ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing – December 11, 2001 and February 1, 2002
Date of Decision – March 1, 2002

IN THE MATTER OF Sections 91, 92, 94, and 98 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Burnswest Corporation with respect to the decision of the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment to issue Administrative Penalty No. 01/10-BOW-AP-01/10 to Burnswest Corporation and Tiamat Environmental Consultants Ltd.

Cite as: *Burnswest* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.*

HEARING BEFORE		Dr. M. Anne Naeth, Chair Dr. John P. Ogilvie Mr. Ron V. Peiluck
PARTIES	Appellant:	Burnswest Corporation, represented by Mr. R. J. Kimoff.
	Director:	Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment represented by Ms. Charlene Graham and Ms. Heather Veale, Alberta Justice.
	Board Staff:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer and Ms. Valerie Higgins, Registrar of Appeals.
WITNESSES	Appellant:	Mr. Leon Mah, Tiamat Environmental Consultants Ltd. and Mr. R. J. Kimoff, Burnswest Corporation.
	Director:	Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, and Mr. Dave Gower, Contaminated Site Co-ordinator, Bow Region, Regional Services, Alberta Environment.

EXECUTIVE SUMMARY

Alberta Environment issued an Administrative Penalty to Burnswest Corporation and Tiamat Environmental Consultants Ltd. in the amount of $3,500 for the contravention of what was section 59 (now section 61) of the *Environmental Protection and Enhancement Act*. This section prohibits a person from carrying out an activity without an approval. Alberta Environment alleged that Burnswest and Tiamat treated more than 10 tonnes of hazardous waste by land treating soil with concentrations of leachable naphthalene greater than 0.5 mg/L at a construction site in Cochrane, Alberta. The treatment of more than 10 tonnes of hazardous waste per month requires an approval.

Burnswest, supported by Tiamat, appealed the Administrative Penalty, and the Board held a hearing on December 11, 2001. During the hearing, it became apparent that the evidence of an additional employee of Alberta Environment would be necessary to conclude the hearing. As this employee was not available to attend the hearing on December 11, 2001, the Board adjourned the hearing and continued on February 1, 2002, to hear this additional evidence.

Upon reviewing all the evidence, the Board has decided to confirm Alberta Environment's decision to issue an Administrative Penalty to the Burnswest and Tiamat. However, the Board reduces the amount of the Administrative Penalty from $3500 to $1000.

In coming to this decision, the Board assessed a greater portion of the penalty than Alberta Environment suggested for failing to obtain an approval from Alberta Environment prior to starting the treatment of hazardous waste. The Board believes that the requirement to obtain an approval is the cornerstone of the regulatory scheme. However, the Board also reduced a portion of the penalty as there was considerable confusion among Alberta Environment employees as to the type of authorization required, resulting in miscommunication and an unacceptably long delay for Burnswest to be informed of what was needed in the application and in assessing the administrative penalty. The Board also decreased the amount of the penalty taking into account the level of response and cooperation from Burnswest and Tiamat.

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I. BACKGROUND

[1] On August 27, 2001, the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") issued Administrative Penalty No. 01/10-BOW-AP-01/10 (the "Administrative Penalty") to Burnswest Corporation (the "Appellant") and Tiamat Environmental Consultants Ltd. ("Tiamat") for a contravention of section 59 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3. This section was subsequently replaced by section 61 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act").[1] The Administrative Penalty states that the Appellant and Tiamat treated more than 10 tonnes of hazardous waste per month without an approval. Specifically, the Appellant and Tiamat are said to have land treated soil with concentrations of leachable naphthalene greater than 0.5 mg/L (a hazardous waste) at a construction site in Cochrane, Alberta. The treatment of more than 10 tonnes of hazardous waste per month requires an approval.[2]

[2] On September 10, 2001, the Board received a Notice of Appeal from the Appellant appealing the Administrative Penalty. The Board acknowledged receipt of the Notice of Appeal on September 10, 2001, and, in the same letter, requested the Director provide the Board with a copy of his records (the "Record") relating to the Administrative Penalty.

[3] According to standard practice, on September 10, 2001, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective Board's legislation. Both Boards responded in the negative.

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[1] The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002 as part of the Revised Statutes of Alberta. Section 59 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 provides:

> "No person shall commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration."

The wording of section 61 of the revised statute is the same.

[2] Section 5(1) of the Activities Designation Regulation, A.R. 211/96 (the "Activities Designation Regulation") provides:

> "The activities listed in Schedule 1 are designated as activities in respect to which an approval is required."
>
> Schedule 1, Division 1, (a) of the Activities Designation Regulation provides:

[4] On September 28, 2001, the Board received a copy of the Record from the Director. On the same date, a copy of the Record was provided to the Appellant. The Director, in his letter of September 28, 2001, requested that the Board deal with the appeal by written submissions only as the issues included in the Notice of Appeal related to interpretation of provisions of the Act and little, if any, disagreement over the facts. The Board acknowledged the Director's letter and requested that the Appellant provide comments on proceeding with the hearing via written submissions. The Appellant and the Director were also requested to advise whether they would provide the Board with an Agreed Statement of Facts, should the hearing proceed via written submissions.

[5] On October 18, 2001, the Board received a response from the Appellant advising that an oral hearing would be preferable but agreeing to provide an Agreed Statement of Facts. The Director advised that on October 16, 2001, an Agreed Statement of Facts was forwarded to the Appellant for review. The Board was subsequently provided with the completed Agreed Statement of Facts on November 20, 2001. The Board notes that the Agreed Statement of Facts indicated that there were a number of issues on which the Parties were unable to agree.

[6] Through consultation with the Parties, a hearing was scheduled for December 11, 2001, in Calgary, Alberta.[3] On November 13, 2001, the Board advised the Parties of the procedures for the upcoming hearing. On November 26, 2001, the Board confirmed to the Parties that the only issues to be addressed at the hearing were "Did the Director act reasonably and correctly in issuing this Administrative Penalty?" and "Is this an activity which requires an approval under the *Environmental Protection and Enhancement Act*?"

[7] On November 27, 2001, the Board received a letter from the Appellant requesting that the monetary costs for which relief was requested in the Notice of Appeal be included as an issue to be heard by the Board. The Board received a response to the Appellant's request from

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"…the construction, operation or reclamation of a fixed facility where more that 10 tonnes per month of waste is treated…."

