Hill submits that there are hundreds of pages of geotechnical, geological, hydrological, and surface and ground water studies which suggest that flooding, and geotechnical matters, were assessed in the context of this Permit application.

The Panel's Findings

[149] When given a generous reading, the Panel finds that the ground for appeal alleged in the paragraph relates to whether or not an additional technical report should have been required by the Director to address flooding. In the context of this paragraph, the CVRD is not saying that the covenants themselves are a reason to rescind the Permit. Nor is it asking the Board to enforce a covenant. Rather, the CVRD is suggesting that the covenants provide some evidence of a flooding concern. The Panel finds that flooding is clearly relevant to a permit of this nature and the considerations under section 14 of the *Act*. Flooding is a relevant consideration when it comes to protecting the environment.

[150] Accordingly, the application to strike paragraph 5 is denied.

Paragraph 6

> *6. The Director erred in failing to consider or give sufficient weight in issuing the Permit to South Island Aggregates' compliance history under the Environmental Management Act, in particular an outstanding remediation order with respect to contaminated soil on the adjacent quarry site which remains unresolved after almost three years.*

Cobble Hill's Submissions

[151] Cobble Hill submits that, to inquire expressly into the reliability of operator/compliance history of non-parties is not within the jurisdiction of the Board. The Board cannot authorize an inquiry into the conduct of non-parties to the appeal because the Director, in considering the Permit, could not have done so in the first instance.

The CVRD's Submissions

[152] The CVRD submits that there are many connections between South Island Aggregates and Cobble Hill that justify an inquiry into this issue. It submits that these connections are relevant and important considerations to the question of whether the Permit should have been issued to Cobble Hill. The connections are that South Island Aggregates is the operator of the quarry on lot 21, and it shares two of its directors with Cobble Hill. South Island Aggregates also applied for the Permit, asked for the Permit to be issued to Cobble Hill as owner of the subject property, and that South Island Aggregates "has represented itself as the operator under the Permit".

The Panel's Findings

[153] Although the Panel appreciates Cobble Hill's position regarding the Board's jurisdiction to conduct an inquiry into the compliance history of a non-party, that is not what is being sought in this ground. Rather, what is at issue is whether there are sufficient links between the companies, and between the companies and the activities authorized under the Permit, such that the Director should have

considered South Island Aggregates non compliance in relation to an outstanding remediation order.

[154] There does not appear to be any dispute that there is an outstanding remediation order. Therefore, an inquiry is not required. The ultimate weight, if any, to be given to this outstanding order is simply a matter for argument.

[155] Further, past behaviour of a permit applicant can be a relevant consideration for a statutory decision-maker. However, the weight that ought to be given to past behaviour and, in this case, the question of whether there is a sufficient link between the entities to attribute the actions of one entity to the other entity, are matters for further evidence and argument.

[156] In the circumstances, the Panel finds that it is not plain and obvious that this paragraph is beyond the jurisdiction of the Director and this Board. The application to strike paragraph 6 is denied.

5. Should the application to strike John and Lois Hayes' ground for appeal in paragraph 1 be granted?

[157] The paragraph at issue in this application to strike is as follows:

> 1. *He [the Director] failed to ascertain from S.I.A. [South Island Aggregates] whether the property was appropriately zoned for the proposed use – which it is not.*

Cobble Hill Submissions

[158] Cobble Hill states that concerns regarding zoning were raised during the public notification and consultation with stakeholders process. This was noted by the Ministry's Senior Environmental Protection Officer, Luc Lachance, P.Eng, in his August 20, 2013 "Ministry Assessment" of the permit application. However, at page 27 of that assessment, Mr. Lachance states that the interpretation of the zoning bylaw was left to the CVRD "as per legal advice".

[159] Cobble Hill submits that, if any part of its planned operation is an infringement of the CVRD's land use bylaws, this is a question for the courts to decide. Further, it submits that the zoning issue is squarely raised by the CVRD's Petition filed in the Supreme Court on October 11, 2013. If the Board is going to address zoning in its decision, it would be embarking upon a question that is already before the Court.

