Province of British Columbia

Environmental Appeal Board

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APPEAL NOS. 2003-WAS-021(b), 2003-WAS-022(a), 2003-WAS-024(a)

In the matter of appeals under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Myrus James on behalf of the Penelakut First Nation Elders; Donna Martin on behalf of the Salt Spring Island Residents for Responsible Land Use; Canadian Sablefish Association	**APPELLANTS**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Sablefin Hatcheries Ltd.	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
Dr. Robert Cameron, Member
Robert F. Gerath, Member

DATES: March 2-5, 8-11, and May 18-19, 2004

PLACE: Victoria, B.C.

APPEARING:

For the Appellants:	
Myrus James on behalf of the Penelakut First Nation Elders:	Renee Racette, Counsel Berry Hykin, Articled student Leanne Baker, Articled student
Donna Martin on behalf of the Salt Spring Island Residents for Responsible Land Use:	Eamon Murphy, Counsel Katherine Deo, Articled student
Canadian Sablefish Association:	Waldemar Braul, Counsel
For the Respondent:	Dennis Doyle, Counsel
For the Third Party:	Wm. Rory Lambert, Counsel Devon Windsor, Articled student

APPEALS

Myrus James (on behalf of the Penelakut First Nation Elders (the "Elders")), Donna Martin (on behalf of the Salt Spring Island Residents for Responsible Land Use (the "Residents")), and Eric Wickham (on behalf of the Canadian Sablefish Association (the "CSA")) filed separate appeals against the September 15, 2003 decision of

Randy Alexander, Regional Waste Manager (the "Regional Manager"), Vancouver Island Region, Ministry of Water, Land and Air Protection (the "Ministry"), to issue approval AE-17356 (the "Approval"). The Approval authorizes Sablefin Hatcheries Ltd. ("Sablefin") to discharge effluent to the land from a land-based marine fish hatchery located at Walker Hook on Salt Spring Island, British Columbia, during the period from September 15, 2003 to December 15, 2004.

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act* (now section 93 of the *Environmental Management Act*) and section 44 of the *Waste Management Act* (the "*Act*"). Section 47 of the *Act* gives the Board the power to confirm, reverse or vary the decision being appealed, send the matter back to the original decision-maker with directions, or make any decision that the person whose decision is appealed could have made, and that the Board considers appropriate in the circumstances.

The Elders request that the Board rescind the Approval. The Residents and the CSA request that the Board rescind the Approval, or alternatively, suspend the Approval pending the correction of alleged deficiencies in the Approval.

BACKGROUND

Walker Hook is a tombolo spit located on the northeastern side of Salt Spring Island, adjacent to Trincomali Channel. A tombolo is a strip of land that joins a small offshore island to the shore of a larger landmass, in this case Salt Spring Island. The portions of Walker Hook that lie above the high-tide mark are owned by Henry Caldwell. In the late 1800's, Mr. Caldwell's family purchased a 167-acre parcel of land that included Walker Hook. His family cleared the original trees and vegetation from the tombolo, and used the land for various agricultural purposes over the years. In recent years, the tombolo area has been used for alfalfa cultivation and livestock grazing.

To the northwest of Walker Hook are eelgrass beds, mud flats, and a salt marsh. There are also eelgrass beds to the southeast of the tombolo.

Sablefin is in the process of establishing a commercial hatchery for sablefish, also known as Alaska black cod, on Walker Hook. The hatchery produces juvenile sablefish or "fingerlings" for sale to fish farms. The hatchery itself is located on the mainland of Salt Spring Island, adjacent to and uphill from Walker Hook. Salt water for the hatchery is supplied by a production well located on the tombolo of Walker Hook. Water flows into the production well from an aquifer that is recharged by marine water. Water is pumped from the production well to the hatchery, and wastewater from the hatchery is pumped through a filter before being discharged into two injection wells located on the tombolo. The hatchery, wells, and associated works are located on land that Sablefin has leased from Mr. Caldwell.

The two injection wells are drilled to a depth of 12.6 m (41.5 ft.) and 10.7 m (35 ft.) respectively.

The injection wells are screened from depths of 7.8 m to 12.6 m (25.5 ft to 41.5 ft.) respectively, to allow the effluent to percolate into the aquifer. Evidence before the Panel indicates that the depth to the top of the groundwater in the vicinity of the injection wells may rise to 1.42 m (4.66 ft.) below the ground surface during injection. In addition, a semi-confining layer is located at the top of the aquifer, at a depth of about 7 m (23 ft.).

There is evidence that aboriginal people used Walker Hook historically. The tombolo area of Walker Hook was designated as an archaeological site in 1974, when the site was recognized as a large shell midden. A midden is a deposit of shells, artifacts and other remains of past human activities. As discussed below, human remains were discovered in the tombolo area of Walker Hook during the construction of works associated with Sablefin's hatchery.

The ancestors of the Penelakut First Nation are among the aboriginal people believed to have used Walker Hook historically. Walker Hook is called Syuhe'mun in the Hul'qumi'num language, which is the traditional language of the Penelakut First Nation. According to the Elders, Syuhe'mun means "place to catch up" when translated into English. In their appeal submissions, the Elders claim certain aboriginal rights in relation to Syuhe'mun, including an aboriginal right to harvest food from the area, and aboriginal rights associated with their claim that the area is a sacred ancestral burial site.

The Penelakut First Nation is part of a larger cultural group known as the Coast Salish people, whose traditional territory extends from southern coastal British Columbia into adjacent Washington State. The Penelakut First Nation's main reserve is located on Kuper Island, which is a few kilometres away from Salt Spring Island. The Penelakut First Nation and several other local First Nations are represented by the Hul'qumi'num Treaty Group in treaty negotiations with the provincial and federal governments. In their appeal submissions, the Elders state that they bring their appeal, and their claims of aboriginal rights, with the support of the Penelakut First Nation and the Hul'qumi'num Treaty Group.

In early 2003, Sablefin hired Lowen Hydrogeology Consulting to conduct a hydrogeological assessment of the proposed system for pumping sea water from, and injecting effluent into, wells to be drilled in the tombolo at Walker Hook.

On March 10, 2003, Sablefin applied for the Approval, for the purpose of discharging wastewater from the hatchery into the injection wells on Walker Hook. In its application, Sablefin states that the characteristics of the effluent shall be equivalent to, or better than: 20 milligrams per litre ("mg/L") of total suspended solids ("TSS"), temperature of 8 to 12 degrees Celsius, pH of 7.4 to 7.9, ammonium (NH^+_4) less than 0.025 mg/L, and a fecal coliform content of zero. The application also indicates that the effluent is to be treated with a filter, and solids from the filter will be directed into settling tanks for subsequent removal to a certified waste discharge site.

Between April and June 2003, Sablefin hired Drillwell Enterprises Ltd. to construct a production well, injection wells, and test wells on Walker Hook. With regard to the

construction of the wells, Sablefin obtained a site alteration permit under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. Site alteration permit no. 2003-123, as amended (the "Site Alteration Permit"), was issued to Dr. Gidon Minkoff, President of Sablefin, and authorizes him to "conduct alterations as described below, subject to the terms and conditions on the back hereof." During the course of construction, human remains were discovered in the midden. Consequently, Sablefin obtained an amendment to the Site Alteration Permit to address the handling and management of First Nations' remains and artifacts.

The alterations are described in the Site Alteration Permit as follows:

> Alterations by Sablefin Hatcheries Ltd to archaeological site DfRu-002, located at Walker's Hook… from proposed drilling for the placement of four well sites and trenching for the installation of an electrical cable and waterline, as well as the removal and reburial of human skeletal remains.

The conditions of the Site Alteration Permit include a requirement that a qualified consulting archaeologist monitor all ground-altering activities associated with the permitted activities.

In July 2003, pumping tests were performed on the production well and one injection well by Wellmaster Pumps and Water Systems Ltd., to determine the water supply capacity of the production well and the capacity of the injection wells for effluent discharge.

A report dated July 2003 and titled, "Hydrogeologic Assessment of Pumping and Injection Well System at Walker Hook" (the "Lowen Report") was prepared for Sablefin by Dennis Lowen of Lowen Hydrogeology Consulting. Sablefin submitted the Lowen Report to the Ministry in support of its application for the Approval. The parties in these appeals disagree on the adequacy and reliability of the information and conclusions in the Lowen Report.

Bernie Taekema, an aquaculture biologist with the Ministry, prepared a Technical Report dated September 12, 2003 (the "Technical Report"), regarding Sablefin's application for the Approval. In that report, Mr. Taekema notes that Sablefin's application was referred to a number of agencies and local groups. The Technical Report indicates that Environment Canada, the Ministry of Health, and the Ministry of Agriculture, Fisheries and Foods had no objections to the application. However, some of the agencies or groups that reviewed the application expressed concerns or made recommendations regarding the application. The Capital Regional District ("CRD") recommended, among other things, that the Ministry ensure that Sablefin retains a qualified professional to answer certain questions concerning the environmental impacts of the discharge, and ensure that Sablefin conducts monitoring of the discharges and the injection wells. The Islands Trust Council and Woodward & Company, the law firm representing the Residents and the Elders in these appeals, provided comments expressing concern about the environmental effects of the effluent discharge.

The Technical Report also indicates that, beginning in January 2003, Sablefin contacted representatives of local First Nations regarding the proposal, and that Robert Morales, Chief Negotiator with the Hul'qumi'num Treaty Group, and Joey Caro, another representative of the Hul'qumi'num Treaty Group, had been Sablefin's primary contacts. The Technical Report states that the Hul'qumi'num Treaty Group advised that Walker Hook is an important site where First Nations people harvest inter-tidal and other marine resources for food, social and ceremonial purposes, and that they are deeply concerned that pollution related to aquaculture developments may affect marine resources in the area.

The Technical Report discusses the discharge rates and content of the effluent, the properties of the receiving environment, and the potential environmental effects of the effluent discharge. In doing so, the Technical Report assesses the information and conclusions provided in the Lowen Report, as well as the comments and concerns expressed by other agencies, local residents, and First Nations. The Technical Report concludes with a recommendation that an approval be issued to Sablefin subject to certain conditions.

On September 15, 2003, the Regional Manager issued the Approval pursuant to section 11 of the *Act*. The Approval authorizes Sablefin to discharge effluent from the fish hatchery into two injection wells located on Walker Hook for a 15-month period commencing on September 15, 2003, subject to a number of conditions. The Approval states that the maximum authorized rate of effluent discharge is 619 cubic metres per day ("m^3/d"), and the TSS content in the discharge shall not exceed 10 mg/L above the TSS content in the source water supply. The Approval also states that the authorized works are an effluent collection system, a 37 micron drum filter, an energy dissipation system, a production well, two injection wells, two groundwater observation wells, and related appurtenances. Additionally, the Approval sets out requirements for monitoring, recording and reporting effluent discharge.

All of the wells and associated piping are located on the tombolo that connects Walker Hook to the mainland of Salt Spring Island. That is also the same area that contains the midden. As noted above, the hatchery and all other works are located on the mainland of Salt Spring Island and are not on Walker Hook.

The tombolo continues to be used for farming purposes by Mr. Caldwell. This includes the growing and harvesting of alfalfa and the pasturing of sheep and cattle. The well heads are fenced off and occupy a few square metres of the tombolo.

On October 14, 2003, the Elders, the Residents, and the CSA filed separate appeals of the Approval.

Mr. James, on behalf of the Elders, filed a Notice of Appeal that lists several grounds for appeal, which are summarized as follows:

- the Elders were not adequately consulted by the Ministry of Water, Land and Air Protection or Sablefin before the Approval was issued;

- the Approval unjustifiably infringes the aboriginal rights and title of the Elders;

- the Approval will have an unreasonable adverse effect on the environment and economic stability of the Elders, on the basis that it interferes with their traditional use of resources which is protected by section 35 of the *Constitution Act, 1982*;

- the Approval will have an unreasonable adverse effect on the health of the Elders, on the basis that the discharge will pollute shellfish that are harvested and consumed by the Elders;

- the Approval desecrates Syuhe'mun (Walker Hook), which is a spiritual place and ancestral burial ground of the Penelakut people.

At the appeal hearing, counsel for the Elders advised that they do not claim aboriginal title to Syuhe'mun in this appeal, but continue to claim other aboriginal rights in relation to Syuhe'mun.

Ms. Martin, on behalf of the Residents, filed a Notice of Appeal that lists several grounds for appeal, which are summarized as follows:

- the Approval will have an unreasonable adverse effect on the sensitive environment at Walker Hook and local shellfish;

- there was inadequate consultation with local residents before the Approval was issued;

- the Approval authorizes activities which may adversely affect local property values and may alter the rural nature of the neighbourhood.

Finally, the Notice of Appeal filed by Mr. Wickham on behalf of the CSA also lists several grounds for appeal, which are summarized as follows:

- the discharge of waste under the Approval may pollute or contaminate fish habitat and may threaten wild sablefish stocks, which CSA members rely on for their livelihood as commercial fisherman;

- the discharge of waste under the Approval may lead to contamination of the local marine environment, which may lead to fishing closures and may harm fish occupying local waters;

- the Approval does not provide for adequate monitoring of the environment.

Remedies sought

The Elders request that the Board rescind the Approval. The Residents and the CSA request that the Board rescind the Approval, or alternatively, suspend the Approval pending the correction of alleged deficiencies in the Approval.

Both Sablefin and the Regional Manager request that the Board dismiss the appeals and confirm the Approval.

In addition, Sablefin requests that the Board grant an order requiring the Elders to pay Sablefin's costs associated with the appeal proceedings.

Preliminary application for a stay of the Approval

On December 1, 2003, the Elders applied for a stay of the Approval, pending the Board's decision on the merits of the appeals.

On January 29, 2004, the Board denied the Elders' application for a stay of the Approval (Appeal No. 2003-WAS-021(a), [2004] B.C.E.A. No. 3 (Q.L.)).

ISSUES

It should be noted that the parties in these appeals agreed, and the Panel accepted, that the Board has jurisdiction to decide questions of aboriginal rights in accordance with the Supreme Court of Canada's decision in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585.

The issues to be decided in these appeals are as follows:

1. Whether the Regional Manager's issuance of the Approval went beyond the province's constitutional jurisdiction.

2. Whether the Regional Manager erred by failing to take into account relevant facts, relying on inadequate and deficient information, or fettering his discretion before he decided to issue the Approval.

3. Whether the discharge of effluent in accordance with the Approval will cause harm to the environment or human health.

4. Whether the Regional Manager and/or Sablefin failed to adequately consult with the Elders before the Approval was issued.