[3] A Notice of Public Hearing advertisement was placed in the *Cochrane Times* on November 21, 2001, advising that a hearing would be held on December 11, 2001, in Calgary and asked that if any person, other than the parties, wished to make representations before the Board, to advise the Board office by November 26, 2001. A news release was forwarded to the Public Affairs Bureau regarding the hearing and placed on the Alberta Government website on November 29, 2001. It was also distributed on the same day to 95 daily newspapers, radio stations, and television stations within Alberta. No requests to make representations were received.

the Director on that same day suggesting the Board deal with costs after issuing its decision on the merits. The Board responded to both letters on November 30, 2001, stating:

> "…the Board understands that Mr. Kimoff specifically refers to item V of his Notice of Appeal which states:
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> > 'The relief I request is as follows:
> > 1. Return of the $3500 penalty
> > 2. Return of the $1000 application fee
> > 3. Return of the $136.36 Advertising Cost
> > 4. Rebate of Fence Rental 10 mo @ $432.28/mo = $4320.28 [*sic*].'
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> The Board advises that item 1, the return of the $3500 administrative penalty would be a logical consequence should the Board decide that the Administrative Penalty was improperly issued to Burnswest Corporation and Tiamat Environmental and therefore does not need to be addressed as a separate issue at the hearing. With respect to items 2 to 4, the Board does not have the jurisdiction to deal with such items.
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> With respect to any requests for costs in relation to preparation and participation in this appeal, the Board advises that parties may indicate any intentions to request costs, on December 11, 2001, prior to the close of the hearing. Such applications will be dealt with after the Board has rendered its decision."[4]

[8] The hearing began on December 11, 2001. During the hearing, witnesses for the Appellant and the Director made references to conversations with Mr. Dave Gower, Contaminated Sites Co-ordinator, Alberta Environment. These conversations, which spanned several weeks, were between Mr. Gower and representatives of the Appellant and Tiamat about the work that was being undertaken and Alberta Environment's regulatory requirements. It became apparent that it would be necessary for Mr. Gower to appear before the Board to testify regarding these conversations. As Mr. Gower was not available to attend the hearing on December 11, 2001, the Board adjourned the hearing until such time as he could participate. In consultation with the Parties, the hearing was continued on February 1, 2002.

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[4] The Board notes that the Appellant subsequently reserved its right to ask for costs in this appeal and the Board will address this request in due course.

II. SUMMARY OF THE EVIDENCE

A. Summary of Facts[5]

[9] The Appellant is the registered owner of an undivided half interest in a commercial property located in the Town of Cochrane, Alberta. During excavation of the property to remove and replace soil unsuitable for building purposes, contaminated soil was encountered. The Appellant retained Tiamat to determine the best method of handling the contaminated soil, and Tiamat recommended the material be disposed of at the BFI Calgary Landfill ("BFI"). However, testing of deeper soil zones indicated there was a zone, designated as Zone C, containing concentrations of naphthalene greater than 0.5 mg/L that classified the soil as hazardous waste according to the Waste Control Regulation, A.R. 192/96 (the "Waste Control Regulation").[6]

[10] On September 1, 2000, Tiamat notified Alberta Environment of the naphthalene on the property.[7] As BFI would not accept the contaminated soil, Tiamat advised Alberta Environment on October 10, 2000, that the most severely contaminated soils would be excavated, allowed to drain, then spread onto a designated area on the site. Once the contamination level was reduced, the soil would be sent to BFI for disposal.[8] On October 11, 2000, Alberta Environment advised Tiamat that treatment of more than 10 tonnes per month of

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5 See letter dated November 20, 2001, from the Director providing an Agreed Statement of Facts.

6 Section 1 of the Waste Control Regulation provides:

> "In this Regulation…
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> (v) 'hazardous waste' means waste that has one or more of the properties described in Schedule 1, but does not include those wastes listed in Schedule 2…
>
> (ll) 'waste' means any solid or liquid material or product or combination of them (i) that is intended to be treated or disposed of…."
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> Schedule 1 of the Waste Control Regulation provides:
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> "1. Waste is hazardous … if, when tested according to test methods prescribed by the Director … (g) it is a toxic leachate because it is in a dispersible form and … (ii) its leachate contains any substance listed in Table 2 of the Schedule to the Alberta User Guide for Waste Managers, published by the Department, as amended from time to time in excess of the concentrations listed in that Table…."

Naphthalene is listed under Table 2 in the *Alberta User Guide for Waste Managers*. According to Table 2, the regulated level of naphthalene is 0.5 mg/L. Therefore, pursuant to Schedule 1, section 1(g)(ii) of the Waste Control Regulation, soil containing greater than 0.5 mg/L of naphthalene is a hazardous waste. See: Alberta Environmental Protection, *Alberta User Guide for Waste Managers* (Edmonton: Environmental Regulatory Service, 1996).

7 See Director's Record at Appendix 4, Dave Gower, Notes.

8 See Director's Record at Appendix 4, Dave Gower, E-mail from Tiamat to Dave Gower.

waste would require an approval. Alberta Environment requested that Tiamat provide a proposal to show no adverse effects would occur if the soil was spread on the site.[9] Alberta Environment claims, but Tiamat does not confirm, that on October 13, 2000, Tiamat was advised not to spread the contaminated soil until Alberta Environment accepted the proposal.[10] The Board notes that in the preparation of the Agreed Statement of Facts, the parties agreed to disagree on this point. Excavation of the initial layers of contaminated soil and their removal to BFI occurred between October 18 and 24, 2000.

[11] Tiamat submitted a proposal to Alberta Environment on October 25, 2000, to land farm the contaminated soils. Tiamat proposed to treat approximately 200 tonnes of the hazardous materials as a "trial" to determine the effectiveness of land farming to treat naphthalene contaminated soil. The material was to be treated by scarifying the contaminated soil, aerating it, and evaporating the naphthalene.[11] On the same day, Tiamat and the Appellant began the trial to determine if the proposal would effectively reduce naphthalene levels and if the operation would be possible within the time constraints and given the weather conditions. That evening, at a public meeting, Tiamat informed Alberta Environment that the trial procedure had started. Alberta Environment repeated that an approval was required to carry out the work. Tiamat indicated that it had no recollection that Alberta Environment had indicated, at that time, that the trial should cease. The trial continued on October 26 and 27, 2000. The Appellant advised that on October 27, 2000, the Calgary Health Region approved the monitoring activities at the site.

[12] On October 27, 2000, investigators from Alberta Environment went to the site and advised Tiamat that an approval was required before the land farming operation continued.[12] The Appellant shut down the land farming operation that day. On October 30, 2000, Tiamat provided further information to Alberta Environment and confirmed that a trial land farming operation using approximately 460 tonnes of Zone C material was initiated on October 25, 2000. Tiamat

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9 See Director's Record at Appendix 4, Dave Gower, E-mail from Dave Gower to Tiamat.

10 See Director's Record at Appendix 4, Dave Gower, Notes.

11 See Director's Record at Appendix 4, Leon Mah, Proposal to Alberta Environmental Protection [*sic*.].

12 See Director's Record at Appendix 3, Kevin Pilger, Notes.

acknowledged that an approval was not obtained prior to the commencement of the trial but it was started in the interest of time and weather.[13]

[13] On November 3, 2000, the Appellant and Tiamat received a Notice of Investigation from Alberta Environment relating to the land treatment of contaminated soil.[14] An Administrative Penalty Assessment Form was prepared.[15] On June 20, 2001, Alberta Environment sent the Appellant and Tiamat a Preliminary Assessment of Administrative Penalty[16] and confirmed a meeting for June 26, 2001, to discuss the matter. On August 27, 2001, the Director issued the Notice of Administrative Penalty No. 01/10-BOW-AP-01/10 in the amount of $3500 to the Appellant and Tiamat.[17] The Appellant paid the Administrative Penalty on September 7, 2001.[18]

B. Submissions of the Appellant

[14] The Appellant stated that the soil containing naphthalene on the site was considered hazardous because the leachable concentration exceeded the properties of hazardous waste outlined in the Waste Control Regulation.[19] There were three zones containing naphthalene. Zone A had creosote mixed with sawdust and was 2 to 3 m below the surface. Zone B, from the 3 to 4.3 m depth, consisted of sand and gravel containing naphthalene and creosote. Some areas were not contaminated. The highest naphthalene concentration was found in Zone C, 4.3 to 6 m below the surface. Material from Zones A and B was transported to and disposed of at BFI. However, BFI would not accept the Zone C material because it was classified as hazardous waste.