[160] Cobble Hill also states that the *Act* expressly places zoning outside of the permit process, and therefore the appeal process. It states that the *Act* "makes it clear that the Director's decision must be made absent any consideration of zoning bylaws, because no permit over-rides zoning, unless Cabinet suspends the zoning restriction." Cobble Hill relies upon section 37(6) of the *Act*, which addresses conflicts between the *Act* and bylaws, permits and other forms of authorization issued by a municipality, as follows:

37(6) Despite the *Local Government Act* and the *Vancouver Charter*, if

(a) a bylaw of a municipality purports to zone land for a use, or

> (b) a land use contract under the *Local Government Act* purports to restrict the use of land to a use
>
> that would not allow the land to be used for the purpose allowed under a permit, approval or order issued in respect of the land or an approved waste management plan respecting the land, the Lieutenant Governor in Council may, by order, suspend the operation of the bylaw or contract to the extent the Lieutenant Governor in Council considers necessary to enable the rights given by the permit approval or order to be exercised. [Emphasis added]

[161] Nevertheless, Cobble Hill also states that the Director did consider zoning as it was referenced in the Ministry Assessment, and was referenced in his August 21, 2013 transmittal letter that accompanied that Permit. In that letter, the Director states:

> This permit does not authorize entry upon, crossing over, or use for any purpose of private or Crown lands or works, unless and except as authorized by the owner of such lands or works. .... It is also the responsibility of the Permittee to ensure that all activities conducted under this authorization are carried out with regard to the rights of third parties, and comply with other applicable legislation that may be in force.

[162] Cobble Hill argues that, under the *Act*, zoning/land use questions are not to be resolved by the Director or the Board, that the zoning issue will be decided by the Court in due course, and this ground for appeal should be struck.

The Hayes' Submissions

[163] The Hayes disagree with Cobble Hill's position on zoning. They submit that zoning cannot simply be ignored; it is relevant to the task of deciding whether to issue the Permit.

[164] Regarding the Ministry Assessment written by Mr. Lachance, Mr. and Mrs. Hayes note that it was addressed to the Director, and states at page 27: "it is unclear whether or not the proposed activities (contaminated soil landfilling) are acceptable uses" under the CVRD's zoning bylaw. However, Mr. Lachance then states that the "interpretation of the bylaw" was left to the CVRD planning department "as per legal advice". Mr. and Mrs. Hayes submit that these statements indicate that Mr. Lachance considered zoning to be relevant, but that he could not decide whether using the land for a landfill would be compliant.

[165] Mr. and Mrs. Hayes seek the opportunity to argue, at the hearing, that it was incumbent upon the Director to consult with the CVRD and make an assessment of whether the zoning could accommodate a contaminated soil landfill. They submit:

> Since it appears that Mr. Bunce [the Director], like Mr. Lachance, simply left the issue as something that he didn't know the answer to and therefore didn't consider, we say he erred in granting the permit.

[166] Mr. and Mrs. Hayes advise that they want to cross-examine the Director at the hearing on his consideration of zoning and, in particular, whether his views were consistent with Mr. Lachance's. They argue that the Board should not dismiss

this as a ground for appeal. Instead, the Board should decide whether zoning is a relevant consideration with the benefit of all of the evidence and arguments tendered at the hearing.

The Director's Submissions

[167] The Director supports Cobble Hill's position regarding zoning. It agrees with Cobble Hill that paragraph 1 should be struck. The Director submits that consideration of permissible land uses under local government zoning bylaws is not within the jurisdiction of the Board and refers to a 2001 decision of the Board on a *Health Act* appeal related to a domestic sewage system. In that case, the Appellant argued that the proposed sewage system would service a commercial enterprise within a residentially zoned neighbourhood. The Board found that "the issues of zoning raised by the Appellants are matters beyond the jurisdiction of the Environmental Appeal Board" (*Reason v. British Columbia (Ministry of Water, Land and Air Protection)*, [2001] B.C.E.A. No. 46 (QL) at paragraph 25).

The CVRD's Submissions

[168] The CVRD opposes this application. Although it does not make specific submissions in relation to the Hayes' appeal, the CVRD's submissions on zoning generally apply to this matter.