5. Whether the discharge of effluent in accordance with the Approval will unjustifiably infringe the aboriginal rights asserted by the Elders.

6. Whether the Board should order the Elders to pay Sablefin's costs associated with the appeal proceedings.

In considering some of these issues, the Panel has considered a number of sub-issues, which are set out in the body of the decision, following the issue to which they pertain.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to these appeals. For convenience, other relevant legislation is set out in the "discussion and analysis" portion of this decision.

Section 3 of the *Act* prohibits the introduction of waste into the environment, subject to certain exceptions:

Waste disposal — strict liability

3 (1) For the purposes of this section, the conduct of an 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.

(2) Subject to subsection (5), a person must not, in the course of conducting an industry, trade or business, introduce or cause or allow waste to be introduced into the environment.

...

(5) Nothing in this section or in a regulation made under subsection (3) prohibits any of the following:

(a) the disposition of waste in compliance with a valid and subsisting permit, approval, order or regulation, or with a waste management plan approved by the minister;

...

Section 1 of the *Act* defines "waste" as follows:

"waste" includes

...

(c) effluent,

Sections 10 and 11 of the *Act* authorize regional managers to issue permits and approvals:

Permits

10 (1) A manager may issue a permit to introduce waste into the environment, to store special waste or to treat or recycle special waste subject to requirements for the protection of the environment that the manager considers advisable and, without limiting that power, may in the permit do one or more of the following:

(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;

...

(c) require the permittee to monitor in the way specified by the manager the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the manager 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 manager in the manner specified by the manager;

(e) specify procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill…

Approvals

11 (1) A manager may approve the introduction of waste into the environment, the storage of special waste or the treatment or recycling of special waste for a period of up to 15 months without issuing a permit.

(2) A manager may issue his or her approval subject to requirements for the protection of the environment that the manager considers advisable and, without restricting that power, may include as a requirement anything referred to in section 10 (1).

DISCUSSION AND ANALYSIS

1. Whether the Regional Manager's issuance of the Approval went beyond the province's constitutional jurisdiction.

The Residents submit that the Regional Manager acted outside of his jurisdiction as a decision-maker on behalf of the province by approving the discharge of effluent into the marine environment. The Residents submit that section 91(12) of the *Constitution Act, 1867* gives the federal government jurisdiction over "Sea Coast and Inland Fisheries", and the federal government has exercised that jurisdiction by passing the federal *Fisheries Act*, which prohibits works or undertakings that "result in the harmful alteration, disruption or destruction of fish habitat." The Residents submit that the federal Department of Fisheries and Oceans ("DFO") was never given an opportunity to review the actual application for the Approval, and was unaware that effluent would be discharged into the marine environment.

The Elders submit that the Regional Manager acted outside of his jurisdiction as a decision-maker on behalf of the provincial government by authorizing an activity that desecrates a significant heritage site of the Coast Salish people, and impacts the core of the cultural identity of the Penelakut First Nation and neighbouring Coast Salish people. The Elders submit that the Supreme Court of Canada has indicated that such an intrusion into the federal jurisdiction over "Indians and Lands Reserved for Indians" under section 91(24) of the *Constitution Act, 1867*, is beyond the jurisdiction of provincial legislation, and therefore, the Regional Manager had no constitutional authority to permit such an activity under the *Act*.

The CSA did not address this issue.

The Regional Manager submits that, if the Approval has the effects that the Elders and the Residents claim, and the province has no constitutional jurisdiction over those matters, then an approval under the *Act* is not required.

Sablefin submits that the Approval permits the discharge of effluent into an injection well, and there will be no effluent discharge to the marine environment. Sablefin also submits that none of the effects of the Approval touch upon the core of Indianness. Sablefin maintains, therefore, that the Approval does not involve matters of federal jurisdiction.

The Panel notes that the Elders and the Residents have raised issues regarding the applicability of the *Act* and the validity of the Approval in light of the division of powers between the provincial and federal governments under the *Constitution Act, 1867*. The Panel also notes that section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, requires advance notice of constitutional questions, as follows:

Notice of questions of validity or applicability

8 (1) In this section:

"constitutional remedy" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"law" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).

(2) If in a cause, matter or other proceeding

(a) the constitutional validity or constitutional applicability of any law is challenged, or

(b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

Given that the issues of jurisdiction raised by the Elders and the Residents require the Panel to make findings regarding the constitutional applicability of the *Act*, and that no notice of the application has been served on the Attorneys General of Canada and British Columbia, the Panel makes no findings on these issues.

2. Whether the Regional Manager erred by failing to take into account relevant facts, relying on inadequate and deficient information, or fettering his discretion before he decided to issue the Approval.

In general, the Residents submit that the Regional Manager made a number of errors prior to issuing the Approval; namely, that he failed to take into account relevant facts and information, relied on inadequate and deficient information, and fettered his discretion before issuing the Approval.

Similarly, the CSA submits that the Regional Manager failed to consider relevant information, particularly with regard to concerns expressed by other agencies and the potential effects of microbes[1] that may be in the effluent. The CSA also submits that the Regional Manager relied on inadequate information.

The Elders' submissions did not address this issue.

The Regional Manager maintains that he did not fetter his discretion. The Regional Manager submits that he properly considered all of the relevant information that was available to him, including comments provided by other agencies that reviewed the application for the Approval, and concerns expressed by local residents. The Regional Manager further submits that he did not rely solely on the Lowen Report when he assessed Sablefin's application, and in any event, the Lowen Report was prepared by a qualified professional with experience in hydrogeology and the design and operation of effluent disposal systems. Moreover, the Regional Manager submits that many of the Appellants' concerns relate to land use and other matters that are not within his mandate under the *Act*.

Sablefin submits that the Lowen Report addressed all relevant considerations regarding the potential environmental effects of the Approval. Sablefin further submits that the Lowen Report was prepared by a qualified professional and is based on sufficient information to support the conclusions that it contains.

Fettering of discretion

The Residents submit that correspondence between Dr. Minkoff, on behalf of Sablefin, and Ministry staff indicates that Ministry staff had "tied their hands" regarding the issuance of the Approval. Specifically, the Residents submit that e-mail communications in 2002 and 2003 between Dr. Minkoff and Lloyd Erickson, an employee of the Ministry, provide the distinct impression that the Ministry intended to issue the Approval long before Sablefin submitted its application. For example, the Residents note that, in July 2002, Mr. Erickson stated, "the Ministry supports projects such as this." On January 30, 2003, Mr. Erickson also stated, "(i)t was good to hear you are proceeding with construction" and "we will try to help you in any way we can." Furthermore, the residents submit that an adverse inference should be drawn from Mr. Erickson's failure to testify at the appeal hearing.

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[1] Microbes are microscopic organisms such as bacteria, viruses and protozoa, including some that are pathogenic or parasitic.

In addition, the Residents submit that the Ministry was forced to weaken the environmental requirements it expected Sablefin to meet, because Dr. Minkoff threatened legal action against the Ministry. Specifically, the Residents submit that, on May 1, 2003, Allan Leuschen, an Environmental Protection Officer with the Ministry, set out the requirements for obtaining an approval. On May 8, 2003, Dr. Minkoff responded by demanding a meeting between his legal counsel and the Ministry. Mr. Taekema followed up with Dr. Minkoff and got the same response, noting in a May 13, 2003 e-mail that Dr. Minkoff was suggesting legal action for delays to the project. The Residents submit that the Ministry then met with Dr. Minkoff and negotiated the terms of the Approval, resulting in weaker environmental requirements. In particular, the Residents submit that internal e-mails dated May 21, 2003, show that the Ministry reduced their requirements from no impact on "environmentally sensitive areas of Walker Hook and surroundings" to no "significant impacts" on the "receiving environment." Furthermore, references to studies of shellfish resources and archaeological sites were removed.

In summary, the Residents submit that the Regional Manager felt obligated to keep the promises made by Mr. Erickson, and in doing so, the Regional Manager fettered his discretion.

The CSA did not address this sub-issue.

The Regional Manager submits that Mr. Erickson's comments simply reflect Ministry policy to look at new and innovative technology, especially when it has the potential to enhance protection of the environment. The Regional Manager submits that no adverse inference should be drawn from the fact that the Regional Manager's counsel did not call Mr. Erickson as a witness, because the Regional Manager testified regarding his decision and the Appellants chose not to cross-examine him on this issue. Furthermore, Mr. Erickson was present for much of the hearing and none of the Appellants requested that he testify.

Finally, the Regional Manager explained why more stringent requirements for obtaining an approval were set out in Mr. Leuschen's letter of May 1, 2003. At the time that the May 1, 2003 letter was written, Mr. Erickson and Mr. Taekema were away from the office and Mr. Leuschen was filling in for them. At that time, the Ministry provided Dr. Minkoff with the requirements for obtaining an approval. As Mr. Leuschen was not familiar with the file, he provided Dr. Minkoff with a standard Ministry form letter setting out all requirements that might be necessary for obtaining an approval. However, upon Mr. Taekema's return to the office, the specific requirements for obtaining an approval were refined, based on the Ministry's knowledge of the application, the project and the site. Those requirements were then provided to Dr. Minkoff by the Regional Manager.

Sablefin did not address this sub-issue.

Panel's findings - Fettering of discretion

It is well-established law that discretion must be exercised by the authority to which it is granted, and that it must be exercised in an independent manner and

not be dictated by another body. However, this principle does not prevent administrative authorities from seeking information and opinions from others, provided that they retain their decision-making authority.

In this case, the Residents have provided no direct evidence that the Regional Manager fettered his discretion. Rather, the Residents submit that the Regional Manager felt obligated to keep "promises" that may have been made by other Ministry staff.

The Panel has reviewed the evidence and is satisfied that there were no "promises" by Ministry staff. Further, it accepts the Ministry's explanation regarding the "approval requirements" initially sent by Mr. Leuschen and then by Mr. Taekema. The Panel is also satisfied that the Regional Manager considered all of the information available to him, including the advice from his own officials. Based on that information and advice he set out the requirements for the approval application. There is no evidence that the Regional Manager was inappropriately influenced by any of his officials in either setting the application requirements or in granting the Approval.

In these circumstances, the Panel finds that there is insufficient evidence to conclude, on a balance of probabilities, that the Regional Manager fettered his discretion.

Failure to consider relevant facts and information and reliance on inadequate or deficient information

The Residents maintain that the Regional Manager failed to take into account relevant facts concerning local residents' recreational use of Walker Hook, the area's significance for park acquisition, the area's sensitive ecosystems, the species at risk that inhabit the area, the area's historical and archaeological significance, and the hatchery's long-term plans for expansion. In addition, the Residents submit that the Regional Manager and Sablefin failed to respond to relevant public questions or requests for information regarding the potential impacts of the hatchery.

Specifically, the Residents submit that the Regional Manager failed to consider their recreational use of the area, because the Technical Report states that "the Caldwell family no longer allows the public to access this land." Moreover, the Residents note that Walker Hook is identified in the Salt Spring Island Official Community Plan as land that should be acquired for park use. The Residents note that Mr. Caldwell testified at the appeal hearing that the federal and provincial governments have approached him several times to acquire Walker Hook for use as a park.

In addition, the Residents submit that the Walker Hook area has a high biodiversity value and contains environmentally sensitive areas. The Residents submit that Walker Hook is a rare "Sparsely Vegetated Ecosystem," according to the *Sensitive Ecosystems Inventory: East Vancouver Island and the Gulf Islands 1993-1997, Volume 2: Conservation Manual*, McPhee, M., et al. (2000), Technical Report Series No. 345, Canadian Wildlife Service, Pacific and Yukon Region, British Columbia (the "SEI Manual"). The Residents submit that the Technical Report misinterpreted the

SEI Manual by putting too much reliance on the lack of natural vegetation and on Mr. Caldwell's anecdotal evidence regarding the area's characteristics. The Residents argue that human disturbances to Walker Hook such as ploughing, clearing, planting of fruit trees, and cattle grazing do not affect the area's characterization as a sensitive and rare ecosystem, because that designation depends primarily on the site's geomorphologic characteristics. The Residents also submit that, although the Regional Manager considered the development guidelines in the SEI Manual, he did not follow any of them.

The Residents further submit that, according to the BC Conservation Data Centre, several species at risk inhabit Walker Hook, including the Turkey Vulture, the Surf Scoter, the Great Blue Heron, and the Double-crested Cormorant. The Residents submit that many of those species require protection from noise and human activity at certain times of the year, such as during nesting season. The Residents argue that the Regional Manager did not inquire into whether there were species at risk at Walker Hook, and failed to consider the impact of the Approval on those species.

With regard to fish and fish habitat, the Residents submit that the Regional Manager failed to properly consider the potential effects of the Approval on eelgrass beds adjacent to Walker Hook, which provide spawning and nursery habitat for many types of fish. The Residents maintain that neither the Regional Manager nor Sablefin conducted a baseline study to determine which types of fish utilize the eelgrass beds. The Residents submit that very small changes in light, turbidity, temperature, pH, salinity, and nutrient levels can cause eelgrass to die, and that, without a baseline study of the site, it is difficult to know whether the level of TSS allowed under the Approval (10 mg of TSS/mL above the influent water supply value) will protect the eelgrass. Moreover, the Approval does not include limits on the effluent's ammonia content, or monitoring requirements for effluent temperature.

In support of their submissions, Dr. Katherine Dunster testified as a witness for the Residents. The Panel accepted Dr. Dunster as an expert in biogeography and plant ecology, with particular emphasis on species at risk and sensitive ecosystems. Dr. Dunster was one of the authors of the SEI Manual. Dr. Dunster testified that the tombolo area of Walker Hook is properly classified as a rare "Sparsely Vegetated Ecosystem" that should not be disturbed with activities such as the drilling of wells.

The Residents submit that the Regional Manager relied primarily on the Lowen Report, which has a number of deficiencies and is too limited in scope to constitute an environmental assessment. The Residents maintain that the conclusions in the Lowen Report are not supported by data, and the Regional Manager should be required to re-evaluate his decision.

Specifically, the Residents submit that the Lowen Report contains no data to support any conclusions about the effect of effluent discharge on the receiving environment, including the eelgrass beds and the salt marsh near Walker Hook. The Residents submit that the Lowen Report contains no supporting data for the conclusions it makes at paragraphs 6.3 and 6.6, as follows:

6.3. No negative impacts with respect to water quality are foreseen for the proposed hatchery well system. All potential contaminants will be at safe levels upon entering the receiving environments.