[15] Tiamat researched the facts on naphthalene in-depth prior to undertaking the trial. These facts included: there is a ubiquitous presence of naphthalene in urban centres; the body changes naphthalene into other chemicals that leave the body in urine over several days;

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13 See Director's Record at Appendix 4, Leon Mah, Letter from Leon Mah to Kevin Pilger et al.

14 See Director's Record at Appendix 3, Kevin Pilger, Letter from Kevin Pilger to Leon Mah and R. J. Kimoff.

15 See Director's Record at Tab 8.

16 See Director's Record at Tab 7.

17 See Director's Record at Tab 3.

18 See Director's Record at Tab 3 and letter from Burnswest to Alberta Environment dated September 7, 2001.

19 See: Footnote 6, *supra.*

naphthalene has a very low odour threshold and humans are capable of detecting naphthalene in air at concentrations as low as 0.03 ppm or 30 ppb; there is a natural tendency for naphthalene to evaporate under standard temperature and atmospheric pressure; and there is a natural breakdown of naphthalene vapour into inert end products (carbon dioxide and water) within about 4 to 8 hours of it being released into the atmosphere.

[16] Tiamat determined treatment of the contaminated soil would reduce the concentration of naphthalene to levels accepted by BFI. The Appellant submitted that

> "…because of the natural inclination of naphthalene to volatilize at normal temperature and pressure, pretreatment, by simple aeration of the higher concentration material on site is a fairly common procedure in Alberta and that this pretreatment method should not constitute any hazard provided it is carried out under proper supervision and control."

The Board notes that there was only one place, in Ontario, which had previously dealt with treating naphthalene in an urban environment.

[17] According to the Appellant and Tiamat, the only regulation in Alberta that specifically applies to the concentration of naphthalene and air quality is the Chemical Hazards Regulation, A.R. 393/88. The occupational exposure limit of naphthalene vapour is 10 ppm, based on an 8-hour workday and 40-hour workweek. The Appellant stated that the vapour concentration produced during the remedial work carried out on the site was well below this limit.

[18] The Appellant estimated that approximately 3000 to 3600 tonnes in Zone C was contaminated. The trial involved an area 20 m by 25 m by 0.3 m and included approximately 460 tonnes.[20] On cross-examination on February 1, 2002, the Appellant stated there was 1800 m^3 that required treatment. Tiamat explained that a monitoring system was set up on the site to detect naphthalene levels. Under cross-examination the Appellant repeated that the vapour concentrations produced during the remedial work carried out on the site were well below the occupational exposure limit. The Appellant indicated that the maximum readings occurred at the base of the excavation. The maximum reading at the monitor on the boundary of property was 1.6 ppm and the maximum reading at the base of the excavation was 4 to 6 ppm.

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[20] The Board notes this represents approximately 12.7% to 15.3% of the total amount of contaminated soil.

[19] The Appellant did not believe it was in contravention of any regulation as it was only completing a trial to determine if the proposed treatment method would effectively reduce the naphthalene concentration in the soil, if the equipment on site (backhoe versus ripper) could effectively carry out the treatment, how much time would be required to decrease the naphthalene to an acceptable level, and if the method would be cost effective. The Appellant was not aware of any complaints about the trial or the removal of the less contaminated soil from the site.

[20] The Appellant provided documentation indicating the uncertainty and confusion of Alberta Environment in determining what type of authorization was required. In letters dated November 3 and 15, 2000, from Alberta Environment to the Appellant, there was reference to a registration being required. The Appellant stated that Tiamat received verbal instructions from Alberta Environment that a Registration Form for Class II Land Treatment had to be completed and submitted. Alberta Environment thought a registration was needed, but not one under the Code of Practice for the Land Treatment and Disposal of Soil Containing Hydrocarbons.[21] However, to start the process, the Class II Land Treatment form was used. Tiamat filed the form on October 30, 2000, a revised form on November 3, 2000, and an additional application on May 18, 2001, on the registration form.[22] Tiamat was then told it was the incorrect form and an application for an approval was submitted on June 6, 2001.[23]

[21] The Appellant argued that an Administrative Penalty cannot be based on "some sort of authorization" being required. They did not consider it fair for the Director to state that the consultant should know what approvals were required when Alberta Environment itself did not know what form of registration or approval was required.

[22] The Appellant contested the Director's interpretation of the Activities Designation Regulation, which requires an approval for "...the construction, operation or reclamation of a fixed facility where more than 10 tonnes per month of waste is treated…."[24] The Appellant did not consider its operation to fall within the definition of "fixed facility." The Appellant

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21 See Director's Record at Appendix 4, Dave Gower, Notes.

22 See Director's Record at Appendix 4, Dave Gower, Notes. In Mr. Gower's notes there is a reference to a registration being required.

23 Approval 15231-00-00 as subsequently issued in September 2001.

24 See: Schedule 1, Division 1, Section (a) of the Activities Designation Regulation.

interpreted a fixed facility to be a "…permanent plant or area which is constructed for the specific purpose of carrying out an activity on an ongoing basis." In closing arguments, the Appellant stated that the "… excavation and work area was certainly not built, purchased or installed to make an action or operation easier; or to serve a special purpose, or to perform some particular function." The Appellant also did not believe the pit could be considered permanent as it could be filled in the next day.

[23] The Appellant further objected to the manner in which the Director interpreted the "10 tonnes per month of waste" requirement. The Appellant submitted that exceeding 10 tonnes of waste is not sufficient as the Activity Designation Regulation refers to "per," implying the processing of material month after month. As its operation would only occur once for a few days, the Appellant assumed that this section of the Activities Designation Regulation would not apply. The Appellant stated that its operation was actually a pretreatment or intermediate step, with the final operation being the removal of the soil to the landfill.

[24] The Appellant also argued that the responsibility imposed on it by section 112[25] of the Act to take remedial action when there is a substance release overrides the requirements of section 61 to obtain an approval.[26] (In the Board's view, this argument appears to be inconsistent with the *Interpretation Act.*[27])

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[25] Section 112 states:

"Where a substance that has caused, is causing or may cause an adverse effect is released into the environment, the person responsible for the substance shall, as soon as that person becomes aware or ought to have become aware of the release,

(a) take all reasonable measures to

(i) repair, remedy and confine the effects of the substance, and

(ii) remove or otherwise dispose of the substance in such a manner as to effect maximum protection to human life, health and the environment, and

(b) restore the environment to a condition satisfactory to the Director."

[26] Section 61 states:

"No person shall commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration."