[169] The CVRD acknowledges that the Board does not have the jurisdiction to determine whether the proposed facilities are permitted by the CVRD's zoning bylaw. However, the CVRD submits that provincial decision-makers have the discretion to consider land use issues in arriving at their decision, or to defer their decision until land use issues have been addressed. In support, the CVRD refers to comments made by the Court in *Anning v. British Columbia*, [2002 B.C.J. No 1320. This was a judicial review of a permitting decision under the *Mines Act* in which the Court found that, while not bound by bylaws, the Chief Inspector had the discretion to consider them in arriving at the decision, and could, in an appropriate case, "even defer the issuance of a permit pending the resolution of land-use issues". In the circumstances of this case, the CVRD submits that the Director ought to have taken the CVRD's zoning bylaw into account, and deferred the issuance of the Permit pending the resolution of land use issues.

The Residents Association's Submissions

[170] The Residents Association points out that while Cobble Hill states that the Director did take zoning into account, this is contradicted by the Ministry Assessment in which Mr. Lachance states that he came to no resolution on the subject. The Residents Association submits that, if Mr. Bunce was of the same mind as Mr. Lachance, then it is open to the Mr. and Mrs. Hayes (and Mr. Sanders) to argue that the Director failed to take all relevant considerations into account when issuing the permit. It maintains that this is a separate and distinct issue to those raised by the CVRD's Petition, and that Mr. and Mrs. Hayes should be allowed to fully argue the point in the hearing of the appeal.

Cobble Hill's Reply

[171] Although references are made to the Ministry Assessment, Cobble Hill submits that the conclusion reached in the Ministry assessment, was that the

interpretation of zoning would be left to the CVRD. It points out that the CVRD has taken control of this matter: it has filed a Petition asking for the court to decide the zoning issue.

[172] In any event, Cobble Hill submits that the clear legislative provision in section 37 of the *Act*, the August 21, 2013 transmittal letter, and the Permit itself, all make it clear that the Director did not make any finding or determination of any kind with respect to contravention of a zoning bylaw that could be reviewed by this Board.

The Panel's Findings

[173] The Hayes' ground for appeal in paragraph 1 states that the Director "failed to ascertain from S.I.A. [South Island Aggregates] whether the property was appropriately zoned for the proposed use – which it is not." [Emphasis added]

[174] As acknowledged by the CVRD, the Board does not have the jurisdiction to determine whether the proposed facilities are permitted by the CVRD's zoning bylaw.

[175] Further, the Panel finds that a Director considering an application for a permit under section 14 has no jurisdiction to take zoning into consideration. A decision-maker, such as the Director, is required to consider the merits of an application on the basis of considerations relevant under the enactment. Although the Director has a broad discretion to issue a permit under section 14 of the *Act*, his discretion is not unlimited. Section 14 contemplates that the powers to be exercised in relation to waste permits, including conditions to be attached to them, will be exercised only for reasons connected to the appropriateness and impact of the proposed activity on the "environment", as defined.

[176] As stated earlier, the Director's jurisdiction is to be focused on environmental impacts - matters related to protecting the environment - not to considerations of zoning or potential enforcement issues by a municipal body. The Panel finds that there is simply no indication in the legislation that the discretion under section 14 extends to matters unconnected to the *Act*, or to the regulator's authority under the *Act*. Zoning, and the enforcement of zoning, is within the jurisdiction of a separate, and unrelated, body.

[177] While Mr. Lachance referred to the zoning question and said the interpretation of the zoning bylaw would be left to the CVRD "as per legal advice", this is not proof of jurisdiction; rather, it is an acknowledgement of a matter raised during the consultation and review process. It is a response to a matter/concern raised. A response to a matter does not confirm or create jurisdiction.

[178] Finally, although the Court in *Anning* commented that the Chief Inspector may consider zoning as part of his discretion, and could, in an appropriate case, "even defer the issuance of a permit pending the resolution of land-use issue", the Panel is not convinced that this has any application to the Director's exercise of discretion under section 14 of the *Act*. Moreover, in the present case, if the Director was satisfied that Cobble Hill's permit application met all legislated requirements, and was satisfied that the environment would be protected, a

deferral to await a zoning decision may constitute an improper delegation of the Director's discretion and/or an improper fettering of his discretion.