6.6. The discharge water quality will be acceptable for any marine life and discharge will not occur within the local clam beds but in deeper ocean water. The discharge will be to the southeast beach (soil becomes impermeable to the northwest).

The Residents submit that the Lowen Report is deficient in a number of other aspects, as follows:

- it does not give adequate consideration to the possibility that substances in the effluent may have adverse effects on human health;
- it fails to consider the effect of tides on the movement of effluent through the tombolo;
- it relies on information from Dr. Minkoff and Dr. Gidi Sagi, neither of whom are independent sources of information or qualified professionals, and
- Mr. Lowen was not at the site when many of the wells were drilled.

The Residents maintain that neither the Lowen Report nor the Technical Report give any qualified consideration as to whether the sandy soil in the injection well would prevent microbes from traveling to the adjacent marine environment.

Finally, the Residents submit that the Regional Manager failed to consider the full context of the Approval; namely, Sablefin's long-term plans to expand the hatchery. The Residents argue that, over time, the hatchery will require greater volumes of water withdrawal from the aquifer and greater volumes of effluent discharge to injection wells, and the Regional Manager should have considered that when he issued the Approval.

The CSA submits that the Regional Manager failed to consider the potential effects on the marine environment of microbes that may be in the effluent. The CSA also argues that the Regional Manager failed to properly consider advice from other agencies regarding the potential impacts of the effluent.

Specifically, the CSA submits that the effluent is likely to contain a variety of pathogens, parasites and other microbes, which pose a significant environmental risk that was not adequately considered by the Regional Manager. In particular, the CSA argues that the Regional Manager failed to consider what microbes might exist in the effluent, whether those microbes may be small enough to pass through the 37 micron filter in the discharge system, how long the microbes could survive in the receiving environment, and the microbes' possible effects on local marine life.

The CSA submits that the Regional Manager also failed to apply the relevant guidelines in the Ministry's "Environmental Impact Study Guideline" dated December 2000 (the "EIS Guideline"), which relates to discharges that are

regulated under the *Municipal Sewage Regulation*. The CSA submits that the Ministry incorrectly asked Mr. Lowen to refer to Chapter 3.5, "Discharges to Ground," in the EIS Guideline. The CSA argues that the Regional Manager should have instead considered Chapter 3.4, "Discharges to Water" in the EIS Guideline, because it discusses the potential impacts of effluent discharges on the marine environment.

Additionally, the CSA submits that the Regional Manager failed to apply the proper water quality guidelines. The CSA submits that the Regional Manager relied on the conclusions in the Lowen Report regarding water quality that are based on guidelines developed in 1994 by N.K. Nagpal (the "Nagpal Guidelines"). The CSA submits that the Nagpal Guidelines are no longer used by the Ministry, and do not consider microbial effects on marine fish. Rather, the Nagpal Guidelines are concerned with bacteria that live in fresh water, and are an indicator of contamination by human or animal waste, not microbes from a fish hatchery.

Peter Wainwright testified as a witness for the CSA. The Panel accepted Mr. Wainwright as an expert in marine ecology with emphasis on the impacts of effluent on fish in the marine environment. The Panel notes that Mr. Wainwright does not have specific expertise regarding sablefish. Mr. Wainwright discussed the general characteristics of microbes including their sizes and longevity under different types of conditions. Mr. Wainwright testified that marine microbes have an extremely long life including a half-life that allows them to survive outside of their natural habitat for over 6 months.

In addition, Richard Bussanich, a fisheries biologist, testified as a witness for the CSA. Mr. Bussanich testified that the Lowen Report did not adequately consider the possible use of chemicals, pharmaceuticals and therapeutants by the hatchery. Mr. Bussanich also noted that the Ministry of Agriculture, Food and Fisheries recommends that a fish health management plan be prepared by aquaculture proponents, but Sablefin has not done so.

The CSA submits that there is no evidence that the Regional Manager or Sablefin obtained information from properly qualified professionals for analyzing marine ecology issues or other non-hydrogeologic issues pertaining to the Approval. The CSA submits that the Regional Manager relied primarily on the Lowen Report, which the CSA maintains is inadequate in its assessment of the potential impacts of microbes. The CSA submits that Mr. Lowen's conclusions regarding microbes and the safety of effluent discharges to the marine environment are unsubstantiated and fall outside of his area of expertise. The CSA argues that the non-hydrogeologic issues which are addressed in the Lowen Report should have been addressed by qualified professionals with expertise in marine ecology and fish health.

In particular, the CSA notes that the Lowen Report suggests that effluent will be "cleaned" by a 37-micron filter, but does not consider if or how that filter will remove microbes from the effluent. Similarly, the Lowen Report states that "All potential contaminants will be at safe levels upon entering the receiving environment," but it does not indicate which potential contaminants were

considered, or what is considered "safe" for a given receptor. The CSA submits that Mr. Lowen stated that he dismissed the relevance of the microbial issue early on in his work, based on the incorrect assumption that microbes would not likely survive the process of being transported through a long pipe and screened by the 37-micron filter. The CSA also argues that, while Mr. Lowen purported to rely on studies which suggest that there will be no microbes discharged to the receiving environment, he did not cite or produce any of those studies.

The CSA also submits that the Regional Manager should have applied a precautionary approach in deciding whether to issue the Approval. While the CSA concedes that the Ministry started off using a cautionary approach, the CSA maintains that significant problems arose after that, largely due to the Ministry's lenient oversight of Sablefin's work. The CSA submits that the Regional Manager should have undertaken an organized effort to identify key risks, and then taken quality-control measures to ensure that the information collected focused on the priority issues. Thus, the CSA argues that the Panel should ask itself whether the Regional Manager undertook a reasoned and careful consideration of the risks associated with the hatchery effluent.

The Regional Manager submits that he took into account the Residents' concerns relating to recreational use of the beach at Walker Hook, and he concluded that there would be no adverse impact on recreational use or human health because there is no direct discharge of effluent to the ocean and no direct impact to the beach.

With regard to the area's potential for park acquisition, the Regional Manager submits that the public should not expect Mr. Caldwell, as a private landowner, to maintain his lands for public use. He further submits that possible alternative land uses cannot form the basis of a refusal of the Approval. The Regional Manager also notes that when the Islands Trust approved the subdivision of Mr. Caldwell's land, it did so with the knowledge that he intended to lease the land for use as a fish hatchery. The Regional Manager maintains that the Islands Trust did not object to the effluent discharge, but instead requested a summary report of monitoring data.

Additionally, the Regional Manager submits that the tombolo is not a "sensitive ecosystem" as defined in the SEI Manual, given the undisputed evidence of extensive clearing and agricultural use of the land. He submits that, according to the SEI Manual, a sensitive ecosystem must be comprised of natural areas but, in this case, the tombolo has been altered by extensive clearing and land uses that are inconsistent and incompatible with the area's classification as a sensitive ecosystem. He further argues that Dr. Dunster's characterization of the ecosystem based on its geomorphologic features, rather than its vegetation, is at variance with the SEI Manual's classification of sites based on natural vegetation and other surficial features.

The Regional Manager notes that the application was referred to Environment Canada and the Ministry of Agriculture, Food and Fisheries, both of which have a mandate to deal with wildlife concerns. Neither of these agencies raised any concerns regarding risk to wildlife from the fish hatchery.

The Regional Manager submits that he considered the potential effects of microbes, but concluded that microbes associated with fin fish hatcheries are not generally a problem and will not be a problem in this case, especially given that the discharge flows through the sand aquifer under the tombolo for several days before it reaches the marine environment, where it will then be diluted by sea water. He submits that the Lowen Report confirmed that bacteria and viruses do not survive well in the subsurface. He further submits that Mr. Wainwright acknowledged that monitoring the discharge for microbes would not be practical due to the large numbers of such organisms that are naturally present in the marine environment.

Additionally, the Regional Manager submits that the Lowen Report addressed the Appellants' concerns about the need for an environmental impact assessment. He submits that Sablefin was directed to prepare a study of the effects of the proposed discharge on the environment, including surface waters, groundwaters, water wells, aquifers, springs, shellfish, and environmentally sensitive areas. The Regional Manager also notes that Sablefin was directed to follow the EIS Guidelines for the purpose of preparing that study. He maintains that the Lowen Report meets those requirements.

The Regional Manager submits that there is no requirement under the *Act* for an environmental impact study, nor a report by a qualified professional. Rather, the requirement for a report by a qualified professional was imposed by the Regional Manager as a result of feedback obtained through the referral process. He further submits that the requirement for a report by a qualified professional was documented in a May 21, 2003 e-mail message that he sent to Dr. Minkoff, as follows:

- Hydrogeological assessment report by a qualified professional confirming the suitability of soils for effluent injection. Report to provide assurance that "breakout" of effluent will not occur, and that the effluent will not significantly impact surrounding surface water, groundwater, aquifers, domestic wells, springs, and receiving environment (i.e. what is the fate of the effluent?).

The Regional Manager submits that the Lowen Report complies with those criteria. He notes that, while the Lowen Report may reach conclusions on environmental impacts based on standards developed by other persons or agencies, that reliance does not compromise the Report's contents or conclusions. The Regional Manager maintains that, where Mr. Lowen did not have personal expertise, he relied on generic criteria such as guidelines and water quality standards in a manner that is consistent with other professionals doing work of that nature.

The Regional Manager also argues that Mr. Lowen's testimony at the appeal hearing confirms the conclusions in his Report. For example, Mr. Lowen's evidence confirmed that his assumptions about the direction of effluent flow from the injection wells was based on both soil permeability and water level measurements taken from a series of wells that were drilled in the tombolo. Mr. Lowen testified that, although the wells may appear to be located in a way that would not allow for triangulation, there is actually sufficient separation between the wells to allow for a

determination of flow direction based on water elevations. Mr. Lowen also described how he used the elevation of the ocean surface as a basis for determining the slope of the water table. The Regional Manager maintains that, although Mr. Lowen did not include that information is his Report, it does not detract from the accuracy or reliability of the conclusions in the Report.

In addition, the Regional Manager submits that he did not rely exclusively on the Lowen Report when he assessed Sablefin's application. He maintains that he also relied on the Technical Report and internal staff reviews, as well as referral comments from other agencies. He submits that the Technical Report demonstrates the work done internally by Ministry staff to assess Sablefin's application. For example, the Technical Report confirms that the conclusions in the Lowen Report regarding the rate of flow from the injection wells toward the ocean were investigated by the Ministry. In addition, the Regional Manager submits that the Technical Report used the 1998 edition of the *British Columbia Water Quality Guidelines (Criteria)* (the "1998 Guidelines") and not the 1994 Nagpal Guidelines, to assess Sablefin's proposal. The Regional Manager maintains that the 1998 Guidelines cover both fresh water and salt water receiving environments, and therefore, compliance with those guidelines will provide satisfactory protection to the environment.

Finally, the Regional Manager submits that the Appellants' concerns regarding the type of land use on Mr. Caldwell's property or the possibility of future expansions of the hatchery are outside of the Regional Manager's jurisdiction under the *Act*.

Sablefin submits that, although it owes no duty to consult with the Residents given that the Approval pertains to private lands, Dr. Minkoff attended several public meetings on Salt Spring Island regarding the project and answered residents' questions at those meetings. In addition, Sablefin submits that the Approval has no effect on local residents' recreational use of the foreshore on Walker Hook. Sablefin maintains that the works associated with the Approval are at least 10 metres inland from the foreshore, and foreshore access is not impeded by the issuance of the Approval. Sablefin submits that the Approval relates to private land, and therefore, any use of that land above the foreshore by local residents requires Mr. Caldwell's permission.

Sablefin also submits that microbial effects were properly considered by Mr. Lowen and the Regional Manager. In support, Sablefin points out that Mr. Lowen testified that, in preparing his Report, he and Dr. Minkoff discussed microbes that may be present in the effluent. Mr. Lowen testified that the length of the flow path and the suitability of the sand material in the sub-surface of the tombolo are appropriate for renovation of the effluent. He testified that the sand within the aquifer filters the microbes out, and although the lifespans of microbes may differ between those associated with humans and fish, the aquifer still has the same ability to filter them out.

Sablefin submits that its application for the Approval clearly states that no antibiotics, therapeutants or vaccines will be used in the hatchery. In addition, Sablefin submits that it has not prepared a fish health management plan because

its hatchery is the first of its kind, and therefore, there are no guidelines that Sablefin could use to develop such a plan. Sablefin maintains that it will develop such a plan over time using data from the hatchery. Sablefin notes that, in any event, the Regional Manager never requested such a plan.

Finally, Sablefin submits that Mr. Lowen is a "qualified professional" as required by the Regional Manager, and that he certified the contents of his Report. Sablefin submits that, in preparing his Report, Mr. Lowen is entitled to rely on textbooks, water quality guidelines devised by experts in that field, and scientists from other jurisdictions, to assist with matters that are outside of Mr. Lowen's expertise. Sablefin also notes that Mr. Lowen testified that he relied on data from other experts in water quality to determine the quality of the effluent and that he was able to determine whether the information provided by these other experts was reasonable.

Panel's findings - Failure to consider relevant factual information and reliance on inadequate or deficient information.

The Panel has considered the nature of the Regional Manager's inquiry when exercising his discretion under the Act. In particular, the Panel has reviewed the relevant provisions of the Act pertaining to the issuance of approvals.

An approval is a time-limited authorization to do something that is otherwise prohibited by section 3 of the *Act*; namely, introduce waste into the environment. Under section 3(2) of the *Act*, a person must not, in the course of conducting an industry, trade or business, introduce waste into the environment. "Environment" is broadly defined in section 1 of the *Act*, and means "the air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed". "Waste" is also defined in section 1 of the *Act*, and includes "effluent".

Section 1 of the *Act* defines "effluent" as follows:

> **"effluent"** means a substance that is discharged into water or onto land and that
>
> (a) injures or is capable of injuring the health or safety of a person,
>
> (b) injures or is capable of injuring property or any life form,
>
> (c) interferes or is capable of interfering with visibility,
>
> (d) interferes or is capable of interfering with the normal conduct of business,
>
> (e) causes or is capable of causing material physical discomfort to a person, or
>
> (f) damages or is capable of damaging the environment.

In order to be considered "effluent", a discharge need not actually injure, interfere, or damage in the ways described above. A discharge is "effluent" if it is simply "capable" of the things listed above. It should also be noted that, although the parties in these appeals dispute the actual or potential injury or damage that may be caused by the discharge of effluent under the Approval, the Regional Manager acknowledged that the discharge is "effluent" within the meaning of the *Act*.