[27] According to the *Interpretation Act*, the entire Act is to be read and interpreted in a manner that best ensures its objectives are attained. (*Interpretation Act*, R.S.A. 2000, c. I-8, s. 10, states: "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.") The main objective of the *Environmental Protection and Enhancement Act* as stated in section 2 is "…to support and promote the protection, enhancement and wise use of the environment…." The *Interpretation Act* appears to suggest that one section does not override another unless it is specifically stated in the act. For example, to have section 112 take precedence over section 61; an exemption would have to be added to

[25] When asked to explain the industry's standard practice on other similar projects, the Appellant stated there is a Code of Practice[28] that deals with soil contaminated with hydrocarbons. To land farm contaminated soil, an application must be sent to Alberta Environment. After Alberta Environment issues a registration number, the land farming can start, and the site can be remediated. Since naphthalene has characteristics similar to gasoline in that it is volatile and will evaporate, the Appellant and Tiamat *assumed* a similar practice to what would be used with gasoline could also be used with naphthalene.[29] The Appellant did not believe an approval was required because it was only a "trial" to test pretreatment methods, another standard practice of the industry.

[26] The Appellant did not recall, nor is there evidence to the contrary, Alberta Environment stating that the trial had to stop on October 25, 2000. It was the understanding of the Appellant and Tiamat that an approval would be required before it went on to a full-scale operation. They did, however, stop the operation as soon as they were instructed to on October 27, 2000.

[27] The Appellant stated that it was attempting to carry out its responsibilities under section 112 and had "… honestly endeavored to cooperate with the Department and to comply with its requirements at all times. This is demonstrated by the proliferation of submissions requested by the Department and provided to them." It added there was no deliberate attempt to circumvent any regulatory process, and its actions were based on "… defensible scientific fact

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the section. Therefore, the *Interpretation Act* appears to indicate that even though the person responsible for the release of a substance has an obligation to contain and remove the substance, it does not mean that other sections of the Act, such as the requirement to obtain an approval, can be ignored.

[28] Code of Practice for the Land Treatment and Disposal of Soils Containing Hydrocarbons, Alberta Environment.

[29] The Board notes that Henry's law constant is the ratio of the concentration of a substance in the vapour phase to that in the soil water phase at equilibrium at a given temperature. Compounds with a large constant tend to partition into the vapour phase and are, therefore, more likely to volatilize. The Henry's law constant for naphthalene is 4.6×10^{-4} atm-m^3/mol, and for gasoline, the constant is 4.8×10^{-4} atm-m^3/mol. (U.S. Department of Health and Human Services, *Toxicological Profile for Naphthalene, 1-Methylnaphthalene, and 2-Methylynaphthalene* (Atlanta: Agency for Toxic Substances and Disease Registry, 1995); U.S. Department of Health and Human Services, *Toxicological Profile for Automotive Gasoline* (Atlanta: Agency for Toxic Substances and Disease Registry, 1995)). Based on the similarity of these constants, it can be predicted that naphthalene would volatilize at a rate similar to gasoline. However, the Board notes that there are other properties of these substances that must be taken into consideration. For example, the odour threshold level for naphthalene is 3 to 7 ppb whereas the threshold for gasoline is 10 to 15 ppm. The average person can detect small amounts of naphthalene in the air, approximately one-thousandths of the amount required to detect gasoline.

and professional engineering judgment following what at the time was considered to be a standard accepted practice." The Appellant was "… attempting to solve an environmental problem under the proper supervision and control of a knowledgeable and experienced consultant and has done nothing to contravene any regulation and/or control."

[28] In final argument, the Appellant alternatively argued that

> "… if the Act or Regulation is unclear and/or ambiguous, it should not be used against a person to determine a contravention or assessing a penalty, particularly where an activity is being carried out with the best of intention, is under proper supervision and control and there has been no significant adverse effect."

The Appellant further submitted that if there is a deficiency in the legislation, it should be changed so that the requirements are clear to all that use it. The Appellant closed by emphasizing that Schedule 1 of the Activities Designation Regulation does not apply to their operation, and there is no justification for the Administrative Penalty.

C. Submissions of the Director

[29] The Director referred to section 61 of the Act that states: "No person shall commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration." The Activities Designation Regulation states that activities listed in Schedule 1 require an approval. Division 1 of Schedule 1 of the Activities Designation Regulation refers to "… the construction, operation or reclamation of a fixed facility where more than 10 tonnes per month of waste is treated…."

[30] The Director stated that the Appellant agreed there was an operation on the site where more than 10 tonnes of waste had been treated, that the Appellant knew regulatory requirements had to be met, and that it did not have an approval to carry on the operation. Even after the Appellant and Tiamat were advised they would need an approval, they conducted the trial operation. The Director admitted there was some confusion on the type of authorization required (registration versus approval), but there was no confusion that some sort of authorization was needed, and there was no confusion that an authorization would be required before the activity was started. The Director said he would consider whether a registration or an approval was required taking into consideration the proposal submitted by the Appellant.

[31] The Director accepted that the definition of "fixed facility" is an issue. As there is no definition of fixed facility in the Act, the Director considered the other subsections of Schedule 1, Division 1 of the Activities Designation Regulation and reached the opinion that "fixed" means "immovable." As the site was a pit and therefore immovable, the operation fit within the definition. The Director used *Black's Law Dictionary*,[30] to define "facility" which included "…that which promotes the ease of any action, operation, transaction or course of conduct." The Director also pointed to the word "facilitates" which is defined as "…embraces anything which aids or makes easier the performance of the activities involved in the business of a person or corporation." The Director submitted that given the broad definition of facility, it was reasonable to interpret the use of the site to treat waste as falling within the definition.

[32] The Director explained how the $3500 penalty was calculated. The variation from the regulatory scheme was assessed as minor, but the potential adverse effect was considered major. The level of naphthalene vapours in the soil headspace was considered as having a high potential for adversely affecting users of the neighbouring businesses. The Director also considered the possibility of naphthalene having a carcinogenic effect. Upon reviewing the MSDS[31] sheets on naphthalene, he noted it was a known carcinogen, irritated the eyes and respiratory system of individuals, and had an odour. The Director also noted that the site was in an urban community. Although the only limits prescribed for naphthalene were found in Occupational Health and Safety legislation, Alberta Environment was not bound by these values and could set lower limits in the approval if the Director considered it appropriate to do so. An approval could have included specific control measures to reduce the risk of naphthalene fumes affecting neighbouring businesses. The base amount for the penalty was assessed at $2500. An additional $1000 was added for not complying with the regulatory scheme and another $1000 was included for the willful or negligent contravention of the legislative requirements. As there was no history of non-compliance, $500 was deducted from the penalty, and an additional $500 was deducted as the Appellant cooperated fully with the investigation. The resulting penalty was $3500.

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30 *Black's Law Dictionary*, (5th ed.) (St. Paul: West Publishing Co.).

31 Mallinckrodt Baker Inc., Material Safety Data Sheet, MSDS No. N0090 (1999).

[33] In his testimony, Mr. Gower said he was not aware the Appellant and Tiamat were planning to run a trial, but even with a trial, Alberta Environment would need to be notified. He said the procedure with respect to a trial is for Alberta Environment to review the proposal, and if accepted, write a letter stipulating the conditions. He considered this situation unique and more information was needed to determine what type of authorization was required. He requested an application under the Code of Practice as he initially thought it might fit under the Code. On October 25, 2000, he told the Appellant not to continue with the work on the site. He was not aware of any complaints filed with Alberta Environment, but, as the activity was still continuing, it would not make a difference when assessing non-compliance with the Activities Designation Regulation.