[179] Finally, the comments made by the Director in his transmittal letter do not constitute a formal consideration of zoning – or reflect an exercise of his discretion under the Act. Rather, it is an administrative matter – a warning to the Permittee – regarding the scope or limits of the authorization constrained in the Permit. This language is commonly found in cover letters to permits, licences and approvals issued under a variety of different statutes.

[180] In summary, the Panel finds that it is plain and obvious that the Board has no jurisdiction to determine whether Cobble Hill's facilities are allowed under the CVRD's zoning bylaw, nor is zoning a relevant consideration under section 14 of the *Act*. The interpretation of zoning bylaws is within the jurisdiction of the courts, and enforcement of zoning bylaws is a matter for the municipality/regional district that created the bylaw.

[181] Accordingly, Cobble Hill's application to strike paragraph 1 of the Hayes' appeal is granted.

6. Should the application to strike Richard Sanders's grounds for appeal in paragraphs c, g, h, i, l-o and q be granted?

[182] The paragraphs at issue in this application to strike are as follows:

> *c. The area is not zoned by the CVRD for this use and a permit was not sought by SIA [South Island Aggregates];*
>
> *...*
>
> *g. The transportation of 100,000 tons of toxic waste (the equivalent of a million 200 lb men) down the Malahat every year for the next fifty years without incident is a pipe dream;*
>
> *h. The facts are SIA [South Island Aggregates] has already admitted to some illegal dumping, the MOE [Ministry of Environment] has yet to take any action against several culprits including for one, Redi Mix whom have been implicated back in 2009, and the ministry has yet to take any action besides writing a letter. No fine, no court action nothing. SIA [South Island Aggregates] was caught red handed removing Save Shawnigan Water Signs, and already have a history of breaching conditions as was evident by them admitting dumping without a permit prior to this permit being granted. How can they be expected to police themselves? I frankly have no faith in them doing anything of the kind and take issue with the $5,000 fine for breach of permit conditions. They should have to provide the ministry with a $500,000 bond to cover any possible environmental damage, I am sure the clean up at Goldstream was more than $5,000;*
>
> *i. The Cowichan Valley Regional District offered to work with the Ministry of Environment to look at an alternate site but they have failed to acknowledge or respond;*

> ...
>
> *l. The citizens of the Cowichan Valley Regional District, whom are also supported by the Capital Regional District have made it clear that [sic] do not want this site in our community;*
>
> *m. Indicating this decision was made by an independent adjudicator and will not be impacted by the political process is ludicrous. The reason there is a Ministry of Environment is to look after Environmental Issues for all of British Columbians. If the elected officials that represent the citizens of this Province don't recognize this they best look for new employment;*
>
> *n. The group that was responsible for the independent adjudication should be made to identify themselves, so those living in close proximity to this site will know who is responsible for considering the risk negligible and within acceptable levels;*
>
> *o. When four party representatives (Liberal – Steven Houser), NDP Conservative and Green Parties signed [sic] and documents indicating they did not support this permit (virtually unheard of in the political world) it is pretty evident that any fool can see this is a stupid idea, especially when there are alternate sites outside of any residential area;*
>
> ...
>
> *q. I am certain this will have a negative impact on the housing market in the area, including ongoing developments in the area, such as Goldstream the new Elkington Forest Hamlet, the facts are this will devastate local business as well as the housing market. A deprecation [sic] of 10% to 20% would impact the area up to half a billion dollars. Not sure what the site is worth, pretty sure it's not worth that.*

[183] Given the number of paragraphs at issue, and the number of responses to each paragraph, the Panel will evaluate Cobble Hill's application paragraph by paragraph.

Paragraph "c"

[184] Paragraph "c" states:

> *The area is not zoned by the CVRD for this use and a permit was not sought by SIA [South Island Aggregates];*

[185] The Panel has analyzed its jurisdiction to consider zoning in relation to paragraph 1 of the Hayes' appeal (above). The Panel finds that its analysis in relation to paragraph 1 of the Hayes' appeal applies equally to this paragraph in Mr. Sanders' appeal.