Although section 3(2) of the *Act* creates a broad prohibition against the discharge of waste into the environment, that section is subject to section 3(5), which allows "the disposition of waste in compliance with a valid and subsisting permit, approval, order or regulation". Approvals are issued under section 11 of the *Act*, which states that a regional manager may approve the introduction of waste into the environment for a period of up to 15 months without issuing a permit, and he or she may issue an approval "subject to requirements for the protection of the environment that the manager considers advisable and, without restricting that power, may include as a requirement anything referred to in section 10 (1)." Section 10(1) authorizes a manager to issue a permit to introduce waste into the environment "subject to requirements for the protection of the environment that the manager considers advisable". Such requirements may include requiring the permittee to construct works, or monitor the method of handling, treating, transporting, and discharging the waste. Thus, an approval may be similar to a permit in terms of what it authorizes and the conditions that it contains, but an approval can be for no more than 15 months, whereas a permit need not have a limited duration.

Given the statutory provisions discussed above, the Panel finds that, in considering whether to issue an approval, a regional manager should consider the risk that the effluent will damage the environment, injure the safety or health of persons, injure property or life forms, or do any of the other things listed in the definition of "effluent". The Panel also agrees with the CSA that the process of deciding whether to issue an approval must be consistent with the preventative policy underlying the *Act*, which is discussed in *BC Minister of Environment, Lands and Parks (MELP) v. Alpha Manufacturing* (February 13, 1996), Vancouver Registry No. C960444 (hereinafter *Alpha Manufacturing*) as follows:

> … it is abundantly clear from the *Waste Management Act* as a whole that it represents the legislative policy of controlling, ameliorating and where possible, eliminating the deleterious effect of pollution on the environment **in a broad sense. The means adopted are in great measure the provision of permits and approvals <u>before</u> potentially polluting activities can be undertaken.**
>
> [emphasis in the CSA's submissions]

The Panel notes that *Alpha Manufacturing* was upheld on appeal, and the Court of Appeal expressly agreed with the conclusions above (*British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (B.C.C.A.) (Q.L.), at para. 24).

In addition, with regard to the decision to issue the Approval, the Panel has considered that Sablefin's hatchery is a new and innovative type of operation. The Technical Report acknowledges the unique nature of Sablefin's operation, and the uncertainties about the quality or quantity of the effluent discharge. In that regard, the Technical Report states as follows at page 8:

> Although the applicant plans to operate a hatchery operation at this location indefinitely it was decided that the issuance of a short-term approval was more prudent than a permit. The proposed operation is unique and will be of a research nature for the first while. Modifications to hatchery processes could occur resulting in potential changes to the quality, quantity and/or disposal method of the effluent. The fifteen-month approval period is expected to clarify the processes the hatchery will follow over the long term. These would be reflected in a permit…
>
> Because the hatchery is still in the research stage and changes, some substantial, could occur in the process, an Approval with a fixed time limit of fifteen months was applied for rather than a Permit. The relatively short approval period will also allow the applicant and WLAP to generate receiving environment data which will assist in the development of a long term receiving environment sampling and monitoring program if a permit is subsequently issued.

In these circumstances, the Panel finds that the Regional Manager is required to take a cautious and technically rigorous approach in assessing the potential risks associated with the effluent discharge from the hatchery. In doing so, the Regional Manager should identify key risks associated with the effluent discharge, and then take measures to ensure that the information he used to assess Sablefin's application focused on those risks.

The Panel has carefully reviewed the evidence concerning the information that was available to the Regional Manager. In particular, the Panel has examined the contents of the Lowen Report and the Technical Report, because those were the main sources of information that the Regional Manager used to assess Sablefin's application. The Panel finds that those reports present a reasonable description and assessment of the potential risks associated with the effluent discharge. The Panel finds that the Regional Manager had adequate information and properly considered all of the potential risks associated with the effluent discharge, with the possible exception of any potential risks that may be associated with microbes. The Panel further finds that the Regional Manager properly concluded that the effluent discharge would not result in harm to humans or the environment.

Specifically, the Panel finds that the Technical Report adequately summarizes the concerns and comments expressed by the general public regarding Sablefin's application for the Approval, including comments submitted by Woodward & Co. on behalf of its clients. The Technical Report also recognizes Walker Hook's status as a designated archaeological site, its historic use by the Caldwell family, and its

designation in the Salt Spring Island Official Community Plan as a primary recreational or scenic area for parkland acquisition.

The Panel notes that the Regional Manager was under no obligation to consider the site's potential designation as a park or its potential for alternate zoning by the Islands Trust, as the question of the site's zoning or its potential use as a park is beyond his jurisdiction in deciding whether to issue an approval. The Panel also notes that the Regional Manager was under no statutory obligation to consult with the general public or respond to public questions or requests for information regarding the potential impacts of the hatchery. However, the Panel finds that the Regional Manager was aware of, and considered, public concerns about the potential effects of the effluent discharge on the area's recreational potential.

The Technical Report also recognizes that the public raised concerns about potential effects of the Approval on local water wells and on sensitive ecosystems in the Walker Hook area. The Panel finds that the Lowen Report contains a thorough analysis of the potential effects of the discharge on the local aquifer, and provides an adequate basis for the Regional Manager to assess that risk. In particular, that report contains a comprehensive analysis of the direction, volume, and rate of effluent flow through the sand aquifer.

Similarly, the Panel finds that the Technical Report contains an adequate analysis of the potential effects of the effluent discharge on sensitive ecosystems in the Walker Hook area and species at risk that may inhabit the area. The Panel has reviewed the contents of the Technical Report, and finds that the Regional Manager considered the area's classification under the SEI Manual, and the potential effects of the discharge on important ecosystems and species at risk in the area. For example, the Technical Report discusses potential effects on sensitive ecosystems at page 13, and notes that the SEI Manual recognizes four distinct zones in the Walker Hook area. The Technical Report states as follows:

> Two of these, coastal bluff and second growth forest, are not located in the area where activity associated with the proposed hatchery will occur. A third type, wetlands, is associated with the salt marsh northwest of the tombolo. Based on the preceding discussion it is unlikely that the effluent discharge will impact this area as it will flow primarily in a southeastern direction away from the salt marsh. Of the portion of effluent that does flow in a northwesterly direction the hydrogeological report states that it will enter the marine environment subsurface which, in the case of the salt marsh, is hundreds of meters away. Of more concern may be the impact the cattle have on this area.
>
> The fourth feature, "sparsely vegetated", encompasses the entire tombolo area where the production and injection wells are located. As discussed… the tombolo can not be considered a natural ecosystem, even if there are some species of vegetation on it considered "sensitive", because of the historic and ongoing activities that have/are occurring on this private land.

The Panel finds that, in the context of considering the effects of the discharge on the area's ecosystems, it was appropriate for the Regional Manager to consider that the natural vegetation and top layers of soil at Walker Hook have been altered from their original state due to clearing, ploughing, cattle grazing and other agricultural activities. Those activities, both historical and continuing, have already impacted and altered the ecosystem of the tombolo.

The Technical Report also summarizes and discusses the comments and recommendations that were provided by other agencies regarding the potential impacts of the effluent. For example, the Technical Report sets out the official responses of Environment Canada, the Ministry of Health, and the Ministry of Agriculture, Food and Fisheries regarding their review of Sablefin's proposal. None of those agencies objected to Sablefin's application.

The Technical Report also sets out the CRD's comments and recommendations. The Panel notes that the Regional Manager was under no statutory obligation to consider the CRD's comments, and the Ministry was under no obligation to take action in response to the CRD's recommendations. However, the Ministry responded to the CRD's concerns by obtaining, or requiring Sablefin to obtain, further information that was then considered by the Regional Manager. That information included data from a nearby marine water monitoring station that provides a baseline to which monitoring data that must be collected by Sablefin, may be compared with information provided in the Lowen Report in response to the Ministry's requirement for Sablefin to hire a qualified professional to assess potential impacts on the freshwater aquifer and the surrounding marine environment. Although Mr. Lowen may not be personally qualified to assess all of the risks associated with the Approval, the Panel finds that he is a qualified professional with adequate education and professional experience to analyze the matters that are addressed in his report.

Furthermore, the Panel finds that the Lowen Report and the Technical Report, together, provide adequate information for the Regional Manager to properly consider the risks associated with the discharge. Although the Lowen Report may have drawn some conclusions regarding water quality based on the 1994 Nagpal Guidelines which were designed for fresh water, the Panel notes that the Technical Report assessed the information in the Lowen Report based on the Ministry's 1998 Guidelines, which list various water quality criteria for both fresh and marine water. The Panel notes that Table 8 of the 1998 Guidelines lists various criteria for microbiological indicators in relation to recreation, drinking water, irrigation, livestock, and industrial uses. However, the only criteria for aquatic life pertain to shellfish harvesting. Table 8 provides no guidance regarding safe microbe levels in relation to fish.

The Panel notes that the *Municipal Sewage Regulation* does not apply to the Approval, and the EIS Guideline was developed to address the environmental impacts of discharges of municipal sewage and does not apply to discharge from fish hatcheries. Therefore, while the EIS Guideline may be considered by the Regional Manager as a policy guideline, its relevance to the discharge that is authorized under the Approval is limited.

With regard to the hatchery's long-term plans for expansion, the Panel notes that the Approval is only valid until December 15, 2004, and Sablefin will have to seek a new authorization under the *Act* for any effluent discharge from the hatchery after that time. If, and when, Sablefin applies for a new authorization under the *Act*, any future changes in the amount or nature of the effluent discharge will be considered by Ministry staff.

The Panel is satisfied that the Regional Manager considered the potential risks associated with marine microbes that may be in the effluent based on the information that was available to him. However, the evidence before the Panel indicates that microbes found in marine water may live much longer outside of a host organism than those found in fresh water, and many marine microbes are small enough to pass through the 37-micron filter. The evidence also indicates that the risks associated with marine microbes may be different from the risks associated with microbes that are commonly found in fresh water or in human sewage effluent. Given the unique nature of Sablefin's hatchery operation, the risks associated with marine microbes and the new information that was given to the Panel, the Panel will undertake a further consideration of that issue.

With regard to all other risks associated with the effluent discharge, the Panel finds that the Regional Manager relied on relevant and adequate information, properly considered those risks, and properly concluded that there would be no harm to humans or the environment. Furthermore, he did not fetter his discretion.

3. Whether the discharge of effluent in accordance with the Approval will cause harm to the environment and human health.

As noted above, the Panel has found that the Regional Manager properly considered all of the relevant risks that may be posed by the effluent discharge, and properly concluded that it will pose no harm to humans or the environment, with the possible exception of the potential risks associated with marine microbes that may be in the discharge. Accordingly, in deciding this issue, the Panel has only considered whether microbes that may be discharged in accordance with the Approval will pose a risk of harm to the environment or humans.

The Residents and the CSA submit that marine microbes that may be present in the effluent discharge could cause harm to humans and the environment. In particular, the Residents and the CSA argue that pathogens found in sablefish and sablefish waste may cause harm to fish, including wild sablefish, and fish habitat near Walker Hook. The Residents and the CSA submit that the marine microbes which may be associated with a sablefish hatchery can live outside of a host organism for much longer than the microbes found in fresh water or in sewage systems that are designed to treat human waste. The Residents and the CSA submit that neither Sablefin nor the Regional Manager provided scientific data to support their claim that most marine microbes will be removed from the discharge before it reaches the marine environment because they will die or be diluted in the sand aquifer.

The CSA and the Residents refer to a list of microbes associated with sablefish and they submit that neither Sablefin's nor the Regional Manager's witnesses

specifically considered the potential effects of those microbes. They also note that there is no requirement in the Approval for monitoring microbes which could pose a threat to humans and marine life.

In support of those submissions, the CSA and the Residents refer to Mr. Wainwright's testimony. He testified that many of the marine microbes that would typically be associated with sablefish hatcheries are small enough to pass through the 37-micron filter. He stated that many of those microbes can survive without a host organism for many months, which is much longer than the 6 to 9 days that the Regional Manager and Sablefin estimate it will take for the effluent to travel through the aquifer. He stated that, if harmful microbes in the effluent reach the marine environment, they could have an adverse impact on fish, including wild sablefish, and fish habitat. He further noted that if disinfectants, antibiotics, therapeutants and pharmaceuticals were in the discharge, they would have a harmful effect on the natural micro-organisms within the salt marsh and on the eelgrass. With regard to fish habitat, he noted that the eelgrass beds and the salt marsh near Walker Hook are particularly sensitive because detritus food chains contribute significantly to the productivity of both of those ecosystems. Specifically, he stated that microbes play a significant role in the food chains of those ecosystems by converting detritus (i.e. dead organic matter) into microbial biomass, which then becomes a food source for other organisms.

The Regional Manager submits that the discharge authorized by the Approval meets all applicable water quality standards, and its impact on the environment is negligible. He submits that, although the discharge may technically be classified as "effluent", it is the life support medium for fish in the hatchery prior to discharge. He submits that the Appellants' concerns about environmental impacts are speculative and are not supported by scientific evidence, by any demonstrated impact during the period in which the discharge has been occurring, or by any evidence from similar facilities. The Regional Manager argues that there are other examples of sablefish being reared on Vancouver Island, and the discharge from those facilities has not presented any problems related to microbes.

Furthermore, the Regional Manager maintains that Sablefin's hatchery incorporates additional treatment through the sand aquifer at the injection wells, which will further reduce microbe levels before the discharge reaches the marine environment. The Regional Manager submits that dilution and slow movement of the effluent through the sand aquifer will vastly reduce the number of microbes in the discharge by the time it reaches the marine environment. Specifically, he refers to the Technical Report and the Lowen Report, which state that the effluent will take 6 to 9 days to travel through the aquifer, during which time it will be renovated by naturally occurring bacteria and will be diluted twelve-fold by groundwater. He submits that the discharge will then be further diluted once it enters the marine environment of Trincomali Channel, which has significant tidal flows.

Additionally, the Regional Manager submits that it would not be practical to monitor microbe levels in the waters near Walker Hook because marine water contains large numbers of naturally occurring microbes.

The Regional Manager submits that Mr. Lowen's testimony at the appeal hearing addressed questions about the potential for microbes in the effluent and possible pathways into the environment. Specifically, Mr. Lowen acknowledged that some microbes may pass through the natural sand filter, but he stated that those microbes would be greatly reduced in numbers or concentrations after passing through the aquifer, and therefore, it is unlikely that they would cause any harm to the environment. Mr. Lowen stated that the sub-surface sand around the injection wells has a similar grain size and permeability to that used in engineered sewage disposal systems.