[34] In closing arguments, the Director recognized three issues: did the activity need an approval; did the Director act correctly; and is the defence of officially induced error available? The Director stated that three elements were required for the Activities Designation Regulation to apply: more than 10 tonnes of waste; an operation to treat; and a fixed facility. The Director stated that the broad definition of facility included the use of a site to treat waste. The pit is immovable and therefore, it is a fixed. The Director argued that he acted correctly as the Appellant and Tiamat knew regulatory requirements had to be met, and they were told authorization was required, as it was a hazardous waste. He stated the amount assessed was correct based on the circumstances.

[35] The Director submitted that the defence of officially induced error is not made out in this circumstance. It had not been proven that erroneous advice had been given, and the Appellant knew authorization was required. There was no evidence of reliance on the advice as the trial was started before any advice was given. Tiamat's experience with underground tanks did not take into account that naphthalene is different, and there was an erroneous assumption made that this experience could apply directly to soil contaminated with naphthalene as well.

III. ANALYSIS

A. Approvals, Registrations, and Codes of Practice

[36] Under the Activities Designation Regulation, certain activities are listed as requiring an approval while others are listed require a registration.[32] Approval and registration are defined in the Act in sections 1(f) and 1(ggg) respectively as:

> "'approval' means an approval issued under this Act in respect of an activity, and includes the renewal of an approval…
>
> 'registration' means, except in sections 23, 24, 34(n), 154(b) and 175(d), a registration issued under this Act in respect of an activity, and includes the renewal of a registration…."

[37] Under section 85(1) of the Act, the Minister may make regulations designating activities or classes of activities as requiring an approval or a registration.[33]

[38] In principle, activities requiring a registration generally have potential effects on the environment that are less than those that are regulated by an approval. Conversely, in principle, activities requiring an approval generally have potential effects on the environment that are greater than those that are regulated by a registration. The legislation generally requires that a person wanting to perform an activity that needs to be registered to comply with a corresponding Code of Practice. (See discussion below.) An approval will usually include terms and conditions that are more site specific.

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[32] Section 5 of the Activities Designation Regulation provides:

"5(1) The activities listed in Schedule 1 are designated as activities in respect of which an approval is required.

(2) The activities listed in Schedule 2 are designated as activities in respect of which a registration is required."

[33] Section 85(1) of the Act states:

"The Minister may make regulations

(a) designating activities or classes of activities in respect of which an approval or registration is required, respecting the circumstances under which an approval or registration is required and the persons or classes of persons who are required to obtain an approval or registration and specifying the kind of approval or registration required;

(b) exempting any activities or classes of activities related to storing and processing designated material from all or any of the provisions of this Part or of the regulations, for a period of time or permanently, with or without conditions…"

[39] Section 61 of the Act makes an approval or registration a requirement before a particular activity can proceed. Although an approval or registration may be sold or transferred to another party, its true value is that it allows the activity to proceed or continue. Without the approval or registration, the activity would not legally be able to take place.

[40] In the arguments presented before the Board, the Appellant referred to section 75 of the Act.[34] This section provides that the Director's permission is required to sell, transfer or otherwise dispose of an approval or registration. The Appellants referred to this section to show that an approval or registration has value, and argued that what it has on its site is a liability and therefore should not be the subject of an approval or a registration. The Board disagrees. An approval or registration cannot be sold or transferred as a separate entity. It can only be transferred with that specific activity. It does not matter if the contaminated site is a liability to the Appellant as the Appellant still has the responsibility of dealing with the environmental issues. It is a cost of doing business. The issuance of an approval or a registration is determined by the effect the activity will have on the environment, not on the value of the project.

[41] The Board found much significant confusion among the Parties about the difference between an approval and a registration and which was required in this situation. Having reviewed the definitions of approval and registration, the Board concludes that whether permission to deal with the contaminants on the site required an approval or a registration is irrelevant. Both Parties knew some kind of formal permission was required from Alberta Environment to treat the naphthalene contaminated soil on the site. The section under which the penalty was assessed makes it an offense to conduct an activity without the appropriate approval or registration. Thus, there was no reason to conduct the activity without such permission and to do so constitutes an offense and as a result, it is appropriate to issue an Administrative Penalty.

[42] There was much discussion during the hearing about the role of Codes of Practice. The Appellant indicated, among other things, that it was there previous experience in deal with

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[34] Section 75 of the Act states:

"(1) No person shall transfer, sell, lease, assign or otherwise dispose of an approval or registration except in accordance with the regulations.

(2) The Director may impose any terms and conditions that the Director considers appropriate in respect of the transfer, sale, lease, assignment or other disposition of an approval or registration."

the Code of Practice relating to soil contaminated with hydrocarbons that lead them to believe that they could deal with soil contaminated with naphthalene in the same way.

[43] A Code of Practice is a set of standardized requirements for a specific activity. Under the Act, a registration generally requires that the holder comply with the terms and condition set out in the Code of Practice.[35]

[44] The Activities Designation Regulation includes three schedules which list activities according to whether an approval is required (Schedule 1), a registration is required (Schedule 2), or notice must be given (Schedule 3). It includes definitions for terms used in each Schedule. In order to comply with the law, the person planning an activity must check to see whether the proposed activity is included in one of the Schedules. If it is listed, then the person can determine if an approval, a registration, or notification is required. If the activity is not listed in one of the Schedules, the person must determine if there are other sections of the Act, other regulations, or other acts that might apply. Ultimately, it is the responsibility of the person undertaking a project that may or may not be an activity to make this determination.

[45] For example, during questioning by the Board, the Parties advised the Board that generally the simple removal of contaminated soil to an approved facility does not require an approval or a registration as the excavation of these sites is not included as a designated activity under the Activities Designation Regulation. Instead, the handling of hazardous waste is specified in section 188 of the Act.[36] (The Board notes this example in that it provides a point of comparison in assessing the conduct of the Appellant in this case.)

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[35] An example of a provision incorporating a Code of Practice can be found in section 14.1 of the Substance Release Regulation, A.R. 124/93. This section provides:

> "A person who carries on an activity referred to in Column A of the Schedule to this Regulation shall comply with the corresponding Code referred to in Column B of the Schedule in the carrying on of that activity."

The Schedule lists the activity and the corresponding Code, such as the Code of Practice for Small Fish Farms and Fish Processing Plants.

[36] Section 188 of the Environmental Protection and Enhancement Act states:

> "(1) No person shall
>
> (a) generate hazardous waste and permit that hazardous waste to leave the premises where it was generated,
>
> (b) collect hazardous waste from the premises referred to in clause (a),
>
> (c) consign or transport hazardous waste, or

[46] The Board concludes there was ample information in the Act, Regulations and Codes of Practice for the Appellant to be aware of what was generally required of it and Alberta Environment. There was sufficient information for the Appellant to know it could not treat hazardous waste on site without the appropriate permission from Alberta Environment.