[186] For the same reasons given above, Cobble Hill's application to strike this ground for appeal is granted.

Paragraph "g"

[187] Paragraph "g" states:

> *g. The transportation of 100,000 tons of toxic waste (the equivalent of a million 200 lb men) down the Malahat every year for the next fifty years without incident is a pipe dream;*

Cobble Hill's Submissions

[188] Cobble Hill submits that, leaving aside the question of what is "toxic waste", transportation of contaminated soil on highways is not subject to the jurisdiction of the Board, particularly when the focus of the complaint is not an area affected by the Permit. It submits that a permit may allow for soil to be located on a property. However, a permit does not create or control the ability of the Permit Holder, or any other party, to move the soil on public highways.

Mr. Sanders' Submissions

[189] Mr. Sanders submits that transporting large amounts of waste increases the possibility of an accidental discharge along the way. He submits that the Board has the mandate to consider whether the volume of soil being moved over the Malahat "will inevitably cause a discharge of waste".

[190] Mr. Sanders states that this issue is not specifically precluded from consideration under the *Act*. Moreover, there is a current trend in environmental management to consider the cumulative impacts or effects of a project.

The Director's Submissions

[191] The Director agrees with Cobble Hill that paragraph "g" is not within the jurisdiction of the Board to consider in the context of an appeal of this Permit. He notes that the Permit authorizes the discharge of refuse to the ground and effluent to an ephemeral stream from a contaminated soil treatment facility and a landfill facility: it does not create or control the ability of Cobble Hill, or any other party, to move soil on public highways. He therefore consents to this application to strike.

The CVRD's Submissions

[192] The CVRD takes no position on the granting of the requested order in relation to transportation on the Malahat.

The Residents Association's Submissions

[193] The Residents Association submits that this transportation issue is, arguably, a relevant consideration for the Director. It submits as follows:

> ... where the Director is faced with uncertainty, a broader consideration of the social and economic benefits of the project is required in order to determine whether, despite the risks to the environment, the project has an overall public benefit that warrants taking the risks involved. The transportation of contaminated soils and the relative demand within the region for a landfill facility are appropriate considerations at that stage, and as a result, broadly

construed, Mr. Sanders' ground of appeal "g" may be entirely relevant to the exercise of the Director's discretion.

The Panel's findings

[194] The Panel notes that subsections 14(1)(c) and (e) of the *Act* both reference "transportation" as follows:

14 (1) A director may issue a permit ... and, without limiting that power, may do one or more of the following in the permit:

...

(c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

...

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

[Emphasis added]

[195] The Panel finds that consideration of accidental spills during transport of the waste to the site might, arguably, be covered be these subsections. Therefore, although the Permit does not create or control the ability of Cobble Hill to move soil on public highways, there may be some jurisdiction under section 14 of the *Act* to add conditions to the Permit in order to address the reasonable concerns (if established by Mr. Sanders at the hearing) relating to the transport of materials to the site.

[196] The application to strike this paragraph is denied.

Paragraph "h"

[197] Paragraph "h" states:

h. The facts are SIA [South Island Aggregates] has already admitted to some illegal dumping, the MOE (Ministry of Environment) has yet to take any action against several culprits including for one, Redi Mix whom [sic] have been implicated back in 2009, and the ministry has yet to take any action besides writing a letter. No fine, no court action nothing. SIA [South Island Aggregates] was caught red handed removing Save Shawnigan Water Signs, and already have a history of breaching conditions as was evident by them admitting dumping without a permit prior to this permit being granted. How can

> *they be expected to police themselves? I frankly have no faith in them doing anything of the kind and take issue with the $5,000 fine for breach of permit conditions. They should have to provide the ministry with a $500,000 bond to cover any possible environmental damage, I am sure the clean up at Goldstream was more than $5,000;*

[198] There are two subjects covered in this paragraph. The first is the issue of South Island Aggregates' compliance history. The second is whether Cobble Hill should have to provide some form of security to cover possible environmental damage. Any relevant submissions by the parties are included in the Panel's findings below.