In support of his submissions, the Regional Manager also refers to the testimony of Dr. Gidi Sagi, who is a consultant to Sablefin. The Panel accepted Dr. Sagi as an expert in hydrobiology, wastewater treatment, water quality and the interface between marine and terrestrial ecosystems. The Regional Manager submits that Dr. Sagi's evidence supports Mr. Lowen's testimony that the presence of the sand aquifer will ensure that the numbers of any microorganisms that may be present in the effluent will be greatly diminished by the time the discharge reaches the marine environment. Dr. Sagi testified that, after the effluent passes through the aquifer, it would contain less nutrients and organic matter than household "grey" water, and would be the salt water equivalent of drinking water. Dr. Sagi also stated that the amount of fish feed used annually in the hatchery would yield less nitrogen loading to the environment than a single dairy cow in one year.

The Regional Manager also refers to Mr. Wainwright's testimony. The Regional Manager submits that, while Mr. Wainwright expressed general concerns that harmful microbes could be present in the effluent and could emerge in the marine environment, those concerns are purely theoretical and are not supported by any evidence.

In addition, the Regional Manager refers to a letter dated January 7, 2004, from Karen Barry of the DFO's Habitat Management division, to Eric Wickham, Executive Director of the CSA. In that letter, Ms. Barry stated that the Ministry of Agriculture, Food and Fisheries referred Sablefin's application for an aquaculture licence to the DFO for review. After reviewing that application, which included information about the proposed wastewater treatment system, the DFO determined that any potentially negative impacts to fish or fish habitat would be mitigated. Specifically, she stated:

> …the project as proposed complies with the federal Fisheries Act since there will be no harmful alteration, disruption or destruction of fish habitat and there is no direct discharge of wastewater to the marine environment. This determination was based on submitted plans, a hydrogeological assessment and a site visit conducted on August 21, 2003.

Sablefin submits that the effluent discharge has no adverse effects on humans or the environment. In particular, Sablefin argues that any microbes in the effluent will have no impacts on sensitive ecosystems or the marine environment, and will not adversely affect local residents, because no microbes will survive after traveling

through the sand aquifer below the injection wells. In addition, Sablefin submits that it uses no antibiotics or therapeutants in the hatchery, and only a small amount of cleaning solutions, which will have no effects on the marine environment.

In support of those submissions, Sablefin refers to the testimony of Mr. Lowen, Dr. Sagi, and Mr. Taekema. In particular, Sablefin notes Dr. Sagi's evidence that the travel distance through the aquifer is approximately 90 metres, and the duration of effluent flow in the aquifer would be 6 to 9 days. He stated that, based on the effluent flow rate and the depth of the aquifer, the discharge would contain virtually no microbes by the time it reaches the marine environment. In addition, Sablefin notes that Mr. Lowen testified that bacteria and viruses flowing through aquifers are normally remediated to drinking water levels after flowing through 30 metres of sand. Furthermore, Mr. Taekema testified that the effluent would meet the Ministry's standards for direct discharge to the marine environment immediately after passing through the 37-micron drum filter, and before passing through the sand aquifer. Mr. Taekema noted that the flow rates used in the Lowen Report are based on the hatchery's maximum estimated discharge rates, which are four times higher than the rates authorized in the Approval.

Panel's findings

After reviewing all of the evidence, the Panel finds that marine microbes in the hatchery's discharge will be attenuated or diluted to a concentration that poses no threat to humans or the marine environment near Walker Hook by the time they pass through the aquifer. The Panel has considered that two sablefish rearing operations on Vancouver Island have experienced no problems associated with microbes in their discharge water, and that the effluent from Sablefin's hatchery would meet the Ministry's standards for direct discharge to the marine environment immediately after passing through the 37-micron drum filter, and before passing through the sand aquifer. The Panel has also considered that the flow rates used in the Lowen Report are based on the hatchery's maximum estimated discharge rates, which are four times higher than the rates authorized in the Approval.

In addition, the Panel finds that discharging the effluent into the sand aquifer provides an added measure of protection over other sablefish rearing operations which vastly reduces any risks that might be associated with microbes that remain in the effluent after passing through the 37-micron filter. The Panel finds that microbes in the discharged effluent will be reduced to safe levels during passage through the sand aquifer due to dilution with ground and marine water, due to the length of time required to travel through the aquifer without a host organism and due to degradation by other microbes that naturally occur in the aquifer. The Panel accepts Dr. Sagi's evidence that, based on the dispersion and dilution in the aquifer and the effluent flow rate through the aquifer, there is very little chance that the microbe concentration in the discharge at the point where the discharge emerges from the aquifer will pose any threat to humans, fish or fish habitat.

The Panel notes that its findings in this regard are supported by the letter dated January 7, 2004, from DFO to Mr. Wickham. In that letter DFO correctly

understood that the effluent would be processed through the 37-micron filter and the sand aquifer before emerging into the marine environment. The DFO states in that letter that its staff had reviewed the proposed wastewater treatment system, reviewed the Lowen Report, and conducted a site visit on August 21, 2003. The DFO determined that any potentially negative impacts to fish or fish habitat would be mitigated, and the Panel agrees.

Furthermore, the Panel finds that the Appellants provided little evidence regarding how any microbes in the effluent would cause harm to humans or marine life, including wild sablefish, should those microbes reach the marine environment. In particular, the Panel notes that there is little evidence confirming the presence of wild sablefish near Walker Hook. The evidence provided by the CSA indicates that mature sablefish inhabit deep waters many miles offshore from Vancouver Island. The CSA's evidence indicates that juvenile sablefish may spend some time in inland marine habitat with characteristics similar to some of the areas near Walker Hook, but there is no actual evidence confirming the presence of juvenile sablefish near Walker Hook.

Finally, the Panel finds that the effluent will contain no antibiotics or therapeutants that could harm natural microbes in the marine environment. Furthermore, the Panel accepts that the disinfectants used to clean equipment at the hatchery will have "no impact on the receiving environment," as stated at page 11 of the Technical Report.

For all of those reasons, the Panel finds that the Appellants have not established that microbes which may be present in the effluent will harm humans, fish, fish habitat, or the environment generally if the effluent is discharged in accordance with the Approval.

4. Whether the Regional Manager and/or Sablefin failed to adequately consult with the Elders before the Approval was issued.

The Crown's duty to consult with and accommodate aboriginal people is distinct from any obligations that statutory decision-makers may have to consult with members of the general public who may be affected by a government decision. The duty of the provincial Crown, and government decision-makers acting on behalf of the Crown, to consult aboriginal people arises from a variety of legal sources, including the Crown's historical fiduciary relationship with aboriginal people, the common law, and the *Constitution Act, 1982*.

Aboriginal rights that have not been extinguished were recognized in the common law before 1982, and are now recognized and affirmed under section 35 of the *Constitution Act, 1982*, which states as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Existing aboriginal rights must not be unjustifiably infringed by decisions of the Crown. In addition, in British Columbia, there is an enforceable legal and equitable duty on the Crown to consult and seek accommodation with aboriginal peoples

whenever the Crown makes a decision that may have an impact on asserted aboriginal rights or title: *Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 (C.A.), leave to appeal to S.C.C. granted March 29, 2003, S.C.C. Bulletin, 2003, p. 442 (hereinafter *Haida*); *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (2002), 211 D.L.R. (4th) 89 (B.C.C.A.), leave to appeal to S.C.C. granted November 14, 2002, S.C.C. Bulletin, 2002, p. 1591 (hereinafter *Taku*). Thus, as the law currently stands in this province, the Crown's duty to consult aboriginal people arises upon the presentation of a *prima facie* claim of aboriginal rights or title, and is not limited to circumstances where aboriginal people have already established or secured their aboriginal rights by way of a treaty or a court declaration.

The scope of the Crown's fiduciary relationship, and the duties that arise from it, are still being defined through litigation. However, Lambert J.A. stated in *Haida* that "… the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for Aboriginal title and Aboriginal rights." In addition, the current provincial policy on consultation with aboriginal people is set out in the *Provincial Policy for Consultation with First Nations*, October 2002 (the "*2002 Provincial Policy for Consultation*"). At page 18, it states that:

> Where a sound claim of aboriginal rights and/or title is made out, consultation efforts must attempt to address and/or accommodate a First Nation's concerns relating to the impact of proposed activities on the aboriginal interests that it identifies or of which the Crown is otherwise aware.

In terms of what constitutes a "sound" claim or a "*prima facie*" claim of aboriginal rights or title, in *Lax Kw'Alaams Indian Band et al v. Minister of Forests and West Fraser Mills Ltd. et al*, 2004 BCSC 420, Mr. Justice Shabbits discussed the use of different terminology to describe the strength of claims of aboriginal rights and aboriginal title, in the context of a judicial review of a decision by a district manager in the Ministry of Forests to issue a cutting permit that authorized a forest company to cut down Crown timber, including culturally modified trees. He stated as follows at paragraphs 112 and 117:

> In the Rationale, the Manager said the petitioners appear to have a good to strong *prima facie* claim to aboriginal rights. No exception is taken to that conclusion, although there is also no explanation within the Rationale as to what that means. I am, however, satisfied that the Manager concluded that the claim to aboriginal rights was stronger than the claim to aboriginal title. The Manager's conclusion that the petitioners' claim of aboriginal title was not a strong *prima facie* claim, but that their claim to aboriginal rights was a good to strong *prima facie* claim, suggests that she considered their claim of aboriginal rights a *prima facie* claim or a good *prima facie* claim, but without defining what that means…
>
> In my opinion, what is of relevance is not the terminology that the Manager used in describing the strength of the petitioners' claim of aboriginal title, but

> whether the accommodation that she effected adequately addressed their claims to aboriginal rights and to aboriginal title.

It should also be noted that, in the context of consultations where aboriginal rights have not been proven, assessing the strength of the claim of aboriginal rights essentially involves a general assessment of the claims and representations made by a First Nation, and then identifying, on the face of those claims and a review of the information that was reasonably available, whether the First Nation has made a sound claim of those rights at law. This claim need not be assessed based on extensive analysis of the merits of the First Nation's claims.

While the parties in these appeals agree that the Board has jurisdiction to legally determine aboriginal rights in the course of deciding the appeals, the Panel has considered the issue of adequate consultation based on the consultation process that occurred prior to the issuance of the Approval. For reasons discussed previously by the Board in *TimberWest Forest Corp. v. Deputy Administrator, Pesticide Control Act*, (Appeal No. 2002-PES-008(a)), [2003] B.C.E.A. No. 31 (Q.L.), it is properly the role of the Regional Manager, and not the Board, to conduct consultation with First Nations. Accordingly, the Panel has considered the consultation issue based on an assessment of the claims and representations that were made by First Nations to the Ministry and Sablefin before the Approval was issued, and a review of the information that was reasonably available to the Regional Manager. The Panel has conducted a more extensive analysis of the merits of the claims of aboriginal rights, based on all of the evidence provided during these appeal proceedings, under the next issue, which addresses the merits of the Elders' claims of aboriginal rights.

Finally, it should also be noted that, although an analysis of the adequacy of consultation does not involve a legal determination of aboriginal rights, it still requires an appreciation of the legal tests that have been developed by the courts for establishing aboriginal rights. The Panel has applied those tests in its analysis of the consultation issue. However, those tests are set out and discussed under the next issue, in which the Panel assesses the merits of the claims of aboriginal rights.

The parties' submissions

The Elders submit that the Approval was issued without proper consultation and without any meaningful regard for the Elders' cultural interests or aboriginal rights. The Elders submit that the Ministry and Sablefin engaged in a "build first, consult later" process based on faulty and incomplete information, rather than a process of meaningful consultation and accommodation as required by the B.C. Court of Appeal in *Haida*, *Taku*, and *Halfway River First Nation* v. *British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666 (hereinafter *Halfway River*).

The Elders submit that the Crown's duty to consult is triggered in this case, because the Elders' have demonstrated a compelling claim by the Penelakut First Nation, and the Coast Salish generally, to interests that could be affected by the Approval. The Elders refer to the statement of Lambert J.A. in *Haida* that "… the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for Aboriginal title and

Aboriginal rights." The Elders submit that the soundness of their claim to aboriginal rights exceeds the minimum threshold that is required to trigger the duty to consult and accommodate. In particular, they submit that Syuhe'mun is the traditional site of a permanent Hul'qumi'num village that was historically associated with the Penelakut people, and the site includes a sacred burial ground containing over 1,000 ancestors of the Coast Salish people. The Elders also submit that Penelakut people and other Coast Salish people continue to use the site for harvesting inter-tidal marine food, for camping and trading, and for spiritual purposes.

The Elders submit that the consultation relied on by the Ministry in this case was fundamentally flawed. In particular, the Elders submit that the Ministry relied on a standard letter which was sent to the Penelakut Tribe on March 27, 2003, and which included only a short cover letter requesting input and a copy of Sablefin's application for an approval. The Elders submit that Ministry representatives did not actively seek to inform themselves of First Nations' interests, elicit First Nation participation, or inform First Nations of the potential impacts of the proposed discharge on their traditional activities. Moreover, the Elders submit that the Ministry never met with representatives of the Penelakut First Nation or the Hul'qumi'num Treaty Group.

In addition, the Elders submit that the facts in this case give rise to an obligation on Sablefin to consult with and accommodate aboriginal people. The Elders submit that this case falls into the category of "knowing receipt" by a third party, as described by Lambert J.A. in *Haida*. Specifically, the Elders submit that Sablefin knew, or ought reasonably to have known, that its consultation with First Nations prior to the issuance of the Approval was inadequate and was misleading to both Crown agencies and First Nations. The Elders argue that, in August 2002, Dr. Minkoff was advised by archaeological consultants from Millennia Research Ltd. that Walker Hook was an archaeological site and that he was obligated to consult First Nations. However, he did not contact the Hul'qumi'num Treaty Group until February 2003, after representatives of that group visited Sablefin's office in response to rumours of unregulated development on Walker Hook. The Elders submit that Dr. Minkoff subsequently misled representatives of the Hul'qumi'num Treaty Group regarding his plans to discharge effluent into the site, and misled the Ministry by falsely stating that he was acting in a transparent manner with regard to First Nations and that they supported Sablefin's operations.