B. Definitions and Interpretations

[47] The Appellant and the Director had some different interpretations worthy of discussion. The Board concludes there is room for interpretation with the phrases "fixed facility" and "10 tonnes per month." This notwithstanding, the Board if of the view that the interpretation the Director gave the terms is reasonable. However, in deciding this appeal, the interpretations are of less importance than the fact that the Appellant was dealing with hazardous waste. As such, deliberate and clear discussions with Alberta Environment officials on a course of action are critical. These discussions should include the meaning of fixed facilities and the amount of material treated in a given time period if there are questions of interpretation. The Board sees no reason why the Appellant would not have discussed this outright with Alberta Environment rather than rely on its interpretation in assuming it was not going against any

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> (d) accept hazardous waste for transportation, treatment or disposal, or store or provide storage facilities for hazardous waste where the hazardous waste is generated by another person,
>
> unless the person referred to or that person's employer has been issued a personal identification number by the Director.
>
> (2) An application for a personal identification number must be made in the form and manner provided for in the regulations."
>
> Section 191 of the Act provides additional requirements for the handling of hazardous wastes.
>
> "No person shall consign or transport or accept for transportation, storage, treatment or disposal any hazardous waste unless the waste is accompanied by a manifest that
>
> (a) is completed in accordance with the regulations,
>
> (b) accurately identifies the quantity, composition and points of origin and destination of the hazardous waste, and
>
> (c) contains the personal identification number of each person consigning, transporting or accepting the waste."

Under the Act, the removal of hazardous waste uses the manifest system instead of approvals and registrations. This system allows for tracking of the waste from the point of origin to the final disposal site. Before the waste can be removed from the site, a hazardous waste generator number must be obtained from the Director, who is informed of the location, type and amount of waste. Persons who carry and receive the waste must be registered with the Director. The manifest forms consist of six copies. One copy is sent by the consignor to Alberta Environment within two working days of shipment; one copy is kept by the consignor; the third copy is sent by the receiver to Alberta Environment within two working days of receiving the shipment; one copy is returned to the consignor by the receiver; one is given to the carrier; and the last copy is retained by the receiver and kept for two years.

regulation. There seems to be a distinct lack of willingness to participate in full and open discussion and instead it would appear that a game of interpreting the rules is being played.

C. Officially Induced Error and Ignorance of the Law

[48] Finally, during the course of its presentation, the Appellant appeared to present elements of the defence of official induced error. The defence of officially induced error exists where the accused is led to believe, by the erroneous advice of an official, that he is not acting illegally. According to Lamer C.J. in *R.* v. *Jorgensen*,[37] for the defence of officially induced error to be successful, four preconditions must be satisfied: the accused considered the legal consequences of his actions; the accused sought advice from an appropriate official; the accused must demonstrate that the advice was reasonable; and the accused must demonstrate reliance on the official advice.

[49] When assessing the defence of officially induced error, the official whose advice was followed "… must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question."[38] The administration of justice would be brought into disrepute if an individual were prosecuted for an offence by the same government that assured the person that his actions were not an offence. For an individual to have relied on the advice, the actions in question could not have started until after the advice had been received.

[50] For this defence to apply, the accused must have taken steps to become informed of the applicable law. As stated in section 19 of the Criminal Code of Canada: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

[51] The Supreme Court of Canada in *R.* v. *Jorgensen* accepted Don Stuart's rationale for not accepting ignorance of the law as an excuse because:

> "1. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.
> 2. It would encourage ignorance where knowledge is socially desirable.

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37 *R.* v. *Jorgenson*, [1995] 4 S.C.R. 55 at paragraphs 29 to35.

38 *R.* v. *Jorgenson*, [1995] 4 S.C.R. 55 at paragraph 30.

3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.
4. Ignorance of the law is blameworthy in itself."[39]

In *R.* v. *Foster*,[40] the Court looked at whether ignorance of the law was relevant in a defence. The Court stated that "…knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence."[41] A person does not have to know that what they are doing is against the law to be found guilty of committing the act. Therefore, claiming that they did not know the law would not be a defence.

[52] In this case, the Appellant clearly indicated they "assumed" a trial was appropriate based on past experience with hydrocarbon contamination. The Appellant and Tiamat suggested the standard of the industry was to conduct trials to determine the most appropriate way to deal with hydrocarbon contamination. The Appellant clearly indicated it did not specifically ask anyone in Alberta Environment if it could carry out a trial while awaiting an approval or a registration for treating the contaminated soil. The Appellant clearly indicated there was little, if any, information on how to treat naphthalene and proceeded to contact numerous officials in other provinces about how to do so. Once Tiamat got recommendations on dealing with naphthalene in an urban setting from Ontario, it did not contact Alberta Environment officials to determine if this approach was appropriate for this jurisdiction. The Appellant said Alberta Environment was not forthcoming in its information to them about what kind of permission was required for its site. The Board agrees with this statement, but does not find it a legitimate excuse for not approaching Alberta Environment directly to be clear that what it was doing in its trial was acceptable by law.

[53] Alberta Environment staff were not open in discussing what was needed to meet the requirements of the Act and the associated regulations. Alberta Environment should have stated unequivocally that an approval or a registration was needed. However, the Board also concludes that it is no excuse for the Appellant to assume it could proceed even with a trial

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[39] *R.* v. *Jorgensen*, [1995] 4 S.C.R. 55 at paragraph 5; D. Stuart, *Canadian Criminal Law: A Treatise* (3rd ed.) (Toronto: Carswell, 1995).

[40] *R.* v. *Foster,* [1992] 1 S.C.R. 339 at paragraph 15.

[41] *Mens rea* means a guilty mind; guilty knowledge and willfulness. (*Black's Law Dictionary* (6th ed.) (St. Paul: West Publishing Co., 1990).)

without clear permission to do so. The Board reminds both Parties that good communication is essential and Parties need to be forthright and proactive in dealing with environmental contaminants. Such communication is required for the proper functioning of the regulatory scheme.

[54] Further, during the testimony of the Director he explained how Alberta Environment is divided into two sides: an approval side and an enforcement side. According to the Director, the "approval side" is responsible for issuing approvals and registrations, deals with approval and registration holders on a day to day basis, and is under the direction of a different "Director".[42] The "enforcement side", for which the Director is responsible in this part of the Province, deals with, among other things, violations of the Act. The Director advised that he is responsible for directing investigations, interpreting the legislation with respect to making enforcement decisions, and for deciding what the appropriate enforcement response should be. The Director pointed to this "division of labour" as an explanation for the confusion at Alberta Environment as to what type of authorization was required in this situation.

[55] The Board does not accept this explanation. While the Board agrees that it is the responsibility of the Director to interpret the legislation with respect to making enforcement decisions and deciding what the appropriate enforcement response should be, this does not provide sufficient explanation about the confusion as to what type of authorization is required in this situation. In providing direction regarding the regulatory scheme, Alberta Environment should speak with one voice. While it is certainly the responsibility of the Appellant to ultimately obtain the appropriate authorization, Alberta Environment should have been able to provide a more definitive and timely response when the Appellant made application for an authorization. Just as good communication is required between the proponent of a project and Alberta Environment, good communication is also required between the approval side and the enforcement side within Alberta Environment. Again, such communication is required for the proper functioning of the regulatory scheme.

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[42] The Board notes that there are a number of Directors's designated under the Act and that they are assigned responsibility for different parts of the Act in different geographical regions.

D. The Penalty

[56] The Board now turns its attention to the penalty imposed by Alberta Environment on the Appellant and Tiamat.

1. Director's Assessment

[57] In the preliminary assessment, the Director determined that the base amount of the penalty should be $2500, based on the variation from the regulatory scheme being viewed as minor and the potential for adverse effect viewed as major.[43] The Director added $1000 because obtaining an approval prior to conducting an activity is the cornerstone of the regulatory scheme, and an additional $1500 was added because the Appellant and Tiamat were aware that an approval was required for the land treatment of hazardous waste. The Director then lowered the assessment by $500 because the Appellant and Tiamat have no history of non-compliance and another $500 was taken off the assessment because they were cooperative during the investigation. This resulted in a total preliminary assessment of $4000.