The Panel's Findings

[199] Regarding South Island Aggregates' non-compliance, the Panel finds that its reasoning in relation to the application to strike the CVRD's paragraph 6 applies to the first part of Mr. Sanders' paragraph "h". Although Mr. Sanders wording is different, his basic concern is the same. The Panel finds that it is not plain and obvious that this part of the paragraph is beyond the jurisdiction of the Director and this Board. Therefore, the application to dismiss the ground for appeal asserted in this part of the paragraph is denied.

[200] Regarding the question of security, the parties submit as follows.

[201] Cobble Hill agrees that the Director has the discretion to order security under section 14(b) of the *Act*. Therefore, security is also within the jurisdiction of the Board. However, Cobble Hill states that the clean-up costs associated with unrelated events and an unrelated company are not proper grounds for appeal in relation to the Permit.

[202] Mr. Sanders submits that, instead of striking the portion of this ground for appeal relating to posting a security bond, the Board should realize that he does not have legal training and should allow him to amend his Notice of Appeal to include this under his request for relief.

[203] In light of the clear discretion in section 14 of the *Act* to require security, the Panel finds that it has the jurisdiction to consider Mr. Sanders' submissions on security.

[204] Accordingly, Cobble Hill's application to strike this paragraph is denied.

Paragraph "i"

[205] This paragraph states:

> *i. The Cowichan Valley Regional District offered to work with the Ministry of Environment to look at an alternate site but they have failed to acknowledge or respond;*

Cobble Hill's Submissions

[206] Cobble Hill submits that this paragraph does not raise a proper issue for the Board to decide. It submits that this paragraph suggests that the Ministry provide

a special level of consultation specifically for the CVRD, over and above ordinary stakeholder consultation. It submits that the CVRD was consulted as part of the ordinary process, and to create an extra statutory level of consultation would be a breach of procedural fairness. It further submits that the BC Supreme Court has confirmed that a decision-maker, like the Director, cannot afford greater weight to inappropriate considerations where to do so amounts to a denial of fairness to the application (*Pacific Broker Minerals Inc. v. British Columbia (Environment)*, 2013 BCSC 2258, at paragraph 138).

Mr. Sanders' Submissions

[207] Mr. Sanders submits that the question of whether Cobble Hill was required to consult with the CVRD is within the Board's mandate to consider.

The Director's Submissions

[208] The Director takes no position on this application.

The CVRD's and the Residents Association

[209] The CVRD and the Residents Association oppose the requested order.

The Panel's Findings

[210] Under the *Act*, and in accordance with the common law, a statutory decision-maker is required to consider the application before him or her. In this case, it is plain and obvious that the Director did not have jurisdiction to impose or refuse to consider the application because of the possibility of another site, nor does this Board have the jurisdiction to order him to do so.

[211] The application to dismiss this ground for appeal is granted.

Paragraph "I"

[212] This paragraph states:

> *I. The citizens of the Cowichan Valley Regional District, whom are also supported by the Capital Regional District have made it clear that [sic] do not want this site in our community;*

The Panel's Findings

[213] As stated in relation to the CVRD's paragraph 4, this Panel agrees with the Board's finding in *Harris* that "public opposition is not a consideration for permit amendments under section 16 of the Act", also applies to a section 14 decision.

[214] The Panel finds that public opposition is not, in and of itself, a relevant consideration under the *Act*. A decision-maker is required by law to consider the merits of an application; the fact that the "public" opposes an application is not a relevant consideration. As part of the notification process set out in the *Public Notification Regulation*, B.C. Reg. 202/94, made under the *Act*, it will likely be evident to a decision-maker that there is general public support or opposition to a

project. However, a permit cannot be granted or rejected by the statutory decision-maker on the basis of its popularity, or lack thereof.

[215] The Panel finds that public opposition is not a consideration under the *Act* and a permit cannot be rejected by a statutory decision-maker under section 14 on the basis of public opposition.

[216] Accordingly, Cobble Hill's application to strike this paragraph is granted.