Robert Morales testified regarding the consultation process. He also provided an affidavit to which a number of documents are attached. Those documents include copies of correspondence between representatives of Sablefin, the Ministry, the Ministry of Sustainable Resource Management, and the Hul'qumi'num Treaty Group. Mr. Morales stated that, as the Chief Negotiator for the Hul'qumi'num Treaty Group, he is the only person with authority to speak on behalf of that group. He discussed his communications with representatives of Sablefin, the Ministry, and other government agencies regarding Sablefin's development, including communications regarding the Sablefin's applications for the Site Alteration Permit and the Approval. Mr. Morales stated that he understood that the Ministry had completed an independent environmental assessment of Sablefin's application for an approval, and on that basis, he sent a letter dated September 9, 2003, to the Ministry,

stating that the Hul'qumi'num Treaty Group supported the Ministry in making an "independent, informed decision" regarding their environmental review of Sablefin's application. In that letter, he also stated that the six First Nations which comprise the Hul'qumi'num Treaty Group retained the right to comment independently on the proposed approval. Mr. Morales testified that the Hul'qumi'num Treaty Group fully supports the Elders' position in these appeals.

The Regional Manager submits that his duties of consultation in relation to the Approval are limited to the effects that arise from the discharge of the effluent into the wells on the tombolo. He maintains that his consultation duties do not extend to the effects of infrastructure created for the works through which the discharge is authorized, because matters such as land use and site disturbance do not require authorization under the *Act*. He submits that the wells, piping, and associated trenches were installed on the tombolo before the Approval was issued, and Sablefin required no authorization under the *Act* before drilling the wells or constructing the pipelines. He submits, therefore, that he had no duty to consult with regard to those activities. Rather, those activities were authorized under the Site Alteration Permit, which was issued by other authorities under the *Heritage Conservation Act*.

The Regional Manager submits that there was proper consultation with aboriginal people in this case, and any claimed aboriginal rights were taken into consideration before he issued the Approval. He submits that the consultation that was undertaken by Sablefin, at his direction, exceeds the consultation that is typically associated with an approval.

The Regional Manager submits that particulars of the proposed discharge, along with a letter inviting comments, were circulated to over a dozen Indian bands or First Nations that had expressed an interest, or claimed an aboriginal right in the vicinity of the tombolo. The Regional Manager notes that the letter invited them to submit technical information or traditional knowledge that might assist in assessing the impact of the proposed discharge on any traditional activities, and invited recipients to contact Ministry staff with any concerns.

In addition, the Regional Manager maintains that consultation was conducted with Chief Earl Jack of the Penelakut First Nation, and with representatives of the Hul'qumi'num Treaty Group who were designated for that purpose. The Regional Manager maintains that he was in receipt of communications indicating that all pertinent materials concerning Sablefin's application had been received by representatives of the Penelakut First Nation, and he understood that they supported the Ministry in making an informed, independent decision on whether to issue the Approval.

In support of those submissions, the Regional Manager referred to Sablefin's consultation report dated May 30, 2003, in which Dr. Minkoff provided details to the Ministry regarding Sablefin's consultations with First Nations. The Regional Manager submits that Sablefin's consultation report confirms that Sablefin was proceeding with full transparency regarding First Nations' concerns, and that the expectations of First Nations were being met.

In addition, Mr. Taekema gave evidence regarding the consultation process. He stated that a number of Indian bands responded to the Ministry's March 27, 2003 referral letter. There was no initial response from the Penelakut First Nation, so he telephoned Chief Earl Jack of the Penelakut First Nation to ensure that they were aware of Sablefin's application for an approval. Mr. Taekema stated that, as a result of that communication, he understood that a representative of the Penelakut First Nation would get back to him within a short time. He stated that the Ministry then received a copy of the letter dated September 9, 2003, from Mr. Morales of the Hul'qumi'num Treaty Group. In that letter, Mr. Morales thanked the Ministry for referring Sablefin's application to the six First Nations that comprise the Treaty Group. He also stated as follows:

> Although our lands on Salt Spring Island became alienated from our Hul'qumi'num people by British settlement in early colonial times, our First Nation community members persist to maintain their cultural connection to *Syuhe'mun* today as one of the few remaining important sites on Salt Spring Island to traditionally harvest inter-tidal and marine resources for food, social and ceremonial purposes.
>
> For the Ministry's consideration, the Hul'qumi'num Treaty Group-membership is deeply concerned about environmental pollution related to aquaculture development projects that may affect the health of our marine resources in the Georgia Basin. We are especially concerned about any proposed industrial contamination of our important marine harvesting locations in the southern Gulf Islands.
>
> On April 29, 2003, Mr. Gidon Minkoff, President, Sablefin Hatcheries Ltd. provided a detailed presentation to our HTG-membership on his company's aquaculture development project and their proposed estimate of environmental pollution by the fish hatchery. Sablefin Hatcheries Ltd. has provided the HTG office with all requested information for our review, including proprietary information relating to fish hatchery and a hydro-geological technical report relating to waste management issues. We understand that Sablefin Hatcheries Ltd. has also hosted an on-site visit by members of the Penelakut Tribe Band Council to discuss the project.
>
> We understand that the Ministry of Water, Land and Air Protection has completed an independent environmental assessment of Sablefin Hatcheries Ltd.'s application for a *Water Management Act* permit. We support the Ministry of Water, Land and Air Protection in making an independent, informed decision in regard to the permitting of a *Waste Management Act* [Approval] that will take into consideration our First Nation memberships' concerns for the long-term future of marine resources and for our aboriginal right to harvest food from the marine and inter-tidal environments at *Syuhe'mun* in the future.
>
> Thank you for your consultation on this matter.

Mr. Morales' letter was copied to members of the Hul'qumi'num Treaty Group and Mr. Taekema.

Mr. Taekema was also in contact with Eric McLay, an archaeological consultant with the Hul'qumi'num Treaty Group, regarding Sablefin's application.

Sablefin submits that First Nations groups who could potentially be affected by the hatchery project were extensively consulted before the Approval was issued. Sablefin maintains that it corresponded and met with representatives of the Hul'qumi'num Treaty Group, as well as the Chief and other members of the Penelakut Tribe, throughout 2003, before the Approval was issued.

In support of those submissions, Sablefin referred to its consultation report to the Ministry, dated May 30, 2003. Sablefin's consultation report indicates that Joey Caro, Senior Negotiations Support with the Hul'qumi'num Treaty Group, visited Sablefin's offices on January 31, 2003, and inquired as to whether Sablefin was following provincial processes for archaeological and environmental impact assessment of the hatchery project. On February 4, 2003, Dr. Minkoff sent a letter to Mr. Morales explaining that the hatchery had been relocated after records from the Archaeological Branch of the Ministry of Sustainable Resource Management revealed that the tombolo contained a midden, and that Sablefin had been in communication with Mia Parker, a fisheries biologist with the Cowichan Tribes (who are also part of the Hul'qumi'num Treaty Group). In March 2003, Dr. Minkoff, Mr. Caldwell, Mr. McLay, and Mr. Caro toured the hatchery site and examined archaeological maps and aerial photos to ascertain the location of the hatchery and the wells. They also discussed how the effluent would be injected into the sub-surface.

Sablefin's consultation report also indicates that, in March 2003, Sablefin hired I.R. Wilson Consultants Ltd., archaeologists, and instructed them to work with First Nations and the Archaeological Branch to ensure that digging on the midden could proceed. The report then summarizes a series of communications in April 2003 between representatives of the Hul'qumi'num Treaty Group, Sablefin, and the Archaeological Branch regarding the hatchery project. On April 29, 2003, Dr. Minkoff made a presentation to representatives of the Hul'qumi'num Treaty Group, including Mr. Caro, Mr. McLay, the Appellant Myrus James, and Audrey Henry of the Penelakut Tribe. On May 7, 2003, a delegation of the Penelakut Tribe visited the hatchery site to learn about its operation, and observe and discuss the archaeological excavations at the site.

Sablefin also referred to a letter dated September 5, 2003, from Nancy Dixon of Sablefin to Mr. Taekema. In that letter, Ms. Dixon states that Audrey Henry of the Penelakut Tribe had spoken to Dr. Minkoff that week to ask questions about the effluent discharge. Ms. Dixon also states that Mr. Caro had visited the hatchery in mid-August to inspect the tombolo and obtain a copy of the Lowen Report, and he had not indicated any concerns since that time.

In reply, the Elders submit that, when Mr. Morales issued his September 9, 2003 letter to the Ministry, he relied on information from the Ministry which led him to

assume that the environmental and archaeological impact assessments appeared to be more thorough than they actually were, and he did not know that the consultation was inadequate. The Elders also submit that the Ministry misinterpreted his letter as one of support, rather than caution.

Panel's findings

Asserted aboriginal rights in relation to Syuhe'mun

With regard to the strength of the claims of aboriginal rights in this case, the Panel finds that the information before the Regional Manager indicated that members of the First Nations represented by the Hul'qumi'num Treaty Group, including the Penelakut First Nation, continue to gather food for traditional purposes from the inter-tidal and marine areas around Syuhe'mun, although they do not appear to have done so frequently in recent years. The information before the Regional Manager was sufficient to indicate that the Hul'qumi'num Treaty Group's claims of aboriginal rights went beyond the mere assertion of aboriginal rights.

The Panel accepts that, based on the information that was before the Regional Manager, the First Nations represented by the Hul'qumi'num Treaty Group established a *prima facie* case that they have an aboriginal right to gather foods from the inter-tidal areas and marine waters near Syuhe'mun for traditional purposes. In addition, the Panel notes that the Regional Manager has accepted, for the purpose of these appeals, that the Penelakut people have an aboriginal right to gather food in those areas for traditional purposes.

The Panel also finds that First Nations, including the Penelakut First Nation, have established a *prima facie* case that they have aboriginal rights in relation to Syuhe'mun as a sacred burial ground, before the Regional Manager issued the Approval.

Specifically, human remains were discovered at the site prior to the issuance of the Approval. In addition, sacred burial ceremonies were performed at the site prior to the issuance of the Approval. The Technical Report prepared by the Ministry prior to the issuance of the Approval recognizes that there may be human remains on the site.

The Panel accepts that, during the course of consultations, aboriginal people expressed concerns about the effluent discharge's potential effects on archaeological values associated with the tombolo. In addition, the Technical Report indicated that the tombolo included a large midden. As such, the Panel finds that a relevant consideration for the Regional Manager was the potential effect of the effluent discharge on the midden.

Scope and adequacy of consultation and accommodation regarding prima facie *rights*

Assuming that the aboriginal right to gather food for traditional purposes from the inter-tidal and marine areas around Syuhe'mun has not been extinguished, and given the Crown's knowledge of aboriginal peoples' concerns about archaeological

values associated with the midden, the requirement for the Crown to authorize the discharge of effluent from Sablefin's hatchery to land engages the Crown's fiduciary duty to consult aboriginal people whose aboriginal rights may be affected by the discharge. However, the parties dispute the scope of the Regional Manager's duty to consult in this case and the adequacy of the consultation that occurred.

With regard to the scope of the Regional Manager's duty to consult on behalf of the Crown, the Panel has considered the scope of the Regional Manager's jurisdiction under the *Act* and the nature of the activities that are authorized under the Approval. Under the *Act*, the Crown, as represented by the Regional Manager, regulates the discharge of waste into the environment. The excavation, disturbance, alteration, or damage of archaeological sites or burial sites is regulated under the *Heritage Conservation Act*. Section 12 of that Act provides that the minister responsible for administering that Act may issue site alteration permits. The *Heritage Conservation Act* is administered by the Minister of Sustainable Resource Management, not the Minister of Water Land and Air Protection. A regional manager in the Ministry of Water, Land and Air Protection has no jurisdiction over matters that are regulated under the *Heritage Conservation Act*. Consequently, the Panel finds that the Regional Manager had no jurisdiction over the alteration or disturbance of the archaeological site on the tombolo. Those activities were not authorized under the Approval and are not regulated under the *Act*.

The Panel notes that the Approval authorizes Sablefin to discharge effluent to the land using "authorized works", including the wells and piping on the tombolo. However, those authorized works were already installed when the Approval was issued. Sablefin's construction of the works on Mr. Caldwell's land is a matter between Sablefin, Mr. Caldwell, and the government agencies that regulate subdivision and private land use. It is not a matter over which the Regional Manager has authority.

The Panel finds that the Regional Manager cannot reasonably be expected to consult with First Nations on matters that are beyond the scope of his jurisdiction under the *Act*. The Panel finds that, in this case, the Regional Manager's duties of consultation in relation to the Approval are limited to the effects that arise from the discharge of the effluent into the wells on the tombolo. The Panel finds that the Elders' concerns regarding the excavations on the tombolo and the construction of the works are beyond the scope of the Regional Manager's jurisdiction under the *Act*, and are not properly before the Board in hearing these appeals. While the Crown may, in some cases, have a duty to consult First Nations with regard to decisions made under the *Heritage Conservation Act* or other legislation, it is not the Regional Manager's responsibility to conduct consultations regarding those decisions.

The Panel has considered whom the Regional Manager should properly have consulted with in deciding whether he should grant the Approval. Throughout the entire application and approval process both the Regional Manager and Sablefin were referred to the Hul'qumi'num Treaty Group by the relevant aboriginal communities for comments on the project. In these circumstances, the Panel finds

that it was reasonable for Sablefin and the Ministry to rely on communications from those who are recognized as speaking on behalf of the Penelakut First Nation, including Mr. Morales of the Hul'qumi'num Treaty Group.

The Panel further finds that it was reasonable for the Regional Manager to expect that Mr. Morales was authorized to speak for members of the Hul'qumi'num Treaty Group, including the Penelakut First Nation. The Penelakut First Nation is a member of the Hul'qumi'num Treaty Group, and Mr. Morales testified that he is the only person authorized to speak on behalf of the Hul'qumi'num Treaty Group. Moreover, the Panel finds that the correspondence between Mr. Morales and representatives of Sablefin and the Ministry indicates that Mr. Morales acted as the primary contact person during their consultations with members of the Hul'qumi'num Treaty Group, including the Penelakut First Nation. In addition, Mr. Taekema telephoned Chief Earl Jack of the Penelakut First Nation to ensure that the Chief was aware of the proposal, and as a result of that conversation, Mr. Taekema understood that a representative of the Penelakut First Nation would respond within a short time. The next communication that Mr. Taekema received was Mr. Morales' letter dated September 9, 2003. In these circumstances, the Panel finds that it was reasonable for the Regional Manager to rely on Mr. Morales as having the authority to speak on behalf of the Penelakut First Nation with regard to consultations concerning the Approval.