[58] Following his meeting with the Appellant and Tiamat, the Director issued his final assessment. In his final assessment, he decided that the Appellant's and Tiamat's failure to obtain an authorization from Alberta Environment prior to conducting their trial was not willful and therefore, he reduced the $1500 assessment for being aware that an approval was required to $1000. Therefore, the total penalty assessed was $3500.

2. The Board's View

[59] The Board disagrees with the Director that the variation from the regulatory scheme should be considered minor. In the Board's view, any variation when dealing with a hazardous material that has no specific regulatory handling procedures should be viewed as at

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[43] Section 3(1) of the Administrative Penalty Regulation, A.R. 143/95 states:

"Subject to subsections (2) and (3), the amount of an administrative penalty shall be the base penalty calculated by the Director in accordance with the following Table:

	Variation From Regulatory Requirement			
		Major	Moderate	Minor
Potential for Adverse Effect	Major	$5000	$3500	$2500
	Moderate	3500	2500	1500
	Minor	2500	1500	1000

least moderate. Obtaining an approval is the cornerstone of the regulatory process. Obtaining an approval ensures that Alberta Environment has reviewed the activity proposed by the proponent and ensures that certain precautions are taken to protect the environment. Where a proponent does not obtain an approval, there is a danger that the appropriate precautions have not been taken.

[60] In considering the properties of naphthalene in the amounts on the site, the Board concludes the potential for adverse effect should also be assessed as moderate, instead of major as assessed by the Director. Naphthalene is easily volatilized from aerated soils, and if exposed to air, moisture or sunlight, will often break down in one day. It binds weakly to soils, and if it enters water, is destroyed by bacteria, biodegrading into carbon dioxide. It does not bioaccumulate in animals, but can be passed on in milk or eggs. However, exposure to large amounts can damage or destroy red blood cells and can cause nausea, vomiting, diarrhea, blood in the urine, and a yellow skin colour. Further, no studies have been done to determine the carcinogenic affect on humans although studies have shown it can cause cancer in female mice.[44]

[61] Further, according to the Canadian Environmental Quality Guidelines, the recommended level of allowable contaminant for total naphthalene in soil is 0.1, 0.6, 22 and 22 mg/kg for agricultural, residential and parkland, commercial, and industrial land uses, respectively.[45] Leachable naphthalene was measured at 3.4 mg/L on September 9, 2000 and 4.5 mg/L on September 14, 2000. Reports show leachable naphthalene was less than 0.5 mg/L, while retests showed it greater than 0.5 mg/L.[46] Dissolved naphthalene in water in contact with the soil in Zone C showed less than 0.5 mg/L.[47] Vapour concentrations in the soil headspace at the bottom of the pit reached a peak of 26 ppm.[48] The National Institute for Occupational Safety and Health considers more than 250 ppm of naphthalene in air to be immediately dangerous to life and health, and at this level, naphthalene is likely to cause permanent health problems or

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[44] U.S. Department of Health and Human Services, *Toxicological Profile for Naphthalene, 1-Methylnaphthalene, and 2-Methylynaphthalene* (Atlanta: Agency for Toxic Substances and Disease Registry, 1995).

[45] Canadian Council of Ministers of the Environment, *Canadian Environmental Quality Guidelines* (Winnipeg: CCME, 1999).

[46] See test results from EnviroTest Laboratories, September 21, 2000 and letter from Tiamat to BFI Canada, dated September 20, 2000.

[47] See test results from EnviroTest Laboratories, September 21, 2000 and letter from Tiamat to BFI Canada, dated September 20, 2000.

death.[49] According to the Appellant, the amount of naphthalene in the air during the trial was 1.6 ppm. Later in his testimony, Mr. Mah stated that the level never exceeded 4 ppm. This reading was obtained from the monitor at the boundary of the site. Regardless, whether the levels peaked at 1.6 or 4 ppm, this is still well below the Occupational Health and Safety standard of 10 ppm.

[62] Therefore, the Board concludes that the appropriate base penalty should remain at $2500, but with the variation from the regulatory scheme being assessed as moderate and the potential for adverse effect being assessed as moderate.

[63] The Director assessed an additional $1000 because obtaining an approval prior to conducting an activity is a cornerstone of the regulatory scheme. The Board strongly supports this addition, and increases the amount to $1500 as a strong message to ensure communication about and compliance with the legislative requirements. Parties simply cannot make assumptions about how to proceed in dealing with hazardous materials. Where there is any doubt, the proponent of an activity should take proactive steps to ensure that they are in compliance with the Act and regulations.

[64] The Director also included $1000 for the willful or negligent contravention of the legislative requirements. The Director states that the Appellant was aware that an approval was required for the land farm treatment of hazardous waste as it was informed by Alberta Environment on two occasions prior to commencement of the activity and once after commencement. In addition, the Parties had communicated with each other about Alberta Environment's requests. The companies were familiar with approval processes as they had applied for and received a licence under the *Water Act* for the removal of contaminated groundwater. The Board agrees that there should be an additional assessment of this nature. However, since there were some discussions with Alberta Environment and considerable confusion as to what legislative requirements were being addressed and in what was being requested of the Appellant, the Boards drops the amount to $500.

[65] As there was no history of non-compliance, $500 was deducted from the penalty. The Board agrees with this deduction.

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[48] Exhibit 2, Appellant's Summary of Relevant Facts.

[66] An additional $500 was deducted as the Appellant and Tiamat cooperated fully with the investigation. The Board believes that the cooperation was significant. The intent of the Appellant and Tiamat to cooperate with Alberta Environment continued to be evident to the Board during the appeal. It was also clear to the Board that the Appellant brought this appeal because it legitimately felt that the Administrative Penalty was inappropriate. Further, the Board notes that the Appellant and Tiamat did considerable research and monitoring that will assist the treatment of naphthalene contaminated material in the future. The Board believes that the Appellants exercised due diligence and reasonable care in undertaking their trial. Thus, the Board concludes that the deduction for cooperation should be increased to $1500.

[67] The Director, and therefore the Board, can include any other factors deemed relevant in determining the appropriate penalty. From the time Alberta Environment was notified of the hazardous waste on the Appellant's site, the Appellant submitted four proposals to obtain either a registration or an approval. As directed by Alberta Environment, the first proposal was submitted on October 30, 2000, using the Registration Form for Class II Land Treatment of Soil Containing Hydrocarbons. Alberta Environment requested a revised proposal, which the Appellant and Tiamat submitted on November 3, 2000. In the Notice of Investigation, dated November 3 and 15, 2000, Alberta Environment referred to operating "without a registration." Then, on May 18, 2001, the Appellant and Tiamat submitted another proposal using the application for One Time Land Treatment of Waste. Even though this was the form requested by Alberta Environment, on June 16, 2001, the Appellant and Tiamat had to file another application for an approval.[50] The Board concludes that the considerable confusion among Alberta Environment employees resulted in miscommunications and an unacceptably long delay for the Appellant to find out what was needed in an application. The seven month delay is grossly unreasonable and warrants an additional deduction from the assessment.