Paragraph "m"

[217] This paragraph states:

> *m. Indicating this decision was made by an independent adjudicator and will not be impacted by the political process is ludicrous. The reason there is a Ministry of Environment is to look after Environmental Issues for all of British Columbians. If the elected officials that represent the citizens of this Province don't recognize this they best look for new employment;*

Cobble Hill's Submissions

[218] Cobble Hill submits that this paragraph appears to argue that the independent assessment process is impacted by the political process on a "tautological basis". Cobble Hill suggests that it appears to be a restatement of the argument that public opposition to a project is a ground for appeal.

Mr. Sanders' Submissions

[219] Mr. Sanders submits that general public interests are well within the Director's, and the Board's, authority to address.

The Director's Submissions

[220] The Director takes no position on this application.

The CVRD's and the Residents Association

[221] The CVRD and the Residents Association oppose the requested order.

The Panel's Findings

[222] Although this paragraph is not framed in legal language, reading the paragraph "generously", it appears that Mr. Sanders is alleging political influence. Put into a legal framework, he appears to be alleging that the Director's discretion was fettered, or that his decision was based on an irrelevant consideration (direction from elected officials), a consideration unrelated to the environment. Such arguments are within the jurisdiction of the Board to consider on an appeal under the *Act*. They are matter covered by the common law and, specifically, the rules of natural justice/procedural fairness.

[223] The application to strike this paragraph is denied.

Paragraph "n"

[224] Paragraph "n" states:

> *n. The group that was responsible for the independent adjudication should be made to identify themselves, so those living in close proximity to this site will know who is responsible for considering the risk negligible and within acceptable levels;*

Cobble Hill's Submissions

[225] Cobble Hill submits that this paragraph does not give rise to a ground of appeal.

Mr. Sanders' Submissions

[226] Mr. Sanders states that this paragraph relates to the decision-making process and concerns that there may have been deficiencies in the permitting process.

The Director's Submissions

[227] The Director takes no position on this application.

The CVRD's Submissions

[228] The CVRD opposes the requested order.

The Residents Association's Submissions

[229] The Residents Association suggests that this ground seems to relate to a concern about which officials within the Ministry of Environment were involved in the decision-making by the Director. It submits that such an inquiry "is not inappropriate" and should be adjudicated following presentation of the evidence during the hearing.

The Panel's Findings

[230] The concern underlying this paragraph appears to be the same as the one Mr. Sanders identified in paragraph "m". At its "heart", it is related to Mr. Sanders' allegation that the Director did not actually "make" the decision; that his decision was a type of "rubber stamp". The Panel has accepted that the Director's decision-making process, specifically whether his decision was fettered or influenced by others, is within the jurisdiction of the Board to consider.

[231] However, the Board is concerned that this paragraph is framed in the language of a "witch hunt". The Board does not have the power to "make" people identify themselves as being responsible for the decision. The Director is the only person authorized by the statute to make the decision, and is the person who signed the decision. Mr. Sanders is cautioned to keep his arguments focused on the legal issues within the Board's jurisdiction to consider, as outlined above.

[232] The application to strike paragraph "n" is denied.

Paragraph "o"

[233] This paragraph states:

> *o. When four party representatives (Liberal – Steven Houser), NDP Conservative and Green Parties signed [sic] and documents indicating they did not support this permit (virtually unheard of in the political world) it is pretty evident that any fool can see this is a stupid idea, especially when there are alternate sites outside of any residential area;*

Cobble Hill's Submissions

[234] Cobble Hill submits that this ground for appeal is essentially a restatement of the argument that public opposition to a project is a ground of appeal. It submits that public opposition to the project has been generated on the basis of material misinformation and, in the event that the number of individuals opposed is to be a persuasive factor will need to consider gathering public polling evidence, and will need to call witnesses regarding material misrepresentations made by those opposing the project in the media.

Mr. Sanders' Submissions

[235] Mr. Sanders submits that the opposition to this permit from environmental groups, citizen groups, First Nations and politicians carry enough weight that their voices should be heard. He advises of his intention to canvass these groups as possible witnesses.

The Director's Submissions

[236] The Director takes no position on this application.

The CVRD's and the Residents Association

[237] The CVRD and the Residents Association oppose the requested order.