With regard to the adequacy of the consultation and accommodation in this case, the Panel finds that the Regional Manager, his staff, and Sablefin, on the Ministry's behalf, made adequate efforts to notify, inform, and address questions and concerns raised by representatives of the Penelakut First Nation and the Hul'qumi'num Treaty Group regarding the proposed effluent discharge. Specifically, the Panel finds that the Regional Manager, and those acting on his behalf in this regard, afforded First Nations who may be affected by the effluent discharge, including the Penelakut First Nation, a full opportunity to identify their interests and claims and express their concerns.

Specifically, the Panel finds that the Ministry, and Sablefin on the Ministry's behalf, took reasonable steps to notify First Nations communities, who could be affected by the Approval, of Sablefin's application for an approval. The evidence provided by the parties indicates that, between February 2003 and the date when the Approval was issued, there was ongoing communication between representatives of the Ministry, Sablefin, the Hul'qumi'num Treaty Group and individual First Nations communities regarding the nature of Sablefin's proposed effluent discharge, and First Nations' concerns regarding potential effects of the effluent discharge on marine resources and the archaeological site. In addition, with regard to the Penelakut First Nation in particular, the Panel notes that the Ministry sent a copy of Sablefin's application to the Penelakut First Nation, along with an invitation to provide comments and express concerns, and Mr. Taekema telephoned Chief Earl Jack to ensure that the Chief was aware of the proposal. In April 2003, Dr. Minkoff made a presentation to representatives of the Hul'qumi'num Treaty Group, including two members of the Penelakut First Nation, and in May 2003, a delegation of the Penelakut First Nation attended at the hatchery site after human remains were discovered. The Panel finds that representatives of the Hul'qumi'num Treaty

Group, including members of the Penelakut First Nation, were well aware of Sablefin's plans to discharge effluent at Walker Hook, and had time to submit information and to make representations.

Furthermore, the Panel finds that it was reasonable for the Regional Manager to rely on Mr. Morales' September 9, 2003 letter as confirmation that the members of the Hul'qumi'num Treaty Group, including the Penelakut First Nation, were satisfied with the consultation process that had occurred. The Panel notes that Mr. Morales, in his letter, thanked the Ministry for referring Sablefin's application to the First Nations that comprise the Hul'qumi'num Treaty Group. Mr. Morales stated that Sablefin had provided his office with "all requested information for our review, including proprietary information relating to the fish hatchery and a hydro-geological technical report relating to waste management issues." He also noted that Sablefin had hosted an on-site visit by members of the Penelakut Band Council to discuss the project. He expressed no concerns in relation to archaeological or spiritual values at the site. Mr. Morales' letter was copied to the Penelakut First Nation, and there is no evidence that any members of the Penelakut First Nation indicated to the Ministry or Sablefin, before the Approval was issued, that they disagreed with Mr. Morales' letter. Finally, Mr. Morales thanked the Ministry for their consultation.

It was only after the Approval was issued that members of the Penelakut First Nation expressed concerns regarding the Ministry's consultation process, and expressed concerns about potential harm to spiritual values associated with the site. In that regard, the Panel notes that in *Halfway River*, Mr. Justice Finch stated as follows at paragraphs 160 and 161 under the heading, "Adequate Meaningful Consultation":

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action: see *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); *R. v. Noel*, [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); *Eastmain Band v. Robinson* (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A.); and *R. v. Nikal*, *supra*.
>
> <u>There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions</u>: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.
>
> [emphasis added]

In the present appeals, the Elders claim that they were not properly consulted before the Approval was issued, yet the evidence indicates that members of the Penelakut First Nation, including several Elders, were aware, before the Approval was issued, that human remains had been found on the site. They had an obligation to express their concerns and identify their asserted aboriginal rights during the course of consultations with the Ministry. The Panel finds that, if their interests and concerns differed from those expressed by Mr. Morales on their behalf, then they were obligated to inform the Ministry, and they failed to do so.

Finally, the Panel finds that the Regional Manager gave meaningful consideration to the concerns that were raised by First Nations regarding the potential impacts of the effluent discharge on the aboriginal rights that they asserted in relation to the tombolo. The Panel finds that the Regional Manager considered the potential effects of the discharge on asserted aboriginal rights to the harvest of inter-tidal and marine resources for traditional purposes and the impacts of the discharge on an archaeological site, and he properly concluded that the discharge, as authorized, would not affect those rights. As such, no further accommodation was required.

Conclusion

For all of these reasons, the Panel finds that the Regional Manager conducted adequate and meaningful consultations with First Nations before he issued the Approval.

5. Whether the discharge of effluent in accordance with the Approval will unjustifiably infringe the aboriginal rights asserted by the Elders.

As stated above, the Panel has considered the scope of the Regional Manager's authority under the *Act*, and the nature of the Approval, and the Panel has concluded that the Elders' concerns regarding the excavations and construction on the tombolo are outside of the Board's jurisdiction in these appeals. In any event, reversing the Approval would not remedy or repair any harm that may have already occurred as a result of disturbing the midden and the human remains. Therefore, at this stage, the issue before the Panel is whether the <u>discharge of effluent</u> under the Approval unjustifiably infringes the aboriginal rights asserted by the Elders. In deciding this issue, the Panel has applied the legal tests and principles set out below.

In *R. v. Sparrow*, [1990] 1 S.C.R. 911 (hereinafter *Sparrow*), the Supreme Court of Canada considered the effect of section 35(1) of the *Constitution Act, 1982* on the status of aboriginal rights, and set out a framework for deciding whether aboriginal rights had been interfered with, and if so, whether such interference could be justified. The test set out in *Sparrow* for resolving conflicts between aboriginal rights and government action has four stages, which are summarized as follows:

1. Is there an existing aboriginal right?

2. Has the right been extinguished?

3. Has there been a *prima facie* infringement of the right?

4. Can the infringement be justified?

The test for proving aboriginal rights was first articulated by Lamer, C.J.C., in *R. v. Van der Peet*, [1996] 2. S.C.R. 507 (hereinafter *Van der Peet*). Writing for the majority, Lamer, C.J.C. stated as follows at paragraph 46:

> … the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive character of the aboriginal group claiming the right.

In *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911 (hereinafter *Mitchell*), a paragraph 26, Chief Justice MacLachlin summarized the elements of the *Van der Peet* test:

> *Van der Peet* set out the test for establishing an aboriginal right protected under s. 35(1). Briefly stated, the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was "integral" to his or her pre-contact society in the sense it marked it as distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim.

In regard to the evidence that is required to establish an aboriginal right, there are no precise rules or absolute principles governing the interpretation or weighing of evidence in support of aboriginal claims, and in any case, the rules of evidence are not strictly applied in administrative tribunal hearings. The consideration of evidence must ensure that the aboriginal perspective is given due weight, bearing in mind that aboriginal rights claims give rise to inherent evidentiary difficulties. Nevertheless, claims of aboriginal rights must be established based on persuasive evidence demonstrating validity on a balance of probabilities. On that point, Chief Justice MacLachlin stated as follows at paragraph 51 of *Mitchell*:

> …claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim.

If an existing aboriginal right is established, then the next question under the *Sparrow* analysis is whether the impugned government action has caused an infringement. The claimant must show a *prima facie* infringement of the right. Specifically, the claimant must show that the government action has the effect of interfering with the aboriginal right, having regard to the character or incidence of the right in issue. The question is whether either the purpose or effect of the statutory decision unnecessarily infringes the aboriginal interest. If so, then the onus shifts to the Crown to show that the infringement is justified.

Overriding all these issues is whether the honour and integrity of the Crown has been upheld in its treatment of the claimants' rights.

Parties' submissions

The Elders submit they have certain aboriginal rights in relation to the protection and preservation of sacred burial sites, including Syuhe'mun, as well as rights to practice their spiritual and religious traditions governing the appropriate care of ancestors buried in sacred burial grounds. The Elders submit that the evidence demonstrates that the Penelakut people engage in culturally integral practices, customs, and traditions that attach to the sacred burial site at Syuhe'mun, and constitute aboriginal rights that are protected under section 35 of the *Constitution Act, 1982*.

With regard to the third element of the *Van der Peet* test, namely, whether there is reasonable continuity between the pre-contact practices of the Penelakut people and their contemporary claims in relation to Syuhe'mun as a sacred burial site, the Elders submit that they have continuously maintained and respected their obligations to the dead. The Elders submit that they have maintained this practice despite the historical and continuing disregard by the government for Coast Salish interests in Syuhe'mun, including its alienation as a result of colonization. The Elders argue that they have adhered, so far as reasonably possible, to the dictates of their traditional laws and knowledge regarding the proper care of sacred burial grounds. They also submit that there is evidence that aboriginal people still fish and collect clams and other traditional foods from the area.

The Elders further submit that those rights have been, and will continue to be, infringed by the acts that are sanctioned by the Approval, and there is no adequate justification for that infringement. The Elders submit that the effluent discharge will permanently destroy the cultural and spiritual qualities of Syuhe'mun, and will prevent First Nations people from using the site for spiritual practices, thereby depriving them of their aboriginal rights. The Elders argue that the discharge of effluent to a sacred site such as this is an affront to First Nations culture and history, and there is no way to clean the effluent from the gravesites and restore the spiritual sacredness of the site once it has been desecrated.

Additionally, the Elders submit that the effluent discharge will adversely affect the health and economic sustainability of members of the Penelakut First Nation, because the effluent may pollute shellfish that are harvested and consumed by them.

In support of those submissions, the Elders referred to several judicial decisions, including *Sparrow*, *Van der Peet*, and *Mitchell*.

The Elders also called several witnesses, including Myrus James, August Sylvester, and Laura Sylvester, all of whom are Elders of the Penelakut First Nation. In addition, the Elders called Kathryn McKay, Morley Eldridge and Kimberley Kornbacher to testify with regard to archaeological matters.

August Sylvester discussed the connection that the Coast Salish people have with Syuhe'mun, and explained the importance of maintaining the integrity of Syuhe'mun as a burial site. Mr. Sylvester stated that a Coast Salish village was once located at Syuhe'mun, and he recalled that, as a boy, his family would stop at

Syuhe'mun to camp or trade goods during fishing expeditions. Mr. Sylvester stated that Syuhe'mun holds a graveyard in which many of his ancestors are buried, and that using an ancestral burial ground as a waste treatment site is disrespectful and contrary to his peoples' beliefs. Mr. Sylvester stated that the use of the ancestral burial ground as a sewage treatment site is very hurtful to his people. Mr. Sylvester further stated that it does not matter how deep the wells are, because Sablefin has desecrated a gravesite by pumping waste into the ground where Coast Salish ancestors lie.

Laura Sylvester, a Penelakut First Nation Elder and spiritual advisor, provided testimony regarding her knowledge of burial practices and spiritual practices to honour dead ancestors. She also stated that she was in attendance at the site in early May 2003, when the remains of several individuals were found, and she observed the bones of a person whom she believed to be a medicine woman. Mrs. Sylvester testified that the bones indicated that the person had been buried with red ochre, and with her hands covering her eyes. Mrs. Sylvester also stated that she took some of the remains found at Syuhe'mun to Kuper Island, where she performed a re-burial and burning ceremony to honour the ancestors. She stated that she and several other Penelakut Elders returned to Walker Hook later in May to re-bury some of the other remains, and perform a burning ceremony.

Morley Eldridge, an archaeologist and President of Millenia Research Ltd., testified that Syuhe'mun is one of the ten largest recorded archaeological sites in the southern Gulf Islands. He also stated that, based on the number of individuals discovered and the reported density value of 0.13 individuals per cubic metre at Syuhe'mun, there may be up to 1170 persons buried there.

Kimberley Kornbacher, an anthropologist from Edmonds Community College in Washington State, testified with regard to a report dated February 27, 2004. In that report, she stated that Syuhe'mun is a highly significant archaeological site that has the potential to contribute unique information about prehistoric land use and human activities in the region. She also described the potential for damage to cultural deposits in the midden if effluent contamination occurred at the surface of the midden.

Kathryn McKay gave expert evidence on the Coast Salish and their burial practices. Ms. McKay gave evidence that the burial ground at Syuhe'mun was used by the Coast Salish people from approximately 4,500 years ago up to approximately 500 years ago. After that time for unknown reasons, the tombolo was no longer used for burial purposes.

The Elders also submitted numerous documents containing general information about Coast Salish culture and spiritual practices.

The Regional Manager accepts, for the purposes of these appeals, that the Penelakut people have an aboriginal right to gather food for traditional purposes from inter-tidal and marine areas adjacent to the Walker Hook. However, the Regional Manager submits that the Elders have not made a strong claim regarding the aboriginal rights they assert in relation to the Penelakut people's use of the

tombolo as a burial ground or in relation to the tombolo as a place of spiritual significance. The Regional Manager submits that the Caldwell family's historical and continued use of Walker Hook for agriculture affects the strength of the Elders' claim that the site is a sacred burial ground.

In addition, in terms of infringement, the Regional Manager submits that the discharge of effluent in accordance with the Approval will have no effect on any human remains or artifacts that may still be buried in the midden, because the effluent will be discharged to the sub-surface aquifer below the midden, and the effluent will remain in the aquifer due to the presence of a semi-confining layer atop the aquifer, which was observed when the wells were drilled at Walker Hook.

Finally, the Regional Manager submits that, as long as there has been proper consultation with aboriginal people in this case, then any harm to aboriginal rights is simply a question of compensation.

Sablefin submits that the site is not a sacred burial ground, and was designated as a "shell midden" based on a government archaeological survey conducted in 1974. Sablefin acknowledges that some human remains were exhumed from the midden, but Sablefin maintains that neither the Elders nor any other aboriginal people were aware that Walker Hook contained human remains before their discovery in April 2003. Sablefin further submits that there is conflicting evidence as to whether a medicine woman was unearthed. Sablefin argues that Mrs. Sylvester's testimony in that regard conflicts with that of Margaret Rogers, the on-site archaeologist from I.R. Wilson Consultants Ltd., and photographic and video evidence provided by Sablefin. Sablefin argues that Mrs. Sylvester's testimony that the person was buried with obsidian and red ochre should be discounted because it is not supported by photographic or video evidence, and the remains in question had no skull, hands, or feet. Sablefin also submits that Mr. Eldridge's testimony should be given little weight because he has not visited the site and he showed a lack of expertise in identifying possible artifacts.