[68] Further, the Board is also concerned with the amount of time that it took the Director to decide to assess the Administrative Penalty. The Board notes that Alberta

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[49] U.S. Department of Health and Human Services, *Toxicological Profile for Naphthalene, 1-Methylnaphthalene, and 2-Methylynaphthalene* (Atlanta: Agency for Toxic Substances and Disease Registry, 1995).

[50] See the written submission of the Appellant.

Environment has established a number of Compliance Assurance Principles.[51] One of the reoccurring themes in these principles is a timely response. Another theme in these principles is the importance of deterrence. In the Board's view, an administrative penalty will not have the desired deterrent effect if it is not assessed in a timely manner. In applying these principles to the matter before the Board, the Board believes any procedures related to hazardous materials must be carried out in a timely and expeditious manner by all parties. The Board believes that the onus is particularly on Alberta Environment to set a standard of rapid response in such matters. The Board also believes that this delay also warrants an additional deduction from the penalty assessment. In the Board's view, the appropriate deduction for the confusion and delay associated with advising the Appellant and Tiamat of what type of authorization is required and the delay in assessing the Administrative Penalty is $1500.

[69] For the reasons discussed above, the Board concludes that the Administrative Penalty should be reduced to $1000. The Board calculates the penalty as follows:

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[51] Alberta Environment: *Compliance Assurance Principles*, (June 2000).

"1. Education, prevention and enforcement will be used to achieve compliance with legislation administered by AENV [(Alberta Environment)].

2. Legislative requirements will be clear, enforceable and widely known within the regulated community and the public.

3. All staff undertaking compliance assurance activities will have adequate training and authority to enable them to carry out their duties. Staff will carry out their duties in a competent, safe and professional manner.

4. Compliance assurance activities will be delivered in a lawful, fair, consistent and timely manner.

5. Every suspected violation that comes to the attention of AENV will be assessed and responded to in an appropriate and timely manner.

6. AENV responses to non-compliance will consider all applicable AENV legislation and will use the most appropriate legislation and compliance assurance response.

7. Enforcement will be firm and fair.

8. Enforcement will use remediation, deterrence and/or punishment to ensure compliance with legislation. Enforcement responses will be based on a "polluter pays"/"resource restitution" philosophy.

9. Follow-up to enforcement responses will be taken to bring the situation into compliance and, where appropriate, to recover AENV's costs associated with bringing the situation into compliance.

10. AENV will measure and report on the effectiveness of its compliance assurance programs and activities.

11. AENV will foster partnerships with other government agencies and the public to promote compliance."

Base Penalty	$ 2500
Importance to Regulatory Scheme	+ $ 1500
Degree of Willfulness or Negligence	+ $ 500
No History of Non Compliance	- $ 500
Other (Cooperation/Due Diligence/Care)	- $ 1500
Other (Miscommunication/Delay)	- $ 1500
Total Penalty to be Assessed	$ 1000

E. Inappropriate Cost Claims

[70] In its submission, the Appellant requested a number of costs. Specifically, the Appellant requested:

> "1. Return of the $3500 penalty
> 2. Return of the $1000 application fee
> 3. Return of the $136.36 Advertising Cost
> 4. Rebate of Fence Rental 10 mo @ $432.28/mo = $4320.28 [*sic*]."

[71] The Board has jurisdiction to award costs to parties in an appeal. As stated in the Act and the Environmental Appeal Board Regulation, A.R. 114/93, the costs awarded must relate directly to the matter of the appeal or the preparation and presentation of the issues. Section 96 of the Act states:

> "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

[72] Costs a party paid to comply with an approval or registration, even in a situation where the Board finds an approval or registration was not needed, may not be costs within the Board's jurisdiction, and in this case the Board finds they are not.

[73] The Appellant's request for costs included reimbursement of the costs of erecting a fence around the site, of advertising for the approval application, and of the fee submitted when applying for the approval. The Board cannot generally award costs for these expenditures, as they were unrelated to the actual appeal. As an approval was required in this situation, the application fee and the advertising costs would have been expended in any event. The cost of the fencing is presumably a requirement imposed in the approval. The claim for the return of the $3500 penalty is also not appropriately considered costs, as it was not a cost associated with the appeal. As the Board stated in its letter of November 30, 2001:

> "The Board advises that item 1, the return of the $3500 administrative penalty would be a logical consequence should the Board decide that the Administrative Penalty was improperly issued to Burnswest Corporation and Tiamat Environmental and therefore does not need to be addressed as a separate issue at the hearing."

[74] In that the Board has determined that the appropriate penalty in this case is $1000 as opposed to the $3500 that the Appellant has already paid, the Board expects that Alberta Environment will refund the Appellant the amount of $2500.

[75] Beyond this, the Board notes that the Appellant has reserved the right to claim proper costs, and the Director has requested the opportunity to respond to any such claims. As indicated at the hearing, the Board is prepared to entertain these requests.

IV. DECISION

[76] The Board has reviewed all of the evidence before it and after careful consideration, has decided on the balance of the evidence, to confirm the Director's decision to issue an Administrative Penalty to the Appellant and Tiamat. However, for the reasons discussed above, the Board alters the amount of the Administrative Penalty and reduces it to $1000.

[77] The Board requests that any applications for costs be submitted within two weeks of the date of this Decision and that any responses to such costs be submitted within four weeks of the date of this Decision.

V. ORDER OF THE BOARD

[78] In accordance with section 98(2) of the Act, the Board has the authority to confirm, reverse or vary the decision of the Director.[52] In this regard, with respect to the decision of the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, to issue Administrative Penalty No. 01/10-BOW-AP-01/10 dated August 27, 2001

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[52] Section 98(2) of the Act provides:

"In its decision, the Board may

(a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and

(b) make any further order the "Board considers necessary for the purpose of carrying out the decision."

under the *Environmental Protection and Enhancement Act* to Burnswest Corporation and Tiamat Environmental Consultants Ltd., the Board orders that the decision of the Director to issue the Administrative Penalty is confirmed subject to the following:

1. That the decision of the Director is varied by reducing the amount of the Administrative Penalty to $1000.

Dated March 1, 2002 at Edmonton, Alberta.

Original signed by
Dr. M. Anne Naeth

Original signed by
Dr. John P. Ogilvie

Original signed by
Mr. Ron V. Peiluck

VI. EXHIBIT LIST

HEARING

December 11, 2001, Calgary, Alberta

Burnswest Corporation.
Administrative Penalty No. 01/10-BOW-AP-01/10
E.A.B. Appeal No. 01-090

E X H I B I T L I S T

Exhibit No.	Description
1	Notice of Public Hearing advertisement placed in the *Cochrane Times* on November 21, 2001. News release forwarded to the Public Affairs Bureau and placed on the Alberta Government website on November 29, 2001, and distributed on the same day to 95 daily newspapers, radio stations, and television stations within Alberta.
2	Notice of Appeal filed by Burnswest Corporation dated September 10, 2001.
3	Excerpt from Black's Law Dictionary – Definition of Facility. Submitted by Mr. Kimoff.
4	Letter from E. Bevilacqua, Alberta Environment to Mr. Kimoff dated October 18, 2001, regarding Cochrane One Time Treatment of Waste. Submitted by Ms. Graham.
5	MSDS - Material Safety Data Sheet: Naphthalene