The Panel's Findings

[238] For the same reasons given in relation to public opposition, and consideration of alternate sites under the headings above, the Panel finds that this paragraph does not raise an issue that is plainly and obviously within the jurisdiction of the Director or the Board.

[239] The application to strike this paragraph is granted.

Paragraph "q"

> *q. I am certain this will have a negative impact on the housing market in the area, including ongoing developments in the area, such as Goldstream the new Elkington Forest Hamlet, the facts are this will devastate local business as well as the housing market. A deprecation [sic] of 10% to 20% would impact the area up to half a billion dollars. Not sure what the site is worth, pretty sure it's not worth that.*

The Panel's Findings

[240] The Panel finds that its analysis of Mr. Witherpoon's appeal and the issues of property values apply equally to this ground for appeal. The Panel finds that it is plain and obvious that neither property values, nor impact on the local housing market, are matters relevant to a consideration of a section 14 permit.

[241] The application to strike this paragraph is granted.

7. Should the Board order the CVRD to post security for costs in the circumstances of this case?

[242] Section 95(1) of the *Act* sets out the Board's authority to order security for costs. It states:

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

[243] The Board has no written policy on the factors it will consider when faced with an application under this section. However, like's its policy on awarding party-and-party costs, this order will only be made in exceptional circumstances.

[244] The Board is of the view that the purpose of an order for security for costs is to protect a party from the possibility that it will be unable to recover its costs from its opponents if that party is ultimately successful in the litigation.

[245] The CVRD submits that it is pursuing its appeal for proper reasons and its grounds are not frivolous or vexatious in nature. Further, there is no rationale for requiring a local government to post security. The CVRD states that it has the ability to satisfy any award of costs that may be made at the conclusion of the appeal and there are no exceptional circumstances that warrant such an order in this case.

[246] The Panel agrees. It also notes that it has declined to pursue one of its grounds for appeal to reduce the cost and duration of the hearing.

DECISION

[247] The Panel has considered all of the submissions and arguments made, whether or not they have been specifically referenced herein.

a) Applications to Strike

<u>Mr. Witherspoon's appeal</u>

[248] For the reasons stated above, Cobble Hill's application 1(a) to strike the Mr. Witherspoon's appeal in its entirety is granted. Accordingly, Appeal No. 2013-EMA—017 is dismissed on the grounds of a lack of jurisdiction.

The CVRD's appeal

[249] The CVRD agrees not to pursue its ground for appeal pertaining to land use (ground for appeal #3) at the hearing of the appeal in order to reduce the cost and duration of the hearing, and given that it is unlikely that the Court will hear and decide this issue before the hearing of this appeal. Accordingly, Cobble Hill's application 1(b)(i) to strike the zoning (land use regulation) ground for appeal is granted by consent. The application to dismiss for abuse of process is denied.

[250] For the reasons stated above, Cobble Hill's application to strike paragraphs 4-6 of the CVRD's appeal is denied.

The Hayes' appeal

[251] Cobble Hill's application to strike paragraph 1 of Mr. and Mrs. the Hayes' Notice of Appeal regarding zoning/land use is granted.

Mr. Sanders' appeal

[252] Cobble Hill's application to strike paragraphs from Mr. Sanders' Notice of Appeal is granted in part. In particular:

- the application to strike paragraph "c" is granted. This ground is struck.
- the application to strike paragraph "g" is denied.
- the application to strike paragraph "h" is denied.
- the application to strike paragraph "i" is granted. This ground is struck.
- the application to strike paragraph "l" is granted. This ground is struck.
- the application to strike paragraph "m" is denied.
- the application to strike paragraph "n" is denied.
- the application to strike paragraph "o" is granted. This ground is struck.
- the application to strike paragraph "q" is granted. This ground is struck.

[253] Although a number of Mr. Sanders' grounds have been struck, some of his underlying concerns have been raised by the other Appellants in a manner that brings the issue within the Board's jurisdiction (e.g., public input regarding environmental impact). All parties should be aware that it is not the number of people raising an issue that is important during a hearing, it is the quality of the evidence and argument.

b) Security for Costs

[254] The application for security for costs is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

February 5, 2014