Sablefin argues that the Elders have presented a relatively weak case regarding their claim of aboriginal rights to the tombolo. Sablefin notes that Mr. James testified that Penelakut people have harvested clams at Walker Hook in the past, but stated that he had not been there in at least 40 years, he had never camped there, had not known it to be sacred ground, and was surprised to hear that human remains had been found there. Sablefin also notes that Mr. Sylvester stated that he had hunted on Walker Hook as a child, that aboriginal laws prohibit hunting on burial sites, and that the human remains at Walker Hook "could be anyone". Similarly, Sablefin notes that Mrs. Sylvester stated that she had only been to Walker Hook on one occasion when she was seven or eight years old.

With regard to the Elders' claim that aboriginal rights associated with their spiritual practices and values are unjustifiably infringed by the Approval, Sablefin submits that any harm is notional, and not actual. Sablefin submits that the Approval has no effect on the Elders' spiritual practices, and therefore, the Approval has no effect on any aboriginal rights associated with those spiritual practices. Sablefin notes that the Elders continue to conduct spiritual practices, such as ritual burnings to

honour their ancestors, at a longhouse and not at Syuhe'mun. Moreover, Sablefin submits that the production wells, injection wells, piping and associated trenches have already been constructed at Walker Hook, and there is no risk of damage to First Nations interests as a result of the effluent discharge. Sablefin submits that the human remains were found in the top three feet of soil, and the depth to water in the injection wells ranges from 8.8 feet to 10.7 feet below the ground surface. Sablefin maintains that the effluent will not contact the part of the midden in which human remains were found, and, in any event, the effluent contains no substances that will harm any bones or artifacts that may remain in the midden. Additionally, Sablefin submits that the Lowen Report indicates that water table mounding below the wells will be at acceptable levels and will not create erosion problems.

In addition, Sablefin argues that all excavations on the site, and the subsequent removal of human remains, were conducted in accordance with the Site Alteration Permit. Sablefin maintains that the development work ceased when human remains were found, and commenced only after careful removal and reburial of the remains in the presence of archaeologists and First Nations representatives.

In support of those submissions, Sablefin referred to the testimony of Mr. Caldwell, Ian R. Wilson, Chief Archaeologist with I.R. Wilson Consultants Ltd., and Ms. Rogers, the archaeologist with I.R. Wilson Consultants Ltd. who was at Walker Hook when the human remains were discovered. Sablefin also referred to a report by I.R. Wilson Consultants Ltd. dated January 9, 2004, which states as follows at pages 2 to 3:

> Cultural deposits at the *Syuhe'mun* (Walker Hook) site were found to a depth of only 80 cm [approximately 2 feet and 8 inches] below surface in the evaluative unit near wellhead 2, which is near the center of the site. The site has been extensively disturbed by ploughing activities from over a century of farming to a depth of approximately 40 cm…
>
> In all, the partial skeletal remains of 11 individuals were identified and recovered during archaeological monitoring. Only three of the 11 recovered were encountered in their primary mortuary context, and even these had been fairly heavily disturbed by past activities at the site. The other eight individuals are represented by scattered human remains recovered from the disturbed horizon…
>
> The density of burials at the *Syuhe'mun* (Walker Hook) site is 0.13 individuals per meter cubed. This value is about average for Northwest Coast shell midden sites containing burials… No clearly identifiable grave goods were associated with any of the human remains. In our archaeological investigations, no clear evidence that DfRu 2 [Walker Hook] represents a winter village were encountered. Though analysis is not yet complete, DfRu 2 likely served as a seasonal camp to exploit clam beds and water fowl…

In addition, Sablefin provided copies of field notes prepared by two archaeologists who visited the tombolo in 1974 as part of a survey of archaeological sites in the Gulf Islands. The field notes of archaeologist Brian Seymour, dated February 28,

1974, state that Mr. Caldwell told Mr. Seymour that aboriginal people were known to have camped overnight there "in historic times" and that his father "collected a good number of fine artifacts from the area."

Panel's findings

Before addressing the question of whether an aboriginal right has been established, the Panel must first characterize the rights that are claimed. In their submissions, the Elders characterize their aboriginal rights at Syuhe'mun as follows:

- An aboriginal right to harvest from the area;
- An aboriginal right to preserve, maintain and access their sacred cemeteries and burial grounds, including the site at Syuhe'mun;
- An aboriginal right to preserve the sanctity of their sacred burial sites from desecration or defilement by culturally inappropriate use and disturbance of the land;
- An aboriginal right to practice and manifest their spiritual and religious traditions; and
- An aboriginal right to respect and maintain their customary laws governing the care, and responsibilities to, the Ancestors interred at the sacred burial ground.

The Panel finds that the Elders' evidence indicates that the Penelakut people have traditionally used inter-tidal and marine areas around Syuhe'mun for the purpose of gathering shellfish, fish and other food. While the Elders' evidence indicates that such use has been infrequent in recent years, the Regional Manager accepts, for the purpose of these appeals, that the Elders have established an aboriginal right to gather food in the area. Consequently, the Panel has considered the question of *prima facie* infringement based on the presumption that there is an aboriginal right to gather food in the area, without fully assessing the merits of that claim in the context of the *Van der Peet* analysis.

The Panel has already found that the discharge of effluent in accordance with the Approval will have no adverse effect on human health or the environment, including shellfish, fish, or fish habitat around Syuhe'mun. Consequently, the Panel finds that the effluent discharge will not interfere with an aboriginal right to gather food from the inter-tidal areas or marine waters around Syuhe'mun. In other words, the Approval will not cause a *prima facie* infringement of such an aboriginal right. Accordingly, the Panel need not consider whether there is justification for an infringement.

In deciding whether the Elders have established aboriginal rights associated with Syuhe'mun as a spiritual site or a sacred burial ground, the Panel relies on the test set out by Chief Justice MacLachlin in *Mitchell*; namely, that claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities, and that sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. In addition, the Panel notes the relevance of

geographic considerations in applying the *Van der Peet* test to the facts in this case, where the claim is made in relation to a particular geographic location, namely, Syuhe'mun. In that regard, the Chief Justice stated as follows as paragraph 55 of *Mitchell*:

> The importance of trade - in and of itself - to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the integrality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised (i.e., north of the St. Lawrence River), rather than in the abstract. This Court has frequently considered the geographical reach of a claimed right in assessing its centrality to the aboriginal culture claiming it.

As in *Mitchell*, the Panel finds that it is necessary on the facts of this case to demonstrate the integrality of certain spiritual practices to the Penelakut people or the Coast Salish people in relation to the specific geographical location at which the practices are alleged to have been exercised. The Panel finds that the rights claimed by the Elders are properly characterized as spiritual practices in relation to Syuhe'mun as a sacred burial ground, and not as spiritual practices in relation to burial grounds generally. In other words, the rights claimed by the Elders require them to establish, on a balance of probabilities, that there is reasonable continuity between current practices, customs and traditions in connection to Syuhe'mun as a sacred burial ground, and those that existed prior to contact with Europeans.

The Panel finds that the Elders' evidence in support of their claims in relation to Syuhe'mun as a sacred burial ground focuses on traditional burial and spiritual practices in general, and not in relation to Syuhe'mun specifically. The Elders' evidence focused on establishing that the Penelakut people have continued, since contact with Europeans, to:

- preserve, maintain and access their sacred cemeteries and burial grounds;
- preserve the sanctity of their sacred burial sites from desecration or defilement;
- practice and manifest their spiritual and religious traditions; and
- respect and maintain their customary laws governing the care, and responsibilities to, ancestors interred at sacred burial grounds.

The Elders' evidence does not establish, on the balance of probabilities, that aboriginal people have maintained an ongoing connection to Syuhe'mun as a sacred burial site that is integral to the distinctive culture of the Penelakut people or other Coast Salish people. In fact, the evidence is that the connection may have been broken as long as 500 years ago. Nor have the Elders provided evidence to establish that the ability of aboriginal people to conduct their traditional spiritual and religious practices requires that the effluent discharge at Syuhe'mun must cease. In other words, in terms of the *Van der Peet* test for establishing an

aboriginal right, the Panel finds that the Elders have not provided sufficient evidence to show reasonable continuity between pre-contact practices and their contemporary claims in relation to Syuhe'mun as a sacred burial ground.

In this regard, the Panel notes Chief Justice MacLachlin's findings at paragraph 51 of *Mitchell*:

> … The *Van der Peet* approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case – a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade – can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold. Such a result is not contemplated by *Van der Peet* or s. 35(1)… I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade.

As in *Mitchell*, the Panel finds that the Elders have provided little direct evidence to support their claims in relation to Syuhe'mun, except regarding their claim to an aboriginal right to gather food in that area. Although there is no dispute that the remains of aboriginal persons have been found at Syuhe'mun, those remains are estimated to be over 500 hundred years old, and there is no oral history or written historical evidence, and little archaeological evidence, that aboriginal people went there to practice ceremonies in honour of their ancestors, or considered the site to be a sacred burial ground, before contact with Europeans. In addition, there is no evidence that aboriginal practices which would indicate that Syuhe'mun is a sacred place have been conducted there since at least the late 1800's, when Mr. Caldwell's family acquired title to the land.

Specifically, none of the Elders who testified stated that they knew that ancestors were buried there, or considered Syuhe'mun to be a sacred burial ground, before human remains were found there in 2003. Although Mr. James testified that the Penelakut people have harvested clams at Syuhe'mun in the past, he stated that he had not been there in at least 40 years. Similarly, Mr. Sylvester recalled that, when he was a boy, his family would stop at Syuhe'mun to camp or trade goods during fishing expeditions. Mrs. Sylvester stated that she had only been to Walker Hook on one occasion, when she was a child.

The Elders' evidence that they used the site for camping is supported by the field notes of archaeologist Brian Seymour, dated February 28, 1974, which state that Mr. Caldwell told Mr. Seymour that aboriginal people were known to have camped overnight there "in historic times." However, there are no historic records of aboriginal people using the site for burials or for conducting spiritual practices.

In terms of Syuhe'mun's pre-contact use specifically as a burial site, there is no question that human remains were found there. However, the presence of human remains at Syuhe'mun does not, in the absence of supporting oral history evidence or evidence of post-contact use of the site as a sacred burial ground, establish reasonable continuity between current practices, customs and traditions in

connection to Syuhe'mun as a sacred burial ground, and those that may have existed prior to contact with Europeans.

Since the Elders have not proven their claims in relation to Syuhe'mun as a sacred burial ground, there is no need to comment on whether there has been an unreasonable infringement of such rights. However, the Panel finds that, even if the Elders had established aboriginal rights in relation to Syuhe'mun as a sacred burial ground, the discharge of effluent in accordance with the Approval will not cause a *prima facie* infringement of such rights, because the effluent discharge will have no adverse physical effect on any human remains or artifacts that may remain buried at Syuhe'mun. Specifically, the report by I.R. Wilson Consultants Ltd. indicates that the cultural deposits at Syuhe'mun (Walker Hook) were found to a depth of only 80 cm below the surface. The Lowen Report and the Technical Report indicate that the water levels in the vicinity of the injection wells will remain well below the depth at which cultural deposits were found, and that the effluent will remain in the sub-surface aquifer due to the presence of a semi-confining layer of silt and clay.

The Panel acknowledges that the Elders and other Coast Salish people believe that Syuhe'mun is a sacred burial ground and that the mere act of discharging hatchery effluent into the sub-surface of the site is disrespectful and offensive, even if the effluent will not physically affect any remains that may still be buried at the site. However, in this case, it is not sufficient to show that the act of discharging effluent at the site offends aboriginal spiritual beliefs and values. Rather, the Elders had the onus to provide sufficient evidence to meet the tests set out by the courts for establishing aboriginal rights in relation to Syuhe'mun as a sacred burial site. In this case, they have not met that onus.

In summary, the Panel finds that the discharge of effluent in accordance with the Approval will not cause a *prima facie* infringement of any aboriginal rights to collect shellfish, fish and other foods from inter-tidal and marine areas around Syuhe'mun for traditional purposes. In addition, the Panel finds that the Elders have not provided sufficient evidence to prove their claims in relation to Syuhe'mun as a sacred burial ground, and, even if those had been proven, the effluent discharge will not cause a *prima facie* infringement of those rights.

6. Whether the Board should order the Elders to pay Sablefin's costs associated with the appeal proceedings.

At the end of the appeal hearing, Sablefin requested an order of costs against the Elders. Sablefin submits that the Elders provided an excessive amount of irrelevant information that Sablefin was forced to review and address. Sablefin submits that counsel for the Elders made no attempt to pare down the documents or indicate which ones were relevant. Sablefin submits that, if the Elders had done so, Sablefin's counsel could have saved three days of hearing time and three days of preparation time. Sablefin requests costs of $7,500 for the hearing time that could have been avoided.

The Elders submit that this is not an appropriate case to award costs to Sablefin. They submit that they did not provide an unreasonable quantity of documents, and

they note that many of the documents were relied on by all three of the Appellants. The Elders also submit that they provided reasonable disclosure of all of the evidence that they relied on, whereas Sablefin introduced some evidence during the hearing without prior disclosure.

Under section 11(14.2)(a) of the *Environment Management Act*, the Board has the power to order costs in an appeal. This section authorizes the Board to require a party to pay all or part of the costs of another party in connection with the appeal. The Board has adopted a policy, as set out in its *Procedure Manual*, to award costs in special circumstances. Those circumstances include situations where an appeal is brought for improper reasons or is frivolous or vexatious in nature, or where a party unreasonably delays the proceedings. The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs."

The Panel finds that there is no evidence that the Elders brought the appeal for improper purposes, nor is the appeal frivolous or vexatious in nature. The Panel finds that the Elders brought their appeal based on their honest beliefs, and they properly exercised their right of appeal. Furthermore, the Panel is not satisfied that the Elders unreasonably delayed the hearing process or unreasonable burdened other parties with the amount of evidence that they submitted. The Panel finds that much of the evidence was relied on by all of the Appellants. Additionally, the Panel notes that the appeals involved numerous issues, including some complex technical and legal issues. In these circumstances, the Panel finds that the amount of documentary evidence submitted by the Elders was not unreasonable.

Consequently, the Panel finds that there are no special circumstances that warrant an order of costs against the Elders.

DECISION

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

For the reasons stated above, the Elders' appeal is dismissed.

Similarly, the appeals of the CSA and the Residents are also dismissed.

Sablefin's application for costs is denied.

Alan Andison, Chair Environmental Appeal Board	Dr. Robert Cameron, Member Environmental Appeal Board	Robert F. Gerath, Member Environmental Appeal Board

November 17, 